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UNREPORTED

CRIMINAL CASES

OF

THE HIGH COURT OF BOMBAY

1862-1898.

BY

RATANLAL RANCHHODDAS B.A., LL. B.

VAKIL, HIGH COURT, BOMBAY.

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PREFACE.

A PUBLICATION such as this hardly requires any lengthy prefatory remarks. Its title alone is a key-note of its contents. Suffice it to say that it not only embodies full reports of all criminal cases—brief summaries of which have been published by the Bombay High Court, month after month, in the form of Statements of Criminal Rulings, for the guidance of the subordinate Magistracy—but also of many other valuable decisions which have, till now, never seen the light. Thus, all important unreported criminal cases from 1862, that is, from the establishment of the present High Court, down to 1898, find place in this volume. In 1899 the *Bombay Law Reporter* came into existence and since that year every criminal decision of any importance is reported in it.

All cases in this compilation are arranged in their chronological order. Decisions which have been overruled have been included for they often prove very useful to indicate the subsequent transformation which the law has undergone. Besides, they are matters of historical interest. Similarly a few cases on some of the repealed Acts have also been incorporated though they are now useful only as historical data.

Considering that the law of this country mostly consists of legislative enactments and of judicial decisions interpreting them, this publication will, it is hoped, be of some service to the Bench and the Bar.

The elaborate Digest at the end will render the search for references both easy and expeditious.

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UNREPORTED CRIMINAL CASES.

OF THE

HIGH COURT OF BOMBAY.

1862.

10 September 1862. SAUSSE, C. J., HEBBERT, FORBES & NEWTON, JJ.

Reg. v. Ramchandra.

Criminal Procedure Code (Act XXV of 1861), Sec. 432—Accused—Agent—Choice of agent —Criminal Courts.

Section 432, Criminal Procedure Code, entitles a prisoner to authorize any person to be his agent in any criminal Court.

READ a report from the acting Magistrate of Poona dated the 8th August 1862, stating that the petitioner Ramchandra Nurhur was formerly employed as Deputy of a District Hereditary officer in the Mamledar's Cutcherry of Talooka Poorundhur; that he was proved in conjunction with the village officer to have transferred to his own name a piece of land covered with mango trees at a rental of Rs. 4 per annum; that on discovery that this was a fraudulent proceeding, the right of occupancy of the said land was sold by Government for Rs. 330, and the petitioner was dismissed from his situation; and that his dismissal was confirmed on appeal both by the Revenue Commissioner, S. D. and Government: That under date 30th January 1862 the Mamledar of Poorundhur made a report to the Second Assistant Magistrate, Mr. Ovans, stating that the petitioner notwithstanding his having been dismissed from service for fraud as stated in the preceeding para was practising as a good mooktear in his Cutcherry, and after some references between the second Assistant and the late Magistrate, Mr. Davidson, it was ordered that the petitioner in consequence of his bad character should not be allowed to enter the Cutcherry, and that the people should be advised not to employ him and that mookhtearnamas in his favour should not be admitted.

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ORDER.—The petitioner is informed that the Court conceives that section 432 of the Code of Criminal Procedure entitles a prisoner to authorize any person to be his agent in any criminal Court: but the Court declines to make any formal order on the Magistrate: but will intimate to him the above opinion.

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11 September 1862. SAUSSE, C. J., HEBBERT & FORBES, JJ.

Reg. v. Tookaram.

Penal Code (Act XLV of 1860), Secs. 191, 193—False evidence—Knowledge—Belief—Materiality.

Under sections 191 and 193 of the Indian Penal Code, false evidence must be intentionally false to the knowledge or belief of the person giving it: cases may arise in which materiality may not be essential to the offence described in the above sections, but it must be taken into consideration in arriving at the intention with which the false statement was made.

ORDER.— False evidence under sections 191 and 193 of Indian Penal Code must be intentionally false to the knowledge or belief of the person giving it. Cases may arise in which materiality may not be essential to the offence described in the above sections, but it must be taken into consideration in arriving at the intention with which the false statement was made.

1864.

24 February 1864. COUCH & NEWTON, JJ.

Reg. v. Bapu.

Penal Code (Act XLV of 1860), Secs. 415, 420—Cheating—Delivery of property—Magistrate—Sessions Court.

The offence of cheating accompanied by a delivery of property may be punished under either of the sections 415 or 420 of the Indian Penal Code: but where the case appears to be of a serious nature, steps must be taken to send it to Court of Session for trial under section 420 of the Code.

ORDER.—The accused in cases Nos. 657 and 688 appear to have been charged with cheating under section 415 of the Indian Penal Code and the facts proved bring the case within that section, although the words of section 420 are also applicable. The Court are of opinion that effect should if possible be given to both sections of the Act, and that the offence of cheating accompanied by a delivery of property may be punished under either section. When the case appears to the trying authority to be of a serious nature steps should be taken that it may be sent to the Court of Session and punished under section 420, but the trial and conviction under section 417 by a Magistrate, the charge being framed in the terms

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of that section is not an excess of jurisdiction which would necessitate the conviction being annulled.

1865.

14 June 1865. COUCH & NEWTON, JJ.

Reg. v. Mukun.

Penal Code (Act XLV of 1860), Secs. 356, 378—Criminal force—Attempt—Offence.

Section 356 of the Indian Penal Code applies to cases of using criminal force in an attempt to commit theft and not to those cases in which theft has been actually committed.

ORDER.—The papers to be returned. The Magistrate to inform his subordinate that he acted very improperly in punishing an offence which according to his own statement amounted to robbery under sections 378 and 356 the latter of which applies to cases of using criminal force in an attempt to commit theft and not to those in which theft has been actually committed. He ought not, by dealing with the cases under sections not properly applicable, to have given himself a jurisdiction which he would not have had if he had treated the case as one of robbery. The Court remark that in the absence of explanation the punishment appears inadequate to the offence described.

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21 September 1865. WESTROPP, TUCKER & WARDEN, JJ.

Reg. v. Raghoo.

Penal Code (Act XLV of 1860), Sec. 211—False charge—Complaint—Civil nature.

Where a person files an information before a Magistrate, disclosing circumstances of a civil nature, he can not be proceeded with under Section 211 of the Indian Penal Code if the circumstances alleged by him are found to be false.

ORDER.—The Court reverse the conviction and sentence and order that the fine if paid, be returned. The false charge alleged to have been made by the accused Raghoo as set forth by the Magistrate in his finding does not amount to an offence against Section 211 of the Indian Penal Code. The accused when he applied to the Magistrate appears to have prayed him to compel Babajee *bin* Gopalla the prosecutor to specifically perform an agreement for the sale of a house by execution of a conveyance or to return the purchase money alleged to have been paid by the accused to Babajee and not to have sought to have Babajee punished criminally. The Magistrate ought under those circumstances to have referred the accused to the civil Court. The Court would further observe that so far as it can discover from the record the deposition of Raghoo on which the present charge against him

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has been founded neither appears to have been recorded or proved in this case an omission which ought not to have occurred.

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30 November 1865. WESTROPP, TUCKER & WARDEN JJ.

Reg. v. Vithaee

Practice—Joinder of charges—Adultery—Remarriage.

The charges of adultery and of marrying again during the life-time of her husband cannot be tried together at one trial.

ORDER.—The Session Judge to be informed that the charges of adultery and of marrying again during the life time of her husband should not have been tried together.

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22 December 1865. WESTROPP & TUCKER, JJ.

Reg. v. Oomerkhan.

Penal Code (Act XLV of 1860), Secs. 379, 447—Theft—Property belonging to accused—Criminal trespass.

The accused was charged with stealing rice plants but was acquitted on that charge by the Magistrate as it did not appear that they were not sown by and the property of the accused; but the Magistrate convicted him of criminal trespass under section 447 of the Indian Penal Code :—

Held, reversing the conviction, that the conviction for criminal trespass was inconsistent with the acquittal of the charge of theft inasmuch as if the rice plants had been sown by and were the property of the accused he would have been entitled to remove them and could not properly have been treated as a criminal trespasser for so doing.

ORDER.—The Court observing that the Subordinate Magistrate has acquitted the accused of theft of the rice plants in dispute on the ground that it did not appear that they were not sown by and the property of the accused himself reverse the conviction of and sentence passed upon the accused for criminal trespass under section 447 of the Indian Penal Code, that conviction being inconsistent with the acquittal of the charge of theft inasmuch as if the rice plants had been sown by, and were the property of the accused, he would have been entitled to remove them, and could not properly have been treated as a criminal trespasser for so doing.

The Court further observe that there is not any clear finding by the Subordinate Magistrate as to the position of the accused with reference to the prosecutor, *viz.* whether the accused albeit he had executed what purported to be a deed of sale of the land was in fact merely a mortgagor and not a vendor, and if the latter, whether after the sale the accused had become tenant to the prosecutor, or care-taker of the land sold to him. It is clear that, even though the accused may have sold the land to the

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prosecutor, yet if the accused became tenant to or care-taker for the prosecutor, he (the accused) could not, so long as he occupied either of these characters, have been rightly treated as a criminal trespasser on the land.

The Court although it quashes the conviction, is unable to concur in the view taken by the Magistrate of the evidence given before the Subordinate Magistrate, or in the Magistrate's opinion that there is reason to believe that the Subordinate Magistrate was influenced by unworthy motives in arriving at his decision.

1866.

23 March 1866. COUCH, C.J. & TUCKER, J.

Reg. v. Jenkoo.

Practice—Conviction—Burden of proof.

A prisoner must be convicted upon the strength of the case made against him and not in consequence of his inability to bring forward proof of his innocence.

ORDER.—The Court reverse the finding and sentence passed upon Dhondia *bin* Mooktajee and Koosaram Dewjee and Dongro *bin* Amro and Dharko *bin* Sankroo and order that they be discharged unless other cause for their detention appear.

* * * * * *

The Chief Justice and Judges consider it would not be safe to convict five prisoners upon the uncorroborated testimony of a single witness (No. 3) who had never seen any of them before and who describes himself as having been struck in several parts of the body and also on the head by which latter he was rendered insensible and disabled from any consciousness of the period when the robbers left his house.

A prisoner must be convicted upon the strength of the case made against him and not in consequence of his inability to bring forward proof of his innocence.

In the trial No. 132, the Session Judge improperly recorded the deposition of a witness (No. 6) upon a former trial when that witness was in Court and capable of being examined; such evidence was quite illegal and should not have been received.

In case No. 134, the Session Judge has not recorded the confessions of Nos. 1 and 2, in case No. 131 which he relies upon as evidence against those prisoners. There is, however, sufficient evidence in case to support the conviction.

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19 April 1866. TUCKER & GIBBS, JJ.

Reg. v. Rahee.

Penal Code (Act XLV of 1860), Sec. 299—Culpable homicide not amounting to murder—Elements of the offence.

To constitute culpable homicide not amounting to murder, under section 299 of the Indian Penal Code, it must be established that death was caused by an act done either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death or with the knowledge on the part of the doer that he was likely by such act to cause death: without one or other of these elements an act though it may be in its nature criminal and may occasion death, will not amount to the offence of culpable homicide of either description.

ORDER—In the present case the accused has been tried by the Session Court at Sattara on two charges, *viz.*, "murder," *i.e.*, "culpable homicide which is murder" and "culpable homicide not amounting to murder" and has been acquitted of the more heinous crime but convicted of the less serious offence and sentenced to rigorous imprisonment for two years. The Session Judge has substantially found that the accused a girl of seventeen pushed the deceased child into the water accidentally in the course of a struggle which took place on the bank of a river in consequence of the accused having seized by force a bead of gold which the deceased was wearing round her neck and which the accused claimed as an ornament of her own which she had lost sometime previously but which has been proved to have been the property of the deceased; and he has excluded from his consideration that portion of the accused's statement to the Magistrate in which after declaring that the fall of the deceased into the water had been accidental, she admitted that she had let drop a stone which had hit the deceased while she was in the water. The record of the examination of the accused by the Magistrate on this point is so scanty and incomplete that the Court find it difficult to determine the precise character of the confession which she made and consider that the Session Judge was justified in rejecting this portion of the accused's statement which was not substantiated or supported by other evidence and in finding the facts as he has done but this finding will not sustain a conviction of "culpable homicide not amounting to murder." To constitute this last named offence, which is defined in Section 299 of the Indian Penal Code, it must be established that death was caused by an act done either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death or with the knowledge on the part of the doer that he was likely by such act to cause death: without one or other of these elements an act though it may be in its nature criminal and may occasion death, will not amount to the offence of culpable homicide of either description. In the present instance if the fall

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of the deceased child into the water was accidental and nothing further was done by the accused, as has been found, she was entitled to a verdict of acquittal on the charge of "culpable homicide not amounting to murder" as well as on the charge of "murder".

The conviction and sentence of the Lower Court must therefore be reversed and inasmuch as the evidence taken does not in the Court's judgment prove the commission of any other offence for the only evidence of the forcible seizure of the bead is the confession of the accused which is qualified by a statement that she believed the bead to be her own property the accused must be discharged.

1867.

5 September 1867. COUCH, C. J. & NEWTON, J.

Reg. v. Purushotam.

Maintenance—Second marriage—Cruelty—Living separate—Wife.

A wife cannot refuse to live with her husband on the ground that he has contracted a second marriage; she can only claim maintenance in cases where she can prove that her husband has habitually treated her with cruelty.

READ a letter from the Session Judge of Surat dated 19th August 1867, No. 1160, forwarding for the orders of the High Court under Section 434 of the Code of Criminal Procedure, the proceedings of the Full Power Magistrate, Surat in the case of Purushottamdas Kirparam together with a copy of his finding in appeal and states that the Magistrate Full Power's order directing the said Purushottamdas to pay a monthly allowance of Rupees 4 to his wife for her maintenance appears to be illegal as the accused was willing to maintain her provided she would come and live with him which she refused on the ground that her husband has contracted a second marriage and it is impossible to live happily with the second wife in the same house.

ORDER.—The Court reverses the Magistrate's order as the contracting a second marriage unless it is proved that the husband has habitually treated the applicant with cruelty is not sufficient reason for her refusing to live with him.

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1868.

14 January 1868. COUCH, C. J. & NEWTON, J.

Reg. v. Chodapa.

Penal Code (Act XLV of 1860), Sec. 403—Criminal Misappropriation—Money found from land.

A person finding out money from a piece of land purchased by him and appropriating it to his own use cannot be convicted of criminal misappropriation.

READ a letter from the Magistrate of Belgaum dated the 17th December 1867, No. 725, forwarding for the orders of the High Court under section 434 of the Code of Criminal Procedure, the proceedings of the 2nd Class Subordinate Magistrate of Athnee in the case of Chodapa *bin* Erapa convicted of dishonest misappropriation of property and sentenced to 20 days' simple imprisonment and to pay a fine of Rupees 50 or in default to a further term of imprisonment for 6 days.

ORDER.—The Court reverse the conviction and the sentence on the ground stated in the following para from the Magistrate's proceedings. "Lastly I do not consider that Chodapa committed an offence at all and therefore as his arrest was improper so was his conviction and sentence unjust. The rupees which he acquired were derelict and not in the possession of any person and Chodapa's taking them cannot be considered a dishonest misappropriation within the meaning of section 403 of Indian Penal Code. Laxuman the person from whom Chodapa bought the ground 20 years ago, does not claim them and though possibly they belonged to the former proprietors of the ground they had long extinguished their ownership."

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11 March 1868. COUCH, C. J. & NEWTON, J.

Reg. v. Sudasevappa.

Practice—Accused—Voluntary appearance—Absence of summons or complaint.

When the accused appears voluntarily to answer a charge, the want of summons or of a complaint antecedent to the issuing of a summons becomes immaterial.

READ a return from the Acting Session Judge of Canara No. 85 dated the 7th February 1868 to the Court's writ No. 147 of the 23rd January 1868 certifying the record and proceedings in the case of Sudasewappa Pandoorungappa as required.

ORDER.—The facts of this case are fully stated in the Magistrate's letter.

The Magistrate Full Power of the Karwar Talooka received intimation through an annonymous petition that a village accountant in his

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District had received a gratification other than legal remuneration he being a public servant. The ryots who were alleged to have given this gratification were sent for, and in the presence of the accused deposed to the circumstance mentioned in the petition and the Magistrate convicted the village accountant on their evidence.

The Sessions Judge on appeal annulled the conviction and sentence on the ground that although the appearance of the accused was voluntary the decisions of the High Court in the cases of *Reg.* v. *Deepchand Khooshal* (1) and *Reg.* v. *Bhagu Oswree* (2) obliged him to hold that inasmuch as there had been no complaint previous to the appearance of the accused the Magistrate had no jurisdiction.

The Court is of opinion that when the accused appears voluntarily to answer the charge, as he is in this case stated by the Sessions Judge to have done, the want of a summons or of a complaint in order to the issuing of a summons (Section 66 Criminal Procedure Code) becomes immaterial. Paley on Convictions, Chap. 2, Sec. 4, 3rd Edition, and the cases there cited and also *Turner* v. *The Post Master General* (3). The Sessions Judge has misapprehended the decisions of the High Court in the cases which he has quoted. In the first of these, that of *Deepchund Khooshal*, the case having been sent by the Moonsiff to the Magistrate of the District it was tried by another Magistrate without any complaint having been made to him and it was not suggested that the accused appeared voluntarily. In the second, the case of *Bhagu wulud Osaree*, no complaint was made to the Magistrate who tried the case and it had been illegally referred by a Sub-Magistrate to a Magistrate Full Power.

In the third case described by the Sessions Judge as one in which the High Court held the trial before the Session Court to be good although no complaint had been preferred under section 179 to the Magistrate who made the committal, the High Court expressly stated as the ground of its decision that in order to give the Sessions Court jurisdiction it was only necessary under section 359 of the Code of Criminal Procedure that there should be a charge preferred by a Magistrate or other officer specially empowered to make commitments to such Court. The Court was not called upon to determine what would have been the effect of the want of a complaint if the validity of the commitment had been questioned in the High Court before the trial had been completed in the Sessions Court which could not itself treat a commitment so made as a nullity. The Sessions Judge is entirely wrong in inferring the decision of the Court to have been that section 179 of the Code of Criminal Procedure does not equally with

(1) 4 Bom. H. C. R., 30. (2) 4 Bom. H. C. R., 34. (3) 34 L. J. M. C., 10.

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section 248 require a complaint. The Court does not concur in the opinion of the Sessions Judge that the taking a complaint and issuing a summons thereon are ministerial acts. In cases not referred to by the Sessions Judge the Court has held that when a case is sent under sections 168, 169 or 170 and the Magistrate to whom the case is sent by the Court himself investigates it, no complaint is necessary when the Court itself holds an investigation nor where the accused is lawfully apprehended by the Police without a warrant and duly brought before the Magistrate. The Court therefore reverses the order of the Sessions Judge and directs him to hear the appeal on its merits.

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15 April 1868. AG. C.J., & TUCKER, J.

Reg. v. Vujeer.

Penal Code (Act XLV of 1860), Sec. 441—Criminal trespass—Offence—Elements.

To support a conviction of criminal trespass it is necessary to prove that the accused entered upon the property of another with the intent of committing an offence made punishable by the general criminal law or to intimidate, insult or annoy.

READ a letter from the acting Sessions Judge of Ahmedabad dated the 25th March 1868, No. 266, forwarding for the orders of the High Court under section 434 of the Code of Criminal Procedure the proceedings of the Full Power Magistrate of Ahmedabad in the case of Vujeer Kussum convicted of criminal trespass and sentenced to suffer rigorous imprisonment for twenty days.

ORDER:—The Court reverses the conviction and sentence passed upon Vujeer Kassum because the facts held proved, do not constitute the offence of criminal trespass. In order to justify the conviction of the accused it was necessary that it should have been proved that he entered the barracks with the intent of committing an offence made punishable by the general Criminal Law or to intimidate, insult or annoy and it considers that both conviction and sentence in this case are not creditable to the trying Magistrate.

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20 May 1868. AG.C.J., & TUCKER J.

Reg. v. Jeeva Amtha.

Accused—Insanity—Hereditary insanity—Presumption.

The facts that the conduct of the accused at the time of the trial was unusual and that his father was insane do not justify the conclusion that the accused at the time of committing the offence was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was wrong and contrary to law.

ORDER.—On a consideration of the character of the prisoner's confession before the Magistrate the Court are of opinion that the evidence

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of the Civil Surgeon now taken by the acting Sessions Judge as to the prisoner's weakness of intellect and the other depositions recorded to show that his conduct has of late been in some respects unusual and that his father was insane do not justify the conclusion that the accused at the time of committing the offence was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was wrong and contrary to law.

The Court cannot, therefore, recommend that he should be pardoned on the ground of insanity as suggested by the acting Sessions Judge but considering that the execution of the warrant was postponed and that so much delay has occurred, and this investigation been made they think undesirable that the sentence of death should now be carried into effect and would recommend Government to commute it to one of transportation for life.

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3 September 1868. NEWTON & TUCKER, JJ.

Reg. v. Shewoo.

Penal Code (Act XLV of 1860), Sec. 268--Public Nuisance—Offensive odour.

Every act which causes an offensive odour does not necessarily constitute a public nuisance: in all prosecutions under section 268 of the Indian Penal Code all the essentials required by the section must be duly established by evidence.

ORDER.—Every act which causes an offensive odour does not necessarily constitute a public nuisance and in all prosecutions under section 268 of the Indian Penal Code—the fact that the act complained of causes any common injury, danger or annoyance to the public or the people in general who dwell or occupy property in the vicinity or must necessarily cause injury obstruction, danger or annoyance to persons who may have occasion to use any public right must be duly established by evidence.

---

4 September 1868. NEWTON & TUCKER JJ.

Reg. v. Toorebajkhan.

Cattle—Straying—Wrongful loss—Intention—Knowledge.

The mere permitting of cattle by the accused to stray does not establish his intention to cause or knowledge that he was likely to cause wrongful loss or damage thereby to the public or any person.

READ a letter from the Magistrate F. P. in charge of Ahmedabad, No. 740, dated the 10th August 1868, referring under section 434 of the Code of Criminal Proceedure, the procedings of 1st Class Sub-Magistrate of Dholka in the case of the *Queen* v. *Toorebajkhan Joravurkhan* and 15 others for the orders of the High Court.

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ORDER.—The Court reverses the conviction and sentence. The Magistrate committed an error in law in inferring that the mere permitting of cattle by the accused to stray establishes his intent to cause or knowledge that he was likely to cause wrongful loss or damage thereby to the public or any person.

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9 December 1868. TUCKER & GIBBS, JJ.

Reg. v. Shiddungowda.

Penal Code (Act. XLV of 1860), Sec. 463—Forgery—Copy—Incorrect copy—Police Diary.

The accused was convicted of forgery on the ground that he sent an imperfect copy of his diary to the Superintendent of Police: the High Court reversed the conviction on the ground that the two lines not embodied in the copy sent were evidently interpolations in the original diary, subsequently struck though with the pen; and that no forgery could be established unless it were proved that these interpolations were extant on the diary and had not been struck though at the time the copy was made.

RESUMED consideration of the petition of Shiddungowda bin Giriapgowda and Deawungowda bin Shiddungowda and Busgugwda bin Gadgeigamda by Vakil Vishwanath Narayan Mundlik and counsel Mr. White last before the Court on the 27th August 1868.

Read a return from the Assistant Session Judge in charge sudder station Dharwar dated the 29th October, 1868, No. 1238, to the Court's writ No. 1327 of the above date certifying the Record and Proceedings in the case as required.

Resumed consideration of the petition of Kooshaba bin Mahadoosa and Fukrood Saheb wulad Moostan Saheb and Murdar Saheb wulad Shaik Roostoom by Vukeel Mr. Nanabhai Hureedas last before the Court on the 3rd September 1868.

Mr. Dhirajlal Muthooradas, Government Prosecutor.

JUDGMENT.—In this case the first prisoner Kristnarao has been convicted on the 7th head of the charge of forgery and also together with prisoners No. 2 Shaik Madar, 3 Fukroodeen, 14 Shiddungowda, 15 Deawungowda and 16 Bussungowda on the 3rd head of "voluntarily causing grievous hurt to one Doorga deceased to extort information which might lead to the detection of an offence."

With regard to the charge against the first prisoner for forgery—The Court cannot find any circumstances to show in what the alleged forgery consisted, it would appear from the finding of the Sessions Judge that it was in sending an imperfect copy of his diary to the Superintendent of Police, but if this is the charge, it must fall to the ground as the two lines not sent, were evidently interpolations in the original diary, subsequently

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struck through with the pen. Wherefore unless it were proved, which it is not, that these interpolations were extant on the diary and had not been struck through, at the time the copy was made, no forgery is established. The Court therefore reverse the conviction and sentence on this head of the charge.

The conviction on the 3rd head rests solely on the evidence of certain witnesses Nos. 27, 28, 29 & 30 of whom the first three depose to the deceased having been taken into the ginning house by the Police and No. 27 to hearing his cries while there, which Nos. 28 and 29 do not mention; while No. 30 states he only heard deceased talking loudly, but not crying or shouting. It is not shown what became of deceased until he was found the next morning in the Maharwara with his throat cut. The Sessions Judge apparently disbelieves No. 30 the informer as to much of his evidence and quantity of blood found in the vicinity of the body as deposed to by all the witnesses examined on this point prevents the supposition that the throat was cut after death as alleged to hide his accidental death by hanging. The chief medical authorities on this point concur that only a small quantity of venous blood would under such circumstances have issued (*vide*—Taylor on Medical Jurisprudence and Guy on Forensic Medicine). The statement of No. 30 is therefore not reliable and the only evidence remaining is of the fellow-prisoners of deceased; *viz.*, his mistress No. 29, her mother 28 and her brother 27. Now with regard to these it is to be remarked that they never said a word about the illusage of deceased until some months after the alleged occurrence, and although summoned by the Mamlatdar (*vide*, Magistrate's proceedings) when the Police were away from the village—they then did not say a word about this maltreatment. It is further to be remarked that even if their evidence be trustworthy it does not prove the commission of "grievous hurt" by the prisoners; the utmost that the present testimony amounts to is that he may have been hurt—and this only can be inferred from one of them saying he heard the deceased cry out when in the ginning house. But the Court cannot uphold convictions supported by slight evidence and without any explanation why the accused made no disclosure when examined by a Magistrate in the absence of the Police soon after the occurrence. It is much to be regretted that the Sessions Judge did not question these witnesses on this point.

Under this view the Court reverse the conviction and sentence on prisoners 1, 2, 3, 14, 16 on the 3rd head of the charge and order their release.

The Court cannot conclude without expressing its regret that so great a length of time should have been allowed to elapse from the time when rumours first reached the authorities that there had been misconduct on

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the part of the Police in the investigation of the circumstances of the death of Durga to the time the enquiry which resulted in the present trial was commenced and also at the further delay which occurred before the Magistrate, Mr. Hearn, which has not been satisfactorily explained. Further the Court are unable to understand why, supposing that Sessions Judge believed the witnesses 27, 28 and 29, he did not frame charges against the prisoners for maltreating those persons. The whole case appears to have been sadly mismanaged from the beginning to the end.

1869.

2 July 1869. WARDEN & LLOYD, JJ.

Reg. v. Patha.*

Penal Code (Act XLV of 1860), Sec. 277—Public spring—River.

A river is not a public spring within the meaning of section 277 of the Indian Penal Code.

READ a letter from the acting Magistrate of Khaira No. 345 dated the 15th June 1869 referring under section 434 of the Code of Criminal Procedure, the proceedings of the 1st Class Subordinate Magistrate of Kapurwunj in the case of the *Queen* v. *Putha Tukha* and 27 others for the orders of the High Court.

ORDER.—Conviction and sentence reversed. Fine if paid to be refunded.

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7 July 1869. GIBBS & MELVILL, JJ.

Reg. v. Chundersungjee.

Penal Code (Act XLV of 1860), Secs. 110, 149—Murder—Unlawful assembly—Common object.

The common object of an unlawful assembly was to beat a person, and two of the persons were armed with wooden bars. In beating the deceased, the armed persons used the bars rather severely and the other persons of the assembly simply used their hands on the deceased:—

Held, that section 110 of the Indian Penal Code was applicable to the case and the persons who were not armed were guilty of only voluntarily causing grivous hurt.

JUDGMENT.—The evidence proves clearly that the six prisoners were members of an unlawful assembly, the common object of which was to beat witness No. 1, Bharutsung. The deceased who was Bharutsungjee's brother interfered and was felled to the ground by a blow on the head from prisoner No. 1. As he lay on the ground, prisoner No. 2 struck him another blow on the back of the head, prisoners Nos. 3 and 4 struck him once on the belly and prisoners Nos. 5 and 6 kicked him once on the same part of his person.

The weapons used by the first two prisoners were formidable pieces

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* *Criminal Ruling.*

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of wood (*aros*) forming the sides of a cart, and described as being between 3 and 4 feet long and two inches in diameter. The weapons with which the deceased was struck by prisoners Nos. 3 and 4 are described as bamboo sticks from 5 to 6 feet in length and ½ to ¾ inches in diameter.

There seems no reason to doubt (though it is to be regretted that there is no medical evidence) that death ensued from the wounds inflicted by the first two prisoners and that the injuries inflicted by the other prisoners were not such as were likely to cause death.

Such being the facts we have to consider whether they are sufficient to sustain the conviction of murder.

The learned Sessions Judge has found that all the prisoners, whether upon general principles, or under the special provisions of section 149 of the Indian Penal Code, are equally guilty, because they were acting in concert, and the beating was in furtherance of a common design.

It seems certain that the common design was only to inflict a beating and not to kill any person, but nevertheless the law as laid down in section 149 has been correctly stated by the learned Sessions Judge, if it be held to be proved that the prisoners all knew that the death of any person was likely to be caused in the prosecution of their object.

When the first two prisoners struck the deceased on the head with such formidable weapons as those which they used they must have known that the act was so imminently dangerous that it would in all probability cause death or such bodily injury as was likely to cause death. They were therefore legally guilty of murder there being in our opinion no sufficient proof of any circumtsances which would bring the case within any of the exceptions mentioned in section 300 of the Indian Penal Code.

The other prisoners may not have observed how prisoners Nos. 1 and 2 were armed; or if they observed it they may not have supposed that prisoners Nos. 1 and 2 would use their clubs with such a reckless disregard of human life. It cannot therefore be said that when they entered the fray, they must have known that murder was likely to be committed in prosecution of their object. Their object was simply to cause hurt, and in pursuance of their object they are not shown to have themselves inflicted greater injury than that which the Code defines as hurt. They are not proved to have shared in, and therefore are not responsible for the murderous intentions of the first two prisoners. Their case seems to come properly within the provisions of section 110 of the Code, which is as follows :—

"Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of

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the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other."

The conviction in the case of prisoners Nos. 3 and 6 is altered into a conviction for voluntarily causing hurt, an offence punishable under section 323 of the Indian Penal Code, and each prisoner is sentenced to one year's rigorous imprisonment and to pay a fine of Rupees 250, or in default to undergo additional rigorous imprisonment for three months.

The conviction and sentence on prisoners Nos. 1 and 2 must be confirmed, but taking into consideration all the circumstances of the case, we are willing to recommend to Government that the sentence be commuted to one of rigorous imprisonment for ten years.

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8 July 1869. WARDEN & LLOYD, JJ.

Reg. v. Goolabchand.*

Criminal Procedure Code (Act XXV. of 1861) Sec. 259, Chap. XIV—Complainant—Non-appearance—Dismissal of complaint.

The provisions of section 259 of the Code of Criminal Procedure do not apply to cases where an accused person is charged with an offence punishable with imprisonment exceeding six months and triable under Chapter XIV; a trying Magistrate therefore has no power to dismiss a complaint for an offence of voluntarily causing hurt in consequence of the non-appearance of a complainant.

READ a return from the Session Judge of Surat No. 1004 dated the 24th June 1869 to the Court's Writ No. 685 of the 10th May 1869 certifying the Record and Proceedings in the case of the *Queen* v. *Goolabchand Kulanchand* and Roopchand Raychand and Itcha wife of Roopchand and Nemkore daughter of Roopchand and Hurkore wife of Goolabchand and Umrut wife of Kulan called for by the High Court on a review of the Criminal return of the Subordinate Magistrates of Surat for the month of December 1868.

ORDER.—The First Class Subordinate Magistrate had no power to dismiss the case as the provisions of section 259 Criminal Procedure Code do not apply in a case where the accused is charged with an offence punishable with imprisonment exceeding six months.

The Subordinate Magistrate should therefore dispose of the case according to law.

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* *Criminal Ruling.*

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8 July 1869. WARDEN & LLOYD, JJ.

Reg. v. Jeenka.*

Criminal Procedure Code (Act XXV of 1861), Sec. 271—Complaint—Withdrawal.

Where an offence charged is punishable with imprisonment exceeding six months and triable under Chapter XIV, section 271 of the Code of Criminal Procedure does not apply, and a complaint alleging the commission of such an offence cannot be withdrawn.

READ a return from the Session Judge of Surat No. 1005 dated the 24th June 1869 to the Court's Writ No. 688 of the 10th May 1869 certifying the Record and Proceedings in the case of the *Queen* v. *Jeenka Ramla* called for by the High Court on a review of the Criminal return of the Subordinate Magistrates of Surat for the month of December 1868.

ORDER.—The 2nd Class Subordinate Magistrate is wrong in allowing the complainant to withdraw his complaint, because the offence charged was voluntarily causing hurt which is punishable with imprisonment exceeding six months and section 271, Criminal Procedure Code, was not applicable. The Court, however, consider it unnecessary to issue an order directing the accused to be put upon his trial again.

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15 July 1869. WARDEN & LLOYD, JJ.

Reg. v. Khushal.*

Penal Code (Act XLV of 1860), Sec. 173—Refusal to receive and sign a summons.

A refusal to receive and sign a summons does not constitute a prevention of service within the meaning of section 173 of the Indian Penal Code.

READ a return from the Session Judge of Surat No. 1031 dated the 28th June 1869, referring under section 434 of the Code of Criminal Procedure, the proceedings of the Magistrate F. P. of Surat in the case of the *Queen* v. *Khoosal Prubhoodas* for the orders of the High Court.

ORDER.—Conviction and sentence reversed. Fine if paid to be returned.

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20 July 1869. WARDEN & LLOYD, JJ.

Reg. v. Gopala Shiru.*

Criminal Procedure Code (Act XXV of 1861), Sec. 412—Sessions Judge—Appeal—Acquittal of accused—Re-arrest.

An accused person acquitted and discharged by a Sessions Judge on hearing an appeal which he was not entitled by law to hear, may be re-arrested even after the expiration of the period to which he was originally sentenced to be imprisoned and made to undergo the remaining portion of the sentence.

READ a return from the Session Judge of Ahmednugur No. 677 dated the 26th June 1869 to the Court's Writ No. 856 of the 9th idem certifying

*Criminal Ruling.

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the Record and Proceedings in the case of the *Queen* v. *Gopalla walad Sheeroo and two others* called for by the High Court on a review of a letter from the Magistrate of Ahmednugur.

ORDER.—The proceedings of the Session Judge annulled as he had no jurisdiction to hear an appeal from a Subordinate Magistrate. The accused should be rearrested and returned to jail.

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27 July 1869. RESOLUTION IN CHAMBERS

Ahmednuggur Magistrate's Letter No. 1984 of 1869.*

Criminal Procedure Code (Act XXV of 1861), Secs. 23 G, 273—District Magistrate—Reference—Practice.

A Magistrate Full Power is not a Subordinate Magistrate within the meaning of Chapter XVI of the Code of Criminal Procedure, section 23G. of which has not altered the law as regards the power of the District Magistrate to refer cases under section 273 of the Code.

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29 July 1869. WARDEN & LLOYD, JJ.

In re **Akbar Ali.***

Criminal Procedure Code (Act XXV of 1861), Ch. XX, Secs. 308, 315—Magistrate—Reference.

The Magistrate of the District had no power, under the Code of Criminal Procedure before it was amended by Act VIII of 1869, to refer an inquiry under Chapter XX of the Code to a Magistrate Full Power, nor had the latter any power to refer it to a Subordinate Magistrate.

READ a letter from the Session Judge of Khandesh No. 755 dated the 10th July 1869, referring under section 434 of the Code of Criminal Procedure, the proceedings of the District Magistrate of Khandesh in connection with a notice issued by the District Magistrate directing Akberali Daoodbhaee Bhoree to remove a certain building erected by him at Shada for the orders of the High Court.

ORDER.—The Court annul the proceedings of the Subordinate Magistrate as at the time of the investigation the District Magistrate had no power to refer the matter for inquiry to the Full Power Magistrate nor had the latter any power to refer it to the Subordinate Magistrate.

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3 August 1869. RESOLUTION IN CHAMBERS.

Khandesh Session Judge's Letter No. 815 of 1869.*

Criminal Procedure Code (Act XXV of 1861), Sec. 48—Indian Penal Code—Accused sentenced while under going another sentence—Appeal—Practice.

When a sentence of imprisonment for an offence under the Indian Penal Code is passed upon an accused person who had just previously been convicted and sentenced for another offence, it appears to be contrary to the provisions of section 48, Criminal Procedure Code, to make the second sentence concurrent with the first. In such cases, although one of the sentences may be inoperative the accused has a right of appeal against either conviction.

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9 August 1869. WARDEN & LLOYD, JJ.

Reg. v. Sattya.*

Criminal Procedure Code (Act XXV of 1861), Sec. 363—Accused—Plea—Silence of accused.

When an accused person makes no answer to the inquiry whether he is guilty or has any defence to make, an inquiry should be made whether that person is obstinately mute or dumb or *ex visitatione Dei.* If he be found to be obstinately mute, a plea of 'not guilty' should be recorded and the trial proceeded with. If found to be dumb *ex visitatione Dei*, an inquiry should be made as to whether he is sane or insane and capable of being tried; if found sane, a plea of 'not guilty' should be recorded and the trial proceeded with; but if found to be insane, the procedure laid down in Chapter XXVII of the Code of Criminal Procedure, should be followed.

ORDER:—The order of the Magistrate is annulled and he is directed to dispose of the case in accordance with the procedure pointed out by the Sessions Judge in his minute of the 23rd June 1869.

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12 August 1869. WARDEN & LLOYD, JJ.

Reg. v. Ganpatee.*

Penal Code (Act XLV of 1860), Sec. 279—Careless driving—Bullocks—Nose-strings.

The mere driving of a cart the bullocks of which have no nose-strings does not constitute an offence under section 279 of the Indian Penal Code.

READ a return from the Session Judge of Sattara No. 561 dated the 19th July 1869 to the Court's writ No. 1055 of the 29th June 1869 certifying the Record and Proceedings in the case of the *Queen* v. *Ganpatee bin Yadowjee Talookee* called for by the High Court on a review of the Criminal return of the Subordinate Magistrates of Sattara for the month of February 1869.

ORDER.—The Court annul the conviction and sentence as simply driving a cart the bullocks of which had no nose-string does not constitute the offence under section 279 of Indian Penal Code.

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16 August 1869. RESOLUTION IN CHAMBERS.

Reg. v. Ramchandra.*

Procedure—Accused—Guilty of more than one head of charge—Concurrent sentences.

Where a Court considers the evidence sufficient to convict an accused person under more than one head of the charge, and considers a certain term of imprisonment adequate to meet the offence under each head, it should not record a formal conviction under the first head and drop the others, but its best procedure is to convict on each head of charge and pass concurrent sentences.

RESUMED consideration of the petition of Ramchandra Jairam Chitnis by Vakil Mr. Shantaram Narayan last before the Court on the 24th June 1869.

Read a return from the Acting Sessions Judge of Ratnagiri dated the

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7th July 1869 No. 711 to the Court's writ No. 993 of the above date, certifying the record and proceedings in the case No. 4 of 1869 as required.

Mr. *Dhirajlal Muthooradas*, Government Prosecutor.

ORDER.—Rejected.

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17 August 1869. RESOLUTION IN CHAMBERS.

Rutnagiri Session Judge's Letter No. 866 of 1869.*

Criminal Procedure Code (Act XXV of 1861), Secs. 237, 238—Penal Code (Act XLV of 1860), Sec. 323—Special exceptions—Form of charge.

The charge under section 323 of the Indian Penal Code should distinctly deny the existence of circumstances constituting a special exception, as the terms of section 237 of the Code of Criminal Procedure ought to prevail in preference to any direction which may be inferred from the forms of charge contained in Section 239 (6).

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6 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Kuchra Premchand.*

Criminal Procedure Code (Act XXV of 1861), Sec. 293—Magistrate—Mitigating penalty—Personal recognizance.

A Magistrate has no power under section 293 to mitigate the penalty entered in a personal recognizance-bond to keep the peace. The penalty must be enforced to its full amount.

READ a letter from the Magistrate of Ahmedabad No. 1007 dated the 19th August 1869 referring under section 434 of the Code of Criminal Procedure, the proceedings of the Honorary Subordinate Magistrate 1st Class of Ahmedabad in the case of the *Queen* v. *Kuchra Premchand* for the orders of the High Court.

ORDER.—The Court concurring with the District Magistrate annul the Subordinate Magistrate's order mitigating the penalty and direct him to enforce the full penalty as laid down in Bombay High Court Reports, Vol I, Part II, page 138.

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6 September 1869. WARDEN & LLOYD, JJ.

Reg v. Dewji.*

Criminal Procedure Code (Act XXV of 1861), Sec. 382—Form 11th—Alternative findings—Practice and Procedure.

The Code of Criminal Procedure only contemplates an alternative finding when the facts are ascertained and it would follow beyond a doubt that the facts proved constitute one of two offences under one section of the Indian Penal Code; or when the evidence proves the commission of an offence falling within one of the sections of the Code and it is doubtful which of such section is applicable.

Hence, where the accused was charged under two heads of charge with dacoity in each of two adjacent houses and the Session Judge was unable to determine into which house he entered, it was held that he was wrong in finding him guilty upon an alternative finding.

**Criminal Ruling.*

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JUDGMENT.—This case was called for on a review of the criminal return for the month of May submitted by the Session Judge of Khandesh with reference to the Session Judge's finding against Mhypia who was charged along with four others with having committed dacoity in two instances. The Session Judge found Mhypia guilty of the dacoity specified in the first head of the charge or of the dacoity specified in the 2nd head of the charge and sentenced him to six years' rigorous imprisonment on the following grounds. "It has been noted above that Purteepmul's house and Kuneeram's house are adjacent to each other, as Mhypia says he did not go inside either house, a slight haze seems to hang over the question whether he was concerned in both dacoity or only in one, and whether that one was the dacoity at Purtapmul's or Kuneeram's."

There seems here to have been a misapplication of the law, as the Criminal Procedure Code only contemplates an alternative finding when the facts are ascertained and it would follow beyond a doubt that the facts proved constitute one of two offences under one section of the Code, or when the evidence proves the commission of an offence falling within one of two sections of the Code and it is doubtful which of such sections is applicable. Whereas it is obvious in the present instance that the fact of Muhipia not having committed one of the dacoity would not be conclusive of his having committed the other.

In deciding this case the Session Judge has apparently lost sight of section 114 of the Indian Penal Code, as the fact of his not going inside either of the houses does not affect Mhypia's criminality.

We consider the alternative finding under the circumstances illegal and therefore annul the finding and sentence and return the case to the Session Judge in order that a legal sentence may be passed.

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8 September 1869. GIBS & MELVILL, JJ.

Reg v. Daya Kesur.*

Criminal Procedure Code (Act XXV of 1861), Sec. 193—Complaint—Dismissal—Examination of witnesses.

Before dismissing a complaint a Magistrate is bound under section 193 of the Criminal Procedure Code to examine every one of the witnesses called by the complainant.

READ a letter from the Magistrate of Surat dated the 5th August 1869 No. 1053 in reply to that of the Court No. 1032 of the 24th June 1869 reporting why he failed to act in conformity with the provisions of section 250 of the Code of Criminal Procedure in the case of Daya Keshoor.

ORDER.—The Subordinate Magistrate might be referred to section 193

*Criminal Ruling.

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of the Criminal Procedure Code and informed that a Magistrate cannot tell beforehand whether the evidence of a witness will be material and that if a complainant insists on a witness being called the Magistrate has no right to refuse it.

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14 September 1869. RESOLUTION IN CHAMBERS.

Reg. v. Antone Jose.*

Criminal Procedure Code (Act XXV of 1861), Secs. 417, 419, 421—Sessions Judge—Appellant—Bringing before the Court—Appellant in jail.

No inference drawn from sections 417, 419 and 421 of the Criminal Procedure Code nor any specific provision of law appears to authorise a Session Judge in causing an appellant under sentence of imprisonment to be brought before the Session Court at the hearing of his appeal.

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14 September 1869. RESOLUTION IN CHAMBERS.

Circular 1260, 1869.*

Criminal Procedure Code (Act XXV of 1861), Secs. 109, 152—Accused—Arrest—Police Officer—Village Police Act (Bom. Act VIII of 1867)—24 hours—Detention by police—Computation of time—Time required for carrying the accused to the Magistrate.

When an arrest is made under section 109, Criminal Procedure Code, by an officer of the District Police not authorized to make an enquiry under Chapter IX, Criminal Procedure Code such Police Officer must forward the accused "without unnecessary delay" to a Magistrate having jurisdiction or to the officer in charge of the Police Station. He has no authority to detain the accused person 24 hours under section 152, Criminal Procedure Code.

When a Police Officer has authority to make enquiry under Chapter IX, Criminal Procedure Code, the 24 hours of detention under section 152 are to be counted up to the time when the accused person leaves the Police Station on the way to the Magistrate. The time occupied on the journey to the Magistrate is not to be counted in the 24 hours, but it is the duty of the Magistrate to see that the time so occupied is reasonable with reference to the distance to be traversed and other local considerations.

The 24 hours during which the Village Police may detain an accused person under (Bombay) Act VIII of 1867 are not to be counted in the 24 hours allowed to the District Police Officer under section 152, Criminal Procedure Code.

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16 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Bhicajee.*

Penal Code (Act XLV of 1860), Sec. 379—Theft—Removal of property—Assertion of right.

Where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal thereof does not constitute theft.

ORDER.—The accused were apparently acting under a claim of right and however ill-founded that claim must be still they were not guilty of theft by asserting it, the conviction and sentences are annulled and the fine, if paid, to be refunded.

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The Subordinate Magistrate has been guilty of a grave irregularity in recording the committee's report No. 43 which was inadmissible as evidence. The attention of the District Magistrate to be drawn to the extreme irregularity of his Subordinate's proceedings.

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17 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Sundar Bhim.*

Criminal Procedure Code (Act XXV of 1869), Sec. 296—Magistrate—Security for good behaviour—Separate proceedings.

Action under section 296 of the Code of Criminal Procedure, requiring security for good behaviour, should be quite irrespective of any proceedings on account of any offence committed.

READ a return from the Session Judge of Ahmedabad dated the 28th August 1869 to the Court's writ No. 1453 of the 16th idem certifying the Record and Procedings in the case of the *Queen* v. *Soonder Bheem* and *Luxmon Rama* called for by the High Court on a review of the Criminal Return of the Magistrates F. P. of Ahmedabad for the month of May 1869.

ORDER.—The Magistrate to be informed that action under section 296 should be quite irrespective of any proceedings on account of any offence committed. And in this case no facts are proved to warrant the securities being required. The report of crime made by chief constable is no evidence. The Court therefore annul the order of security.

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17 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Suklal.*

Penal Code (Act XLV of 1860), Sec. 268—Criminal Procedure Code (Act XXV of 1861), Chap. XX—Prosecution under Sec. 268 not illegal owing to absence of proceedings under Chap. XX.

A prosecution under section 268 of the Penal Code is not illegal on the ground that proceedings have not previously been taken under Chapter XX of the Code of Criminal Procedure.

RESUMED consideration of the case of Sooklal walad Bagmal and thirteen others last before the Court on the 6th September 1869.

ORDER.—The Session Judge to be informed that it is unnecessary to proceed under Chapter XX of the Criminal Procedure Code.

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20 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Jagjivan *

Criminal Procedure Code (Act XXV of 1869), Sec. 259—Voluntarily causing grievous hurt—Want of prosecution—Dismissal of complaint—Subordinate Magistrate.

A Subordinate Magistrate has no power to dismiss a complaint for the offence of volun-

*Criminal Ruling.

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tarily causing grievous hurt on the ground that the complainant refused to proceed with the prosecution.

READ a letter from the Magistrate of Surat No. 1165 dated 2nd September 1869, referring, under section 434 of the Code of Criminal Procedure, the proceedings of the Subordinate Magistrate Oolpar in the matter of the complaint made by Jugjeevan Dhurumchund for the orders of the High Court.

ORDER.—The Court concur with District Magistrate that Subordinate Magistrate had no power to dismiss the complaint on the ground that the complainant refused to proceed with the prosecution. The complaint should be inquired into according to law.

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20 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Lakha Jibhai.*

Criminal Procedure Code (Act XXV of 1861), Schedule—7th Explanatory Note—Interpretation.

The 7th explanatory note at the head of the Schedule of the Code of Criminal Procedure as amended by Act VIII of 1869 refers to procedure and not to the class of officers by whom an offence is punishable.

READ a letter from the Magistrate of Khaira No. 558 dated the 3rd September 1869, referring under section 434 of the Code of Criminal Procedure the proceedings of the First Class Subordinate Magistrate of Nuriad in the case of the *Queen* v. *Lukha Jibhaee* for the orders of the High Court.

ORDER.—The Court consider that under the Act VIII of 1869 amending the Schedule of the Code of Criminal Procedure (offences against other laws) the Subordinate Magistrate had jurisdiction in this case.

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23 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Buldev Goomajee.*

Criminal Procedure Code (Act XXV of 1861), Sec. 194—Complainant—Examination—Presence of accused—Deposition of complainant read to the accused—Practice.

To satisfy the requirements of section 194 of the Code of Criminal Procedure, it is not enough to read over the deposition of a complainant to him in the presence of an accused person. The examination of the complainant must take place in his presence.

READ a letter from the Magistrate of Thanna No. 2968 dated the 6th September 1869 referring, under section 434 of the Code of Criminal Procedure, the proceedings of the Subordinate Magistrate 1st Class of Shapoor in the case of the *Queen* v. *Buldev Goomajee and another* for the orders of the High Court.

ORDER.—Conviction and sentence reversed as the provisions of section 194, Criminal Procedure Code have not been attended to.

**Criminal Ruling.*

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28 September 1869. WARDEN & LLOYD, JJ.

Reg. v. Luxumandas.*

Penal Code (Act XLV of 1860), Secs. 193, 209—False claim—False verification—Magistrate.

In a case in which an accused person was convicted by a Magistrate, F. P., under section 209, Indian Penal Code, of making a false claim, it appeared that the accused had made a false verification of his plaint. The High Court annulled the conviction on the ground that an offence punishable under section 193, Indian Penal Code, had been committed, and that the Magistrate had no jurisdiction. It was left to the discretion of the Magistrate to take further proceedings against the accused.

READ a return from the Session Judge of Ahmednugur No. 1057 dated 4th September 1869 to the Court's Writ No. 1502 of the 24th August 1869 certifying the Record and Proceedings in the case of the *Queen* v. *Luxumandas bin Pemchund* and *Mukundas bin Pemchund* called for by the High Court on a review of the Criminal return of the Magistrate F. P. of Ahmednugur for the month of May 1869.

ORDER.—The conviction and sentence annulled as it appears that the offence was that punishable under section 193, Indian Penal Code, and therefore not triable by the Magistrate F. P., *vide*, sections 24 and 27 of the Code of Criminal Procedure. The fine paid to be refunded. The Court leave it to the discretion of the Magistrate to take further proceedings against the accused.

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7 October 1869. WARDEN & LLOYD, JJ.

Reg. v. Dajee Mansukhram.*

Criminal Procedure Code (Act XXV of 1861), Sec. 432—Vakil—Accused—Appearance—Magistrate.

A Magistrate has no power under section 432 of the Code of Criminal Procedure to forbid a duly qualified pleader to appear for the accused.

RESUMED consideration of the petition of the Vakil Dajee Munsookram last before the Court on the 22nd July 1869.

Read a letter from the Magistrate of Khaira No. 599 dated the 21st September 1869 in reply to that of the Court No. 1267 of the above date stating that the Vakeel Dajee Munsookram holds a sunud from the late Sudder Court.

ORDER.—The Court annul the order of the Subordinate Magistrate as he had no power under section 432 to forbid a duly qualified pleader to appear for the accused.

**Criminal Ruling.*

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12 October 1869. RESOLUTION IN CHAMBERS.

Kulladghee Magistrates's Letter No. 444 of 1869.*

Village Police Act (Bom. Act VIII of 1867), Sec. 12 (1)—Police—Bail—Police Patel.

The power of the Police to take bail being regulated by the Code of Criminal Procedure, the Court cannot authorise Police Constables to admit to bail persons sent up to them by Police Patels under the privisions of (Bombay) Act VIII of 1867 for offences for which bail may be allowed by the Criminal Procedure Code. Section 12 Clause 1 of (Bombay) Act VIII of 1867 authorizes Police Patels to arrest for "any serious offence."

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20 October 1869. GIBBS & MELVILL, JJ.

Reg. v. Amrita Shahaji.*

Criminal Procedure Code (Act XXV of 1861), Sec. 382—Alternative finding—False evidence.

An accused person was convicted of giving false evidence before the Session Court solely on the ground that his evidence before the Session Court differed from his evidence before the committing Magistrate.

Held, that if the variance in his evidence was such as to justify a conviction, the finding should have been an alternative one under section 382 of the Code of Criminal Procedure.

Mr. *Bhairavnath Mangesh* for the petitioner.

Mr. *Dhirajlal Mathooradas* Government Prosecutor.

ORDER.—The Court reverse the conviction and sentence and order the prisoner to be discharged.

The prisoner has been convicted of having given false evidence in the Sessions Court. No evidence whatever has been taken to prove the falsity of the statements on which the perjury has been assigned; but the conviction is based simply on the fact that the prisoners' deposition in the Sessions Court differed in some respects from a deposition made by him before the Magistrate. If this circumstance justified a conviction at all, the finding should have been an alternative finding (section 352, Criminal Procedure Code, Form 11); but the discrepancies do not appear to the Court to be of such a nature as to justify a conviction for giving false evidence.

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17 November 1869. WARDEN & LLOYD, JJ.

Reg. v. Lakha Jibhai.†

Criminal Procedure Code (Act XXV of 1861), Sch. Expl. Note 7—Procedure—Class of officers—Interpretation.

The 7th explanatory note at the head of the Schedule of the Code of Criminal Procedure as amended by Act VIII of 1869 refers to procedure and not to the class of officers by whom an offence is punishable.

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25 November 1869. WARDEN & LLOYD, JJ.

Reg. v. Imam.

Criminal Procedure Code (Act XXV of 1861), Secs. 379, 408—Maturity of understanding—Question of fact—Jury—Judge.

The question whether an accused person (a child above seven years of age and under twelve) has sufficient maturity of understanding to judge of the nature and consequences of his conduct is a question of fact upon which, in cases tried by a jury, the accused is entitled to the verdict of the jury. The omission of the Sessions Judge to refer this question to the Jury is a ground for setting aside the conviction, and for ordering a new trial.

JUDGMENT.—The accused whose age is entered in the proceedings at 9 years has been convicted by a Jury at the Poona August Session under section 397, Indian Penal Code. It was alleged for the defence that the accused is not legally responsible for his actions being under 12 years of age and not having attained sufficient maturity of understanding to judge of the nature and consequence of his conduct.

This was a question of fact which should have been left to the consideration of the Jury, but in his charge the Session Judge has positively told the Jury that the accused cannot be considered to be "*doli incapax*" in the following terms :—

"The accused says he is only 9 years of age but he is evidently at least 10 and is probably 11 years old and his answers to the Court's questions clearly indicate that he has attained sufficient maturity of understanding to have been able, if he committed the act with which he is charged to judge at the time of its commission, of its nature and consequences ; so that he cannot come under the exemption from legal responsibility referred to in section 83 of the Indian Penal Code."

This point on which the accused was clearly entitled to have the verdict of the Jury has been determined by the Session Judge himself and we must therefore set aside the conviction and sentence and direct that a new trial be held.

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30 November 1869. WARDEN & LLOYD, JJ.

In re Girdhar Dhanjee.*

Criminal Procedure Code (Act XXV of 1861), Sec. 318—Possession—Party in possession—Magistrate.

When a party in possession has been ousted by an arrest upon even a false charge and the opponent enters into possession in the meanwhile, the Magistrate cannot under Section 318 of the Code of Criminal Procedure restore possession to the party so dispossessed, for he is strictly required to see who is in actual possession at the time of inquiry.

RESUMED consideration of the petition of Girdharee Dhunjee Bhetia

**Criminal Ruling.*

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manager of Shreenathjee's Gadee by vakil Mr. *Shantaram Narayan* and counsel Mr. *Macpherson* last before the Court on the 25th November 1869. Mr. *Nanabhaee Hureedas* and counsel Mr. *Marriott* appeared for the opposite party.

JUDGMENT.—We have nothing now to do with the question of the legality or otherwise of the petitioner's dispossession but merely to see whether Girdharee's petition to the Magistrate, under section 318, dated 25th January has been disposed of in accordance with the law on the subject.

It has been argued that the Magistrate should have gone back to the period of Girdhareejee's arrest, and found who was in possession at that time, but this would be going far beyond the scope of Chapter XXII. Unless the Magistrate was satisfied at the time he made the inquiry that a dispute likely to induce a breach of the peace existed he had no power to proceed and being satisfied on that point all he had to do was to determine which party was in actual possession. It is admitted that Wurujraeejee was in possession and under this law the Magistrate could not oust him.

The petitioner asserts that the whole of his evidence has not been taken but we think the Magistrate has not shown good reason for dispensing with the evidence of Wurujraeejee and the non-examination of the other three witnesses was because they could not be found.

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7 December 1869. RESOLUTION IN CHAMBERS.

Reg. v. Teesla Tooka.

Bom. Act XII of 1867, *Sec.* 23—*Police-Officer—Witness—Examination.*

Section 23 of the Bombay Act XII of 1867 does not give a Police officer any right to examine or cross-examine witnesses in a criminal Court.

RESOLUTION IN CHAMBERS.—The Magistrate might be informed that Section 23 (Bombay) Act XII of 1867 does not give a Police officer any right to examine or cross-examine witnesses in a criminal Court.

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8 December 1869. GIBBS & MELVILL, JJ.

In re **Ragho.***

Criminal Procedure Code (Act XXV of 1861), *Sec.* 435—*Magistrate—Dismissal—Accused—Previous convictions—District Magistrate—Interference—Practice.*

Where a Subordinate Magistrate, 1st Class, dismisses a complaint preferred against the accused who, though twice convicted before, persists in committing house-trespass, the Magistrate of the District cannot interfere with the order dismissing the complaint, as the offence is not one of the nature specified Section 435 of the Criminal Procedure Code.

If a complaint is made to the Magistrate of the District in such a case, he may proceed with the trial himself, or refer it to a Subordinate Magistrate.

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* *Criminal Ruling.* Criminal Reference No. 199 of 1869.

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18 January 1870. RESOLUTION IN CHAMBERS.

Canara Magistrate's Letter No. 43.*

Criminal Procedure Code (Act XXV of 1861), Sec. 61—Magistrate—Attachment—Sale.

Section 61 of the Criminal Procedure Code does not authorise the Magistrate to issue an order for attachment and subsequently an order for sale. When he has issued his warrant for levy of the fine he has no power to give directions as to the time of the sale.

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10 February 1870. WARDEN & LLOYD, JJ.

Reg. v. Syad Umar.*

District Police Act (Bom. Act VII of 1867), Secs. 7, 26—Breach of order—Police Superintendent—Magistrate—Jurisdiction.

A Police Officer enrolled under Bombay Act VII of 1867 permitted two reputed thieves to escape from his custody and failed to make any report to his superior, as in duty bound, and was convicted of the offence of wilful breach or neglect of orders made by competent authority, under section 26 of the Bombay Act VII of 1867, by the Superintendent of Police, who was also a Magistrate, F. P.

Held, that the Superintendent of Police, although he was a Magistrate, F. P. had no authority to try the case (section 7 of the Act).

THE accused in this case was convicted of breach of neglect of orders made by competent authority, under section 26 of the Bombay Act VII of 1867, in that he being a police officer enrolled under Act VII of 1867 permitted two reputed thieves to escape from his custody after they had been duly given in charge and after the escape of these prisoners failed to make any report to his superior officer as in duty bound. He was sentenced by the Full Power Magistrate of Canara to undergo rigorous imprisonment for three months.

ORDER.—The Court annul the conviction and sentence as the Superintendent of Police as a F. P. Magistrate had no power to try the case.

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16 February 1870. RESOLUTION IN CHAMBERS.

Sattara Magistrate's Letter No. 335 of 1870.*

Magistrate—Trial—Non-competancy—Police—Taking the trial to another Magistrate.

When it is found by a Subordinate Magistrate before the trial of a case has commenced before him that he is not competent to try it, the Police should be told to take it on to a Magistrate who is competent.

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22 February 1870. RESOLUTION IN CHAMBERS.

Reg. v. Bechar Pitamber.*

Criminal Procedure Code (Act XXV of 1861), Sec. 432—Appellant—Agent—Appeal Court.

The provisions of section 432 of the Criminal Procedure Code do not apply to an Appellant.

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*Criminal Ruling.

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The Appellate Court is bound under sections 417 and 419 of the Code to hear an agent on behalf of an appellant.

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8 March 1870. WARDEN & GIBBS, JJ.

Reg. v. Sukar Budhia.*

Penal Code (Act XLV of 1860), Sec. 188—Criminal Procedure Code (Act XXV of 1861), Secs. 62, 63—Magistrate—Order—Disobedience—Order posted at a place—Individual service necessary.

The accused was convicted, under section 188 of the Indian Penal Code, for disobeying an order posted at a certain place by a Subordinate Magistrate, 1st Class, prohibiting people from burying and burning corpses there:—

Held, that the order not having been served individually upon the accused, the conviction was illegal.

IN this case an order was issued by the Sub-Magistrate of Bassein prohibiting corpses being buried and burnt on a certain piece of ground at Malonday in Bassein—which notice was a general one (stuck up on the spot in question) and enforced in the case under notice under sections 62 and 63 of the Criminal Procedure Code. The accused, disobeyed this notice, for which he was charged under section 188 of the Penal Code and was fined one rupee.

The District Magistrate of Thana in referring the case to the High Court stated :—" The notice should, I am of opinion, have been served individually on each person, and not issued as a general one, as was done by the Sub-Magistrate."

ORDER.—The Court annul the conviction and sentence and direct fine to be refunded.

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10 March 1870. WARDEN & MELVILL, JJ.

Reg. v. Mardan Husen.*

Criminal Procedure Code (Act XXV of 1861), Sec. 62—Order—Written order—Addressed to a person.

An order, under section 62 of the Criminal Procedure Code, must be a written order addressed to a particular individual.

IN this case, the accused was convicted under section 188 of the Indian Penal Code for disobedience to an order duly promulgated by a public servant in that he buried a body in a burial ground the use of which had been prohibited by the Magistrate and was sentenced to pay a fine of Rs. 5.

PER CURIAM.—An order under section 62 of the Code of Criminal Procedure must be a written order and must be proved by production of the writing. There is no such written order on the record. We would annul conviction and sentence.

**Criminal Ruling.*

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31 March 1870. WARDEN & LLOYD, JJ.

Reg. v. Chotalal Jhaver.*

Criminal Procedure Code (Act XXV of 1861), Sec. 173—Indian Penal Code (Act XLV of 1860), Sec. 465—Forgery—Small Cause Court Judge—Commitment.

A Small Cause Court Judge, in hearing a suit, considered that a certain person had made a false document and committed him to take his trial before the Session Court for forgery, under section 465 of the Indian Penal Code.

Held, that the commitment was illegal the offence of forgery not having been perpetrated in the presence of the Judge.

THE Judge of the Court of Small Causes at Ahmedabad committed the accused for trial before the Court of Session for the offence of forgery.

The Sessions Judge of Ahmedabad being of opinion that the Judge of the Court of Small Causes had no jurisdiction to commit the case, referred the case to the High Court with the following remarks :—

"Section 173, Criminal Procedure Code, authorizes 'in any case triable by the Court of Session exclusively any civil Court before which any such offence was committed' to commit such case for trial before the Court of Session. The Judge of the Court of Small Causes in hearing a suit, discovered or thought he discovered, a forged document. He has committed two persons for trial for forgery—Indian Penal Code, sections 463-465.

"I am of opinion that the order of commitment is illegal in that the offence of forgery is not alleged to have been committed before the Court of Small Causes. The Judge was competent to commit for using as gunuine a false document, Indian Penal Code, section 471, but not, I think, on the charge of forgery.

"I find that the commitment is altogether illegal, and refer the proceedings for the orders of the High Court under section 434, Criminal Procedure Code."

ORDER.—The Court annul the committing order of the Judge of the Court of Small Causes as the offence was not committed before that Court who could only sanction the institution of the proceedings against him. The complainant to be informed that he can prefer his complaint before a Magistrate upon obtaining the Small Cause Court Judge's sanction.

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7 April 1870. WARDEN & LLOYD, JJ.

Reg. v. Jeevajee Abajee.*

Penal Code (Act XLV of 1860), Secs. 193, 467—Two accused—Joint trial—Separate trial.

The two accused were tried together and convicted of the offences under sections 467 and 193 of the Indian Penal Code. The High Court intimated to the trying Judge that in its opinion

*Criminal Ruling.

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each of the accused should have been tried separately on the charge of giving false evidence, and it therefore annulled the conviction on that charge, but did not order a retrial as the punishment under the first head of the charge was sufficient to meet the requirements of the case.

ORDER.—The Court decline to interfere with the conviction and sentence on the first head of the charge but on the second they reverse conviction and sentence as they consider that each of the accused should have been tried separately on the charge of giving false evidence; but the Court consider it unnecessary to retry the accused on the latter charge as they consider the punishment under the former sufficient to meet the requirements of justice. The conviction and sentence passed upon the prisoner who has not appealed is also reversed for the same reasons.

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27 April 1870 WARDEN & MELVILL JJ.

Reg. v. Narayan Ramchundra.*

Criminal Procedure Code (Act XXV of 1861), Sec. 167—Public Works Department—Overseer—Sanction for prosecution—Letter of Executive Engineer.

An Executive Engineer, Public Works Department, by a letter addressed to a Magistrate Full Power, gave sanction to prosecute the accused his subordinate, a 1st Grade Overseer, not removable from his office without the sanction of Government, for framing an incorrect document. The Magistrate Full Power without a formal complaint, tried and convicted the accused; but the Session Judge reversed the conviction on the ground of want of formal sanction for the prosecution:—

Held, that the Executive Engineer's letter constituted a sufficient sanction for the prosecution.

READ a petition of Narayan Ramchandra dated the 20th April 1870 by Vakil Mr. Vishnoo Moreshweer appealing against a sentence passed against him by the Session Judge of Khandesh on the 21st February 1870.

ORDER.—Petition rejected.

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28 April 1870. WARDEN & LLOYD, JJ.

Reg. v. Babon Antone.*

Criminal Procedure Code (Act XXV of 1861), Sec. 273—District Magistrate—Reference.

A Magistrate of the District has no authority under 273 of the Code of Criminal Procedure to refer a case for trial to a Magistrate Full Power.

ORDER.—We consider the Session Judge is right in holding that the Magistrate of the District had no authority to refer this case for trial to the Full Power Magistrate and that consequently the proceedings of the Full Power Magistrate are illegal and we therefore determine on quashing those proceedings. The fine if paid to be refunded.

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* *Criminal Ruling.*

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The Government prosecutor has opposed the reference, alleging that the Session Judge had no power to make it, the Full Power Magistrate being immediately subordinate to the Magistrate of the District. But here it is the illegal order of the District Magistrate which has been referred for our consideration; and even if it were not so it could be competent to this Court having the proceedings of the Full Power Magistrate before it to review them under section 404 of the Code of Criminal Procedure.

---

28 April 1870. WARDEN & LLOYD, JJ.

Reg. v. Poonja Kala.*

Criminal Procedure Code (Act XXV of 1861), Sec. 244—Sessions Judge—Offence—Foreign territory—Act I of 1849, Secs. 34.

It appeared to a Session Judge on the trial of a case that the witnesses deposed that the offence had been committed in a Foreign territory. He directed the committing Magistrate to obtain the orders of Government under Act I of 1849, section 3, and proposed on the receipt of an order under section 4 to amend the charge and continue the trial, reading over the proceedings already held to the accused, or at their option re-examining the witnesses:—

Held, that the Session Judge's procedure was correct.

THE Sessions Judge of Ahmedabad in making the reference to the High Court, observed:—

"At this stage of the trial I arrive at the conclusion that it is absolutely necessary that the charge be amended, by the insertion of the words 'or within the limits of the village of Ugal in the territories of Kathiawar.'

"All the alleged eye-witnesses who deposed before the committing Magistrate state Ugal as the scene of assault, and the witness Sultansing has done so now. Were Ugal within the jurisdiction of this Court, I would at once amend the charge by inserting the necessary words, but Ugal being in a Foreign State I have no authority to try the accused, who are British subject, for an offence alleged to have been committed there. I therefore cannot amend the charge. To continue the trial and possibly to acquit the accused, on the ground that the offence was not committed, or was not certainly proved to have been committed at Bodana as laid in the charge would perhaps be a miscarriage of justice.

"The committing Magistrate ought to have laid no alternative, or doubtful venue, in the commitment after obtaining the orders of Government under Act I of 1849—as he has not done so, how am I to proceed? The point is as far as I am aware novel, and I have no precedent. I think, however, reading section 3 of Act I of 1849, that my proper course is to refer to the committing Magistrate to obtain an order of Government for

*Criminal Ruling.

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the trial of the accused persons, on a charge of having committed the offence within the limits of the village of Ugal, in a Foreign State since it is clear from that section that the order is necessary only before trial not before commitment.

"I shall do so and on the receipt of the order of Government from the committing Magistrate I propose to amend the charge, and continue the trial of the case, the proceedings already held being read in Court, and the accused persons being allowed to recall the witnesses, and at their option to have them re-examined *ab initio.*"

ORDER.—The Judge to be informed that the Court consider his procedure to be correct.

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14 June 1870. RESOLUTION IN CHAMBERS.

Tanna Magistrate's Letter.*

Criminal Procedure Code (Act XXV of 1861), Sec. 36—District Magistrate—Referring a case for trial—Withdrawal of the case.

A District Magistrate cannot refer any case for trial to a Magistrate Full Power unless he has withdrawn it from some Court subordinate to him under section 36 of the Code of Criminal Procedure.

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16 June 1870. GIBBS & MELVILL, JJ.

Reg. v. Gopala Pursoo.*

Criminal Procedure Code (Act XXV of 1861), Secs. 56 to 59—Penal Code (Act XLV of 1860), Secs. 395, 412—Charge—Conviction—Want of charge.

The accused was charged with committing dacoity under section 395 of the Indian Penal Code and found guilty under section 412 of the Code of receiving stolen property from the dacoits :—

Held, that the convictions were bad as no charge under section 412 of the Indian Penal Code had been preferred by the Session Judge and the case did not fall within the provisions of sections 56 to 59 of the Code of Criminal Procedure.

ORDER.—The Court reverse the convictions and sentences passed on the prisoners, 1, 2, and 3 Gopala walad Pursoo, Satwa walad Peeria, and Amrita walad Rajoo, and direct that they be tried on the charge of dishonestly receiving or retaining stolen property, the possession of which they knew or had reason to believe to have been transferred by the commission of dacoity (section 412) no such charge having been preferred by the Session Judge and the case not falling within the provisions of the sections 56 to 59, Criminal Procedure Code.

**Criminal Ruling.*

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16 June 1870. GIBBS & MELVILL, JJ.

Reg. v. Khoda Bharthe.*

District Police Act (Bom. Act VII of 1867), Sec. 28—Police—Notification—Driving on the proper side of the road.

The Police have power under section 28 of the District Police Act (Bombay Act VII of 1867) to issue a general notification ordering people to drive on the proper side of the road.

ORDER.—Held that the Police have power under Section 28 of the District Police Act to issue a general notification ordering people to drive on the proper side of the road.

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28 June 1870. RESOLUTION IN CHAMBERS.

Reg. v. Parvati.*

Criminal Procedure Code (Act XXV of 1861), Sec, 272—Acquittal—Assessors—Opinions.

When a judgment of acquittal is recorded under section 272 of the Code of Criminal Procedure it is not necessary to take and record the opinions of assessors.

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12 July 1870. RESOLUTION IN CHAMBERS.

Kaladji Magistrate's Quarterly Return.*

Act I of 1849—Nizam's authorities—Arrest—British India—Detention—Custody—Orders of Government.

H. H. the Nizam's authorities have no power to make an arrest in British territory.

Unless it is clearly alleged by the complainant that the accused had been resident in British territory for six months before the offence was committed, the accused should not be imprisoned. In any case, he should not be detained in custody without the orders of Government obtained under Act I of 1849.

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12 July 1870. RESOLUTION IN CHAMBERS.

Sattara Session Judge's Letter No. 562.*

Penal Code (Act XLV of 1860), Sec. 70—Fine—Warrant to levy it—Subsequent finding of accused's property—Recovery of fine.

Every warrant for the levy of a fine or a portion of it must be issued by the Court passing the sentence. If, at any time subsequent to the passing of the sentence, the fine or any part of it remains unpaid, and the Court, from information gained in any way, has reason to think that any moveable property belonging to the offender is within its jurisdiction, it should issue a fresh warrant for the attachment and sale of that property within a specified period, returnable within a certain time.

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28 July 1870. GIBBS & MELVILL, JJ.

Reg. v. Sakaram Govind.*

Penal Code (Act XLV of 1860), Secs. 280, 109—Ferry-boat—Contractor—Ommission to load ballast—Negligence—Safe Navigation—Upsetting of boat.

A ferry-boat contractor was convicted under sections 280 and 109 of the Indian Penal Code

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**Criminal Ruling.*

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of abetting the rash navigation of a vessel, on the evidence that the boat hired by him in fulfilment of the contract was upset from not containing sufficient ballast :—

Held, that, there being no evidence to show that the contractor intentionally omitted to provide the ferry-boat with what he knew to be necessary for safe-navigation, the conviction for abetment could not be supported.

THE accused was charged before the District Magistrate of Colaba with the offence of having abetted the navigation of a vessel in a manner so rash as to endanger human life and was convicted under sections 208 and 109 of the Indian Penal Code. The evidence in the case showed that the ferry boat was upset, because it was sent with only 1½ or 2 *candies* of ballast.

ORDER.—There being no evidence to show that the contractor intentionally omitted to provide the ferry boat with what he knew to be necessary for safe navigation, the conviction for abetment cannot be supported. The Court, therefore, reverse the conviction and sentence and order fine to be repaid.

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28 July 1870. GIBBS & MELVILL, JJ.

Reg. v. Kalyanray.*

Penal Code (Act XLV of 1860), Sec. 21 (9)—Public Servant—Stamp-vendor—Appointed by Collector under the old Act, after the new Act XVIII of 1869 came into force.

A person was appointed by a Collector after the new Stamp Act XVIII of 1869 came into operation, to sell stamps under rules promulgated under Act X of 1862 :—

Held, that as that person was not appointed under the new stamp Act, and could not be appointed under the old one, which had been repealed, he could only be considered a person who had entered into an agreement with the Collector to sell Government property, *i. e.*, stamps, and as such agreement created no office, he was not an officer within the meaning of section 21, cl. 9, of the Indian Penal Code.

THE accused was convicted under section 161 of the Indian Penal Code, in that he being as a stamp vendor a public servant received a gratification, namely one pice other than his legal remuneration for himself as a reward for doing an official act, namely, of giving an eight annas stamped paper to the complainant.

ORDER.—The accused could not be appointed under the old Stamp Act as that was repealed before the appointment was made (4 January 1870) and it is clear from the sunnud that he was not appointed under the new Stamp Act. We must therefore hold that he was a person who had entered into an agreement with the Collector to sell certain Government Property, *i. e.*, stamps and as that created no office, accused is not an officer within the meaning of section 21 clause 9 of the Indian Penal Code;

**Criminal Ruling.*

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he is not therefore a public servant. The District Magistrate's conviction contains therefore an error in law and must be set aside.

The Court reverse the conviction and sentence passed upon the accused Kulyanrai Vurajrai.

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11 August 1870. GIBBS & MELVILL, JJ.

Reg. v. Tapee Poonja.*

Income Tax Act (IX of 1869), Sects. 3, 25—Magistrate—Subordinate Magistrate—Jurisdiction—Non-payment of income tax.

A Subordinate Magistrate, 2nd Class, has no jurisdiction to convict for non-payment of Income tax under Act IX of 1869 for, by section 25 of the Act, such convictions must be had before a "Magistrate", which term is defined in section 3 to mean "any person exercising the powers of a Magistrate, or a Subordinate Magistrate of the First Class".

READ a letter from the Magistrate of Khandesh No. 19/2230 dated the 21st July 1870, referring under section 434 of the Code of Criminal Procedure, the proceedings of the 2nd Class Subordinate Magistrate of Nuseerabad in the case of the *Queen* v. *Tapee walud Poonja* for the orders of the High Court.

ORDER.—The Court annuls the conviction and sentence in all these cases and directs that the fines if paid be refunded.

By section 25 of Act IX of 1869, convictions for non-payment of Income tax must be had before "a Magistrate", which term is defined in section 3 to mean "any person exercising the powers of a Magistrate, or of a Subordinate Magistrate of the 1st Class". It follows that the Subordinate Magistrate, 2nd Class, had no jurisdiction; and the conviction and fine must be annulled and the amount returned.

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17 August 1870. GIBBS & KEMBALL, JJ.

Reg. v. Alya Dhurma.*

Penal Code (Act XLV of 1860), Secs. 503, 44—Criminal Intimidation—Injury—Threat to put out of caste.

The accused told the complainant, a member of their caste, that he should give up his field or else they would put him out of caste:—

Held, that this did not amount to criminal intimidation within the meaning of the Indian Penal Code, the injury threatened not falling within the definition contained in section 44 of the Indian Penal Code.

JUDGMENT.—The accused and complainant in this case both belong to the Agri caste. The Magistrate of Colaba before whom the trial took place finds it proved that the accused said to the complainant "give us your field or we will put you out of caste and injure you in person and reputa-

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*Criminal Ruling.

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tion"; and that on his refusal to do so, they called a meeting of the caste at which the complainant did not attend and at which his excommunication was pronounced.

The Magistrate upon these facts observed that "as a general rule it is not the province of a Magisterial Court to interfere in caste matters but when the authority of the caste is attempted to be used as an engine of oppression in matters with which they have nothing to do, and in meddling with which they attempt to usurp the functions and authority of the ordinary Courts of law, it is in the opinion of the Court a clear case for interference. It can never be permitted for caste meetings to become instruments of extortion." He therefore found the accused guilty of criminal intimidation under section 503 of the Indian Penal Code, and sentenced each of them to six months' rigorous imprisonment.

An appeal was made to Mr. Coghlan, the Session Judge, who upheld the convictions, holding that the threat of expulsion from caste was a threat of injury to complainant's person and reputation.

The case comes before us in the exercise of our extraordinary jurisdiction, and we have to decide whether the facts found constitute the offence of criminal intimidation. In section 503 that offence is thus defined "whoever threatens another with any injury to his person, reputation or property.....commits criminal intimidation." The word injury is defined in section 44, to denote "any harm whatever, *illegally* caused to any person, in body, mind, reputation or property." Section 43 provides amongst other definitions, that every thing which furnishes ground for a civil action is illegal. Here then we come to the proper test of determining the point raised in the case. If the words uttered by the accused furnished to the complainant a ground for a civil action, they are guilty of criminal intimidation; if they do not, then the accused are not guilty and must be acquitted.

Under Regulation II, section 21 "no interference on the part of the Court in caste questions is warranted, beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste or character of the plaintiff." This section may be said to be rather inconsistent with Regulation V, section 2, clause 3, which evidently contemplates "suits for recovering the right of participation in caste communications and privileges" and prescribes limitation but the former being the substantive law and the latter only a law of limitation, the former must have precedence. However they may be, the civil Courts have always refused to inquire whether an expulsion from caste was legal

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or illegal, although they have awarded damages to persons who were entitled to be invited to caste dinners and were omitted.

The complainant in this case therefore could not have brought a civil action to decide, whether he was rightly or wrongly expelled from caste. We must therefore reverse the convictions and sentences and direct the accused to be discharged.

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18 August 1870 GIBBS & MELVILL, JJ.

Reg. v. Amirchund.*

Criminal Procedure Code (Act XXV of 1861), Sec. 318—Magistrate—Breach of the peace—Possession—Absence of record of proceedings—Procedure.

Where a Magistrate, F. P., without having recorded a proceeding, stating the grounds of his being satisfied that a breach of the peace was likely to result from a dispute regarding a piece of land, decided a question of possession under section 318 of the Criminal Procedure Code the High Court annulled his proceedings.

READ a letter from the Magistrate of Ahmedabad No. 1778 dated the 2nd August 1870, referring under section 434 of the Code of Criminal Procedure, the proceedings of the Magistrate F. P. of Ahmedabad in the case of the *Queen* v. *Ameechund Veerchund* for the orders of the High Court.

ORDER.—For the reasons given by the Magistrate of the District, the Court annul the proceedings of the Magistrate, F. P.

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13 September 1870. RESOLUTION IN CHAMBERS.

Magistrate F. P. in charge Surat, No. 1193.*

Criminal Procedure Code (Act XXV of 1861), Sec. 44—Fine—Compensation—Award—Appellate Court.

The law makes no provision authorising an Appellate Court to award to a complainant any portion of a fine paid by a convict, when the trying authority has refused to award it.

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15 September 1870. GIBBS & MELVILL, JJ.

Reg. v. Hiroo Chima.*

Evidence—Witnesses—Sessions Court—Committing Magistrate—Evidence at the Sessions—Practice.

In a trial by a Court of Session, in his reasons for his finding, the Session Judge observed that certain witnesses had before the Magistrate given evidence against the prisoner, which evidence the Session Judge believed to be true though the same witnesses retracted it before the Court of Session. The High Court remarked that the decision must be according to the evidence given in the Session Court, *and that only*. It is illegal to use against the prisoner evidence given before the committing Magistrate except when such evidence is expressly made admissible by law. The only use which could be made of the evidence given by the witnesses

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before the Magistrate in this case was to show that their evidence before the Session Court was valueless and must be left out of consideration altogether.

In this case, the Session Judge of Thana in the course of his Judgment remarked :—" This complainant Nana has evidently been tampered with since his appearance before the Magistrate, as to-day he has given a deposition full of contradictions, he is apparently a stupid man and has seemed to waver and alternate between the account he gave before the Magistrate, which I believe to be the true account of what took place, and a new story which he has but partly learnt. The evidence of complainant's wife Namee is also obviously one-sided and biased. She has suggested explanations and is evidently primed with her story."

Judgment.—The Court consider that there is not sufficient evidence to sustain the conviction. The decision must be according to the evidence given in the Session Court, *and that only*: and the Court consider that it was illegal to use against the prisoner evidence given before the Magistrate. The only use which can be made of the evidence given by the complainant and his wife before the Magistrate is to show that their evidence before the Sessions Court is quite valueless and must be left out of consideration altogether. Apart from this, the facts shown in evidence that the prisoner borrowed the gun without leave, that when he fired he was probably close to the complainant and that he ran away seem to the Court not necessarily inconsistent with his statement that it was an accident.

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15 September 1870. Gibbs & Melvill, JJ.

Reg. v. Maya Devjee.*

Penal Code (Act XLV of 1860), Secs. 69, 70—Act XXXI of 1850, Sec. 3—Fine—Default—Imprisonment—Partial payment of fine—Commutation of the sentence of imprisonment—Section 69 applicable to offences under the Penal Code.

A Magistrate, F. P., on convicting an accused person under section 3 of Act XXXI of 1850 sentenced him to pay a fine of Rs. 250 commutable to six weeks imprisonment. On the payment of Rs. 238-14-3, the balance, being the "amount proportional to 2 days' imprisonment," was remitted under section 69 of the Indian Penal Code :—

Held, that the sentence of imprisonment in default was not warranted by law;

Held, also, that the application of section 69 of the Indian Penal Code to the case was improper as that section would only apply to offences under the Code. If the section had been applicable, it was not a procedure warrantable under the following section of the Code. to remit a portion of the fine tendered. Had the accused, in a case to which the law quoted was applicable, tendered only a portion of the fine, he might legally have been released, if the term of imprisonment already suffered were not less than proportional to the amount of fine unpaid; but under section 70 of the Indian Penal Code, the unpaid amount would still be leviable.

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* *Criminal Ruling.* Criminal Review No. 72 of 1870.

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THE accused was convicted under section 3 of Act XXXI of 1850 for being concerned in passing unexcised salt, in that he took from salt pans at Suza Gunuti 42 maunds 37 seers of salt beyond the amount covered by his pass, and took means to conceal the same by packing some under the matting and putting planks in the salt to prevent accurate rod measurement by darogah. The Full Power Magistrate of Oorun sentenced the accused to pay a fine of Rs. 250 commutable to simple imprisonment for six weeks. The prisoner paid in, by the afternoon of the same day as he was sentenced, the sum of Rs. 238-14-3, and the amount proportional to imprisonment of two days was accordingly remitted, under section 69 of the Indian Penal Code.

On the case, having been called up under review by the High Court, the Registrar appended the following minute:—"The sentence of imprisonment in default appears illegal (see Mayne's Commentary, on section 64, Penal Code). The application of section 69 of the Indian Penal Code to the case was also, apparently, improper, as that section would only apply to the offences under the Code. Moreover, if the section had been applicable, it was not a procedure warrantable under the following section of the Code to remit a portion of the fine tendered. Had the accused, in a case to which the law quoted was applicable, tendered only a portion of the fine he might legally have been released if the term of imprisonment already suffered were not less than proportional to the amount of fine unpaid; but under section 70 the unpaid amount would still be leviable."

ORDER.—The Registrar's remarks to be communicated to Magistrate, but as the fine has been paid, the Court will not interfere.

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29 September 1870. GIBBS & MELVILL, JJ.

Reg. v. Rama Bahiru.*

Regulation (Bom.) XIV of 1827—Secs. 7 (3), 19 (2)—Imprisonment—Interpretation—Penal Code (Act XLV of 1860).

In the Regulation and Acts previous to the passing of the Indian Penal Code, the term "imprisonment' meant imprisonment with or without labour, according as the warrant might direct, (Reg. XIV of 1827, section 7, cl. 3). Except, therefore, in cases in which the law expressly provided that imprisonment should be without labour (*e. g.*, Reg. XIV. of 1827, section 19, cl. 2) the trying authority could order that imprisonment should be with labour.

READ a letter from the Magistrate of Colaba No. 1808 dated the 13th September 1870 referring, under section 434 of the Code of Criminal Procedure, the proceedings of the Subordinate Magistrate 2nd Class of Penn

**Criminal Ruling.*

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in the case of the *Queen* v. *Rama bin Buhiroo* for the orders of the High Court.

ORDER.—The Court think that in Regulations and Acts previous to the passing of the Penal Code the term "imprisonment" meant imprisonment with or without labour according as the warrant or sentence might direct (Regulation 14 of 1827, section 7, clause 3).

It was competent to the trying Authority to order that imprisonment should be with hard labour, except in cases in which the law expressly provided that the imprisonment should be without labour. (Reg. XIV of 1827, section 19, clause 2.)

In the present case therefore the sentence was legal. The only error was an error of words in describing the punishment as "rigorous imprisonment" instead of "ordinary imprisonment with hard labour."

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1 December 1870. GIBBS & MELVILL, JJ.

Reg. v. Ramchand.*

Criminal Procedure Code (Act XXV of 1861), Sec. 435—Penal Code (Act XLV of 1860), Sec. 411—Sessions Court—Commitment—Power to order commitment.

The addition of the words "Subordinate Magistrate of the First Class" in column 7 of the Schedule to the Code of Criminal Procedure, against section 411 of the Indian Penal Code, takes the offence triable under the latter section out of the operation of section 435 of the Code of Criminal Procedure, the intention of the Legislature being that the Court of Session should only interfere in serious cases. The Court of Session therefore cannot order the commitment of a person charged under section 411 of the Indian Penal Code who may have been discharged by a Magistrate, F. P.

READ a letter from the Magistrate of Ahmedabad dated the 11th October 1870, No. 1530, in reply to that of the Court No. 1554 of the 4th August 1870 retransmitting the Record and Proceedings in the case of *Ramchund Hemchand* tried by the Cantonement Magistrate, F. P. of Ahmedabad and requesting orders of the High Court with reference to the correspondence between him and the Session Judge of Ahmedabad whether the Session Court cannot under section 435 of the Criminal Procedure Code order the committal to it of the case.

ORDER.—The Court think that the Magistrate has made no mistake about the schedule, offences punishable under section 411 are entered as triable by the "Court of Sessions or Magistrate of the District or Subordinate Magistrate 1st Class". The question is whether the addition of the words Subordinate Magistrate 1st Class" takes the case out of the operation of section 435. The Court think that they do, the intention of the law being that the Court of Session should only interfere in serious cases.

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8 December 1870. GIBBS & MELVILL, JJ.

Reg. v. Kashiraj Martand.*

Penal Code (Act XLV of 1860), Secs. 378, 22, 30—Valuable securities—Moveable property—Theft.

Valuable securities are moveable property and may be the subject of theft.

THE District Magistrate of Nassik in making the reference to the High Court observed :—

"The ground of the application is that the Magistrate, F. P., made a mistake on a point of law in ruling that 'valuable securities' cannot be subjects for theft inasmuch as they are not saleable property.

"This decision has been based partly on the strength of *In re Pestonji* (1) in which it has been ruled that the account books of a defendant are not liable to seizure or sale, because the seizure of property under the Civil Procedure Code is in order that the decree may be executed 'not by attachment only but by attachment and sale. Hence anything which is not in its nature saleable, and not expressly provided for, would not fall within the scope of section 205, howsoever comprehensive its language may at first sight appear', and that any sale of such books 'would be more in the nature of a wilful destruction of property than of a *bona fide* sale.'

"But the Magistrate, F. P., has further held that a 'valuable security' cannot be considered 'moveable property,' *i. e.*, that it is not 'corporeal' property and cannot therefore be the subject of theft.

"On considering the question the District Magistrate considers that the decision at which the Magistrate, F. P., has arrived is incorrect and certainly the point is one on which it is desirable that there should be a ruling to remove all doubt.

"In the edition of the Penal Code published in 1861 by Morgan and Macpherson, they remark, 'many moveable things which are of small intrinsic value become very valuable when they show a title to property or constitute the evidence of a legal right. A piece of paper or parchment may thus acquire great value. By what is written upon it the material may become a title-deed or mortgage-deed or a bond, bill of exchange, promissory note, &c. It seems that any of these documents, as well deeds relating to land, as documents and tokens showing a right to moveable property or any other right and written contracts or agreements may be the subject of theft ... It is not a part of the definition itself of theft that the moveable property should be of some assignable value.'

"He may further observe that if valuable securities are not property,

* *Criminal Ruling.*

(1) 3 Bom., H. C., 42.

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a man who with the intent to cause wrongful loss or damage to any person destroyed a valuable security, he would not have committed the offence of mischief but on looking at the illustrations under section 425 of the Penal Code, the very first one is 'A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z, A has committed mischief'. This seems to the District Magistrate to support the opinion above expressed and to show conclusively that the framers of the Code looked on valuable securities as moveable property and hence as liable to become subjects of theft."

ORDER.—The F. P. Magistrate was in error and misapplied the case alluded to. The Court are of opinion that valuable securities are moveable property and may be subject of theft. The Magistrate of the District should take such further steps in the case as he may think necessary.

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15 December 1870. GIBBS & MELVILL, JJ.

Reg. v. Budhya Gurya.*

Criminal Procedure Code (Act XXV of 1866), Secs. 295, 296—Evidence—Habitual Robber—Magistrate—Practice.

No evidence as to general character having been adduced before the Magistrate that either of the persons before him was "by repute a robber, house breaker, or thief &c." as required by section 296 of the Code of Criminal Procedure, the order requiring securities under that section was illegal. It is also, necessary to record evidence under section 295, before requiring security under that section.

JUDGMENT.—The orders in the cases of Boodya, Yellappa and Ramapa are illegal, no evidence as to general character was adduced before the Magistrate that Yellapya was "by repute a robber, house-breaker or thief &c." as required by section 296 of the Criminal Procedure Code. The Magistrate should also have recorded evidence under section 295 before requiring Boodya and Bhowanee security.

1871.

19 January 1871. GIBBS & MELVILL, JJ.

Reg. v. Natha Kullian.

Penal Code (Act XLV of 1860), Sec. 379—Theft—Stridhan—Wife—Husband.

A wife cannot be convicted of theft for taking her own *pulla* from out of the custody of her husband.

ORDER.—The Court is not satisfied from the evidence in the case that the female prisoner took any property from her husband other than her "Pulla" or "Stridhan". Therefore, without going into the question

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* *Criminal Ruling.*

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and deciding whether a Hindoo wife can be convicted of stealing her husband's property, the Court is of opinion that she cannot be convicted of theft for taking away her own "Pulla" for over that her ownership, on this side of India seems undoubted (2 Bor. pp. 270, 481, 1 Madras H. C. 35, and the Mayukha IV, 10, Stokes, p. 100). The conviction and sentence on the female prisoner must therefore be reversed.

As therefore the woman in removing this property committed no crime, it follows that the male prisoner must also be acquitted.

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16 February 1871. GIBBS & MELVILL, JJ.

Reg. v. Jeejibhai Nathubhai.*

Penal Code (Act XLV of 1860), Sec. 188—Criminal Procedure Code (Act XXV of 1861), Secs. 62, 63—Disobedience—Order—Sanction—Withdrawal—Magistrate.

Section 168, of the Code of Criminal Procedure provides that a Court or public servant, may, in cases in which there has been a contempt of its or his authority, either institute a complaint or give its sanction to a complaint being instituted by any person injured. In the present case, the person who had been injured by the disobedience of the order and who had been allowed to prosecute the accused was the complainant and might withdraw his complaint in cases falling within Chapter XV. of the Code of Criminal Procedure.

THE facts in this case were that a Subordinate Magistrate, 1st Class, in his capacity of Mamlutdar, ordered, under Bombay Act V of 1864, the accused to give possession of a field to the complainant, but the accused disobeyed the disorder. Thereupon the Subordinate Magistrate, accorded as Mamlutdar, his sanction, under section 168 of Criminal Procedure Code, for the prosecution of the accused by the complainant on a charge of "disobedience to an order duly promulgated by a public servant" (Indian Penal Code, section, 188). He subsequently allowed the complainant to withdraw his complaint under section 271 of the Code of Criminal Procedure. The Magistrate of the District considered this to be illegal on the ground that the Mamlutdar was the complainant.

ORDER.—The Court does not agree with the Magistrate. Section 168, Criminal Procedure Code, provides that a Court or public servant may either vindicate its or his authority by instituting proceedings for disobedience of an order, or if such Court or public servant do not choose to move in the matter, may allow the private individual who is injured by such disobedience, to proceed against the offender. In the latter case (which seems to be the present one) the Court or public servant merely gives its sanction to the entertainment of the complaint of the private individual, and the latter is the complainant and may withdraw his complaint in cases falling within Chapter XV of the Criminal Procedure Code.

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* *Criminal Ruling.*

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16 February 1871. GIBBS & MELVILL, JJ.

Reg. v. Vinayek.

Magistrate—Transfer of case—Order of transfer not reaching in time—Disposal of the case—Illegality—Discretion.

The High Court ordered a transfer of a case on the 26th January 1871. Immediately on the passing of the order, the accused's pleader wired the information to his client. On the 27th, the telegram having been shown to the Magistrate, he adjourned the further proceedings till the 30th in order to allow the orders of the High Court to reach him. The order was despatched on the 27th but it failed to reach the Magistrate till the 31st. In the meanwhile, on the 30th no orders having been received, the Magistrate disposed of the case and found the accused guilty and passed a sentence upon him :—

Held, declining to interfere by way of revision, that though the Magistrate did not act discreetly in not waiting sufficiently for the order of the High Court, there was no illegality in his proceedings.

JUDGMENT.—This matter has been more than once before the Court. On the 26th ultimo, Vinayak Dewaker a Deputy Collector and Full Power Magistrate in the Khandesh District presented to this Court through his pleader a verified petition, in which he stated that he had been put upon his trial by the District Magistrate of Khandesh on certain charges of bribery and extortion and prayed that the case might be transferred to some other Magistrate and that the trial might be held in some stationary Court, as he could not procure proper legal assistance in the constantly moving camp of the Magistrate of Khandesh. The petitioner further stated that it would be necessary for him in his defence to call the Magistrate himself as a witness. We refused to take the enquiry out of the hands of the Magistrate of Khandesh, entertaining no doubt that that officer would conduct the inquiry fairly and without prejudice, and would inquire into and put a stop to any oppression by the Police which the petitioner might bring to his notice. But we issued an order, under the powers vested in us by the Letters Patent of the High Court, directing that if the evidence against Vinayak Dewakar should appear to the Magistrate sufficient for his conviction, he should commit him for trial before the Session Court of Khandesh. We informed the Magistrate that our reasons for issuing the order were that Vinayak Dewakar had made an affidavit that he required the evidence of the Magistrate himself and that we considered that Vinayak's allegation as to the difficulty which he experienced in obtaining competent legal advice while moving about in the Districts, was a fair and reasonable allegation. In making this order we were also influenced by the consideration that Vinayak Dewakar was an official of high rank and a Magistrate of the First Class—that a conviction in his case involves not only as in all cases, fine or imprisonment but the loss of position, high reputation, and a pension almost earned by many years of

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Government service; and that such a person might fairly ask that his case should not be disposed of by another Magistrate, but that he should have the benefit of a solemn and deliberate trial by the highest tribunal in the District by which the charges against him were cognizable. Our order was made on the afternoon of the 26th and was despatched to the Magistrate on the 27th but owing to unavoidable causes it did not reach the Magistrate's camp till the 31st. Meanwhile immediately on our order being made, Vinayak's Pleader in this Court, Rao Saheb Vishwanath Narayan Mandlik, telegraphed to his client informing him that the order had been issued and this telegram was shown to the Magistrate on the morning of 27th; the Magistrate thereupon adjourned further proceedings till the 30th, in order, as he states, to allow any orders of the High Court to reach him. On the 30th no orders having been received and the accused not asking for any further adjournment, the Magistrate proceeded to dispose of the case. He found the accused guilty on three charges and sentenced him to imprisonment for one year and a fine of Rs. 2000 and committed him for trial before the Session Court on two other charges which were not within the Magistrate's cognizance.

Mr. Anstey, on behalf of the convict, then applied to us and he has again appeared today in support of the application, to call for the Magistrate's proceedings and to quash the conviction, as being in itself illegal and in contempt of the authority of this Court. We declined to call for the Magistrate's proceedings immediately but desired him to report on the steps which he had taken in the matter, so that we might be in a position to judge whether there was any *prima facie* illegality which would justify us in calling for the proceedings. Pending the receipt of the Magistrate's report, we have given the matter much consideration and as it involved, or might appear to involve, a question of contempt of authority of this Court, we have thought it right to consult some of our brother Judges and the Chief Justice. Having now received and considered the Magistrate's report, the conclusion at which we have arrived is that there has been no actual illegality in his proceedings, and it is only on the ground of illegality that we could interfere with the conviction and sentence passed by him. The unofficial telegram which was shown to the Magistrate was sufficient to induce him (as his own conduct in granting an adjournment shows) to believe that an order had been passed by the High Court, directing him not to proceed to judgment. He was not legally bound to act on the information so received; but it is the practice of the Courts of Justice, under such circumstances, to stay their hand, until such time as the information may be conveyed to them

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through the regular channel. A Court which refused so to stay its hand, would act not illegally but indiscreetly. In this case the Magistrate did stay his hand and in so doing acted rightly; but the time which he allowed for the receipt of the Court's writ was very short, considering the defective postal communication between his camp and Dhoolia, to which place he must have known that the writ would in the ordinary course of business be addressed. We think the Magistrate would have acted more discreetly if, having such good reason to believe that a writ of this Court had issued, he had allowed a longer period to elapse, before acting in the manner in which that writ ordered him not to act, or if he had telegraphed to the Registrar of the Court, to ascertain whether such a writ had really issued or not; and, independently of the order of this Court and even if no such order had been issued, we think that the Magistrate would have shown a more wise discretion, if, instead of convicting the accused on every charge on which he would convict him and committing him for trial on the other charges, he had left the whole question of his guilt and innocence to the superior tribunal. The course adopted by the Magistrate was a very unusual and severe course. To force a person like the accused to appear and stand his trial in the Session Court as a convict from the Jail appears to us to have been very greatly and unnecessarily to aggravate the difficulties of his position. But in so doing, the Magistrate undoubtedly acted within the power given him by law. And neither on this nor on the other grounds which have been submitted for our consideration, is it competent to us to interfere in the exercise of our extraordinary jurisdiction. We must leave the petitioner to the ordinary remedy of an appeal to the Court of Session and reject the present application.

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23 February 1871. GIBBS & MELVILL, JJ.

Reg. v. Shravan.*

Criminal Procedure Code (Act XXV of 1861), Sec. 280—Alternative charge—Penal Code (Act XLV of 1860), Secs. 299,307—Conviction—Order for recognizance for good behaviour—Recognizance for keeping the peace.

The accused was convicted on alternate charges, under sections 299 and 307, Indian Penal Code, (attempt to commit murder) and section 324, Indian Penal Code, (voluntarily causing hurt by instrument for cutting) and sentenced to 2 years' rigorous imprisonment, and at the expiration of the sentence to execute a recognizance for good behaviour for one year:—

Held, that the recognizance should have been for keeping the peace, under Chapter XVIII of the Code of Criminal Procedure, and not for good behaviour under Chapter XIX, but that otherwise the order was such as was warranted by section 280 of the Code of Criminal Procedure.

**Criminal Ruling.*

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READ a letter from the Assistant Session Judge of Khandesh No. 194 dated the 11th February 1871, stating with reference to the Court's letter No. 201 dated the 2nd idem, that the Session Judge acted without authority in requiring the accused Shrawan walad Soobajee to enter into recognizance for his good behaviour for one year at the expiration of his sentence.

ORDER.—Record and Proceedings to be returned. The recognizance should have been for keeping the peace, not for good behaviour, but otherwise the order seems to be such as is warranted by section 280, Criminal Procedure Code.

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27 February 1871. RESOLUTION IN CHAMBERS

Khandesh Magistrate's Letter No. 19.*

Court Fees Act (VII of 1870), Sec. 31—Fees—Repayment to the complainant—Sessions Court—Committing Magistrate.

When a case to which section 31 of the Court Fees Act of 1870 applies is disposed of by a Court of Session, such Court and not the committing Magistrate is the proper authority to make the order for the repayment to the complainant of the fee paid by him on his petition of complaint.

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2 March 1871. GIBBS & LLOYD, JJ.

Reg. v. Vithya.*

Penal Code (Act XLV of 1860), Sec. 75—Criminal Procedure Code (Act XXV of 1861), Secs. 22,46—Magistrate—Punishment—Powers.

Section 75 of the Indian Penal Code does not give a Subordinate Magistrate power to inflict a punishment beyond that which he can inflict under section 22 of the Code of Criminal Procedure. This cannot be done except when his jurisdiction is expressly enlarged, as by section 46 of the Code of Criminal Procedure.

READ a letter from the Magistrate of Sattara No. 535 dated the 14th February 1871, referring under section 434 of the Code of Criminal Procedure, the proceedings of the 2nd Class Subordinate Magistrate of Kurar in the case of the *Queen* v. *Vittya walad Soobhana*, forwarded to him by the Magistrate Full Power, Mr. Spence, with an expression of his opinion thereon, and requesting to be informed whether Mr. Spence's opinion is correct, *viz.*, that the Subordinate Magistrate's authority does not extend to the infliction of a punishment beyond that which he can inflict under Section 22, Criminal Procedure Code, except where such authority has been expressly enlarged as by section 46 of the Criminal Procedure Code.

ORDER.—The Court concur in the opinion expressed by the Full Power Magistrate.

**Criminal Ruling.*

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21 March 1871. RESOLUTION IN CHAMBERS.

Letter from the Secretary of Govt., No. 1043.*

Criminal Procedure Code (Act XXV of 1861), Secs. 23 G, 273, 276, Chap. XIV—"Subordinate Magistrate"—District Magistrate—Referring a case.

The words "Subordinate Magistrate", as used in the title to Chapter XVI, Criminal Procedure Code, and throughout that Chapter, apply only to the particular class of Magistrates denominated Subordinate Magistrates, and do not include Magistrates, F. P., notwithstanding that the latter are, by section 23 G. made subordinate to the Magistrate of the District. The Magistrate of the District cannot, therefore, refer a case to a Magistrate F. P., under section 273, Criminal Procedure Code, because, although the words of the first paragraph of that section are sufficiently wide to allow of such a reference, such a liberal construction is limited by the subsequent use of the words "Subordinate Magistrate" in the same section. The Magistrate of a District may, under section 36, refer a case to a Magistrate F. P., as being "a Court subordinate to him," and also under section 276, the Magistrate F. P. being "an officer subordinate to him."

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13 April 1871. LLOYD & KEMBALL, JJ.

Reg. v. Tatya.*

Penal Code (Act XLV of 1860), Sec. 188—Criminal Procedure Code (Act XXV of 1861), Sec. 44, 62, 308—Order—Repair to a well—Disobedience—Fine—Order to execue the repairs out of the fine imposed.

A Subordinate Magistrate, 1st Class, issued, under section 62 of the Code of Criminal Procedure, an order calling upon the accused to make certain repairs to a well, and, upon his failing to make these repairs, tried him for disobedience of an order, under section 188 of the Indian Penal Code, and fined him Rs. 100 and directed, under section 44 of the Code of Criminal Procedure, that the repairs should be made to the well and paid for out of fine.

Held, that in this case section 308 of the Code of Criminal Procedure alone was applicable, and that, therefore the Subordinate Magistrate had no jurisdiction in the matter; and that the order to repair the well was one which he was not competent to make under section 44 of the Code of Criminal Procedure.

THE District Magistrate of Kolaba in making this reference to the High Court stated:—"The Subordinate Magistrate convicted the accused of an offence punishable under section 188, Indian Penal Code, and fined him Rs. 100 and ordered that certain repairs to a well necessary to make it safe (and for neglecting an order to carry out which accused was tried) should be made out of the fine under section 44, Criminal Procedure Code. It appears more than doubtful whether the Subordinate Magistrate had power to make such an order."

ORDER.—The Court annuls the proceedings of the Subordinate Magistrate as he had no jurisdiction in the case. The order to repair the well from the fine levied was one which he was clearly not competent to make under section 44 of the Code of Criminal Procedure.

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* *Criminal Ruling.*

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15 June 1871. GIBBS & WEST, JJ.

Reg. v. Nathu.*

Criminal Procedure Code (Act XXV of 1861), Sec. 318—Breach of the Peace—Magistrate—Omission to record proceedings.

Where the Magistrate, F. P., omits to conform to the provisions of section 318, Criminal Procedure Code, by recording a proceeding stating the grounds of his being satisfied as to a dispute likely to lead to a breach of the peace; his proceedings are null and void.

READ a letter from the Magistrate of Ahmedabad No. 129 dated the 31st May 1871 referring, under section 434 of the Code of Criminal Procedure, the proceedings of the Magistrate F. P. in the Ahmedabad District in the case of the *Queen* v. *Nuthoo Manekchund* for the orders of the High Court.

ORDER.—The Court annul the proceedings of Mr. Sharkey as having been taken without jurisdiction.

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15 June 1871. GIBBS & WEST, JJ.

Reg. v. Sayad Kazi.*

District Police Act (Bom. Act VII of 1867), Sec. 9—Railways Act (XVIII of 1854), Sec. 27—Railway Police—Neglect of duty.

Members of the Police Force who are styled the Railway Police, and are in the pay of a Railway Company, are amenable for neglect of duty to the provisions of section 27 of Act XVIII of 1854, notwithstanding that they hold commission from the Commissioner of Police under section 9 of the District Police Act (Bombay Act VII of 1867).

THE District Magistrate of Poona in making this reference to the High Court observed:—"The accused are members of the Railway Police Force and having been found asleep while on duty were convicted of negligence. In a petition for review presented by the accused one point raised seems worthy of consideration. Petitioners contend that although they are styled of the Railway Police, and paid by the Company, they virtually belong to the District Police Force, as each of them holds a commission from the Commissioner of Police, under section 9 of the District Police Act, 1867. They cannot therefore be held amenable to the provisions of section 27 of Act XVIII of 1884."

ORDER.—Receiving the pay of the Railway Company they owed the Railway a duty whatever other duty they may have accepted. The Court would not interfere.

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15 June 1871. GIBBS & WEST JJ.

Reg. v. Supdu.*

Criminal Procedure Code (Act XXV of 1861), Sch.—Registration Act (XX of 1866), Secs. 94, 95—Registering officer—False personation—Court of Session—Jurisdiction.

*Criminal Ruling.

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The offence of abetting false personation before a Registering officer punishable under section 94 of Act XX of 1866 with imprisonment for a term which may extend to seven years, is triable exclusively by a Court of Session.

JUDGMENT.—The Court think the Session Judge's view was correct. The ruling of the Bombay High Court was made before Act VIII of 1869 was passed, and amounted to this, that to institute a prosecution does not mean to carry it through all its stages. The High Court of Bengal, six months later, appears to have thought otherwise (10 W. R., Cr. 21); but against the argument of Mr. Justice *Phear* in that case, drawn from the language of the Codes, may be set that of the Penal Code, section 211, where" institutes any criminal proceeding" is clearly not identical with following up the prosecution to completion. At that time, however, Act VIII of 1869 was not in existence. At present, it is, and forms part of the Code of Criminal Procedure. The Session Judge's determination, therefore, against the Magistrate's jurisdiction was well-founded. The objections, in which the Magistrate, Mr. Pollen, has allowed himself to indulge, however specious, are without solidity. The intention of section 95 of the Registration Act was to prevent Registration cases getting into the hands of the Subordinate Magistrates of the Second Class, (eventhough empowered under section 38 of the Code of Criminal Procedure to commit for trial). The difficulty raised as to a Subordinate Magistrate First Class, not empowered to commit, is to be obviated in either of two ways: (1) by taking the case before a Magistrate possessing that power, or (2) by a reference on the Subordinate Magistrate's part under section 277 of the Code of Criminal Procedure.

The sentences by the Assistant Session Judge, though he was certainly not bound to be guided in any way by those previously passed by the Magistrate F. P. were inadequate to the gravity of the offences of the two prisoners who were convicted.

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1 August 1871. RESOLUTION IN CHAMBERS.

Reg. v. Tukaram.*

Penal Code (Act XLV of 1860), Sec. 75—Whipping Act (VI of 1864), Secs. 3, 4—Previous conviction—Proof.

In cases wherein a previous conviction subjects an accused person, if found guilty, to an additional or different punishment, the previous conviction should form the subject of a separate head of the charge and to this the accused person should be required to plead only, if he is convicted of the offence for which he has been under trial. If he admits the previous conviction that will suffice; but if he denies it, it should be proved by recording the finding in the previous case and the evidence of the jailor or other person to the identity of the accused person with the person previously convicted.

**Criminal Ruling.*

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3 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Dosa Umar.*

District Police Act (Bom. Act VI of 1873), Secs. 8, 11, 26—Police officer—Suspension—Engaging in another employment—Offence.

The intention of section 11 of Bombay Act VII of 1867 was to prohibit Police Officers from engaging in any other employment, while in the active discharge of their Police duties, but there would appear to be no objection to a Police Officer, who is under suspension, maintaining himself by other work; when his suspension came to an end he would be bound at once to resign any employment in which he might have been engaged in the interval or otherwise he would render himself liable to the penalties specified in Section 26 of the Act.

READ a letter from the Magistrate of Kaira No. 387 dated the 21st July 1871, referring under section 434 of the Code of Criminal Procedure, the proceedings of the Magistrate Full Power of Kaira in the case of the *Queen* v. *Dossoo Oomar* for the orders of the High Court.

ORDER.—The Court thinks that the intention of section 11, Bombay Act VII of 1867 was to prohibit Police Offices from engaging in any other employment, while in the active discharge of their Police duties, because by so doing they might be hindered in the proper discharge of those duties. There would appear to be no objection to a Police Officer who is under suspension maintaining himself by other work, indeed he might starve if he did not do so. Of course when his suspension came to an end, he would be bound at once to resign any employment in which he might have engaged in the interval, or otherwise he would render himself liable to the penalties specified in section 26.

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17 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Tukaram Bhawani.*

Criminal Procedure Code (Act XXV of 1861), Sec. 360—Session Judge—Evidence—Truth.

In every case it is the duty of the Session Judge not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the utmost into the truth of the matter before him.

ORDER.—The Court confirms the sentence of death passed against Tookaram.

The Court notices a serious omission in the case in that there is no evidence in regard to the discovery of the axe which from the statement of the Civil Surgeon appears to have been stained with blood and which in the list of articles before the Session Court is described as having been produced by the accused. One witness Bala before the Magistrate stated that he saw this axe brought out of the accused's house. This witness was not questioned on the point in the Court of Session. Nor was any

*Criminal Ruling.

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other evidence given on the point. If the public prosecutor failed to produce evidence, the Session Judge should have called for it.

The Court thinks that it is the duty of the Session Judge not merely to receive and adjudicate upon the evidence submitted to him by the parties but also to enquire to the utmost into the truth of the matter before him.

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17 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Balkrishna.*

Criminal Procedure Code (Act XXV of 1861), Sec. 198—Witness—Deposition—Contradictory statements—Opportunity of explanation and correction.

Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain; and the statement which the witness finally declares to be the true one—and that statement only—must be taken to be the statement which the witness intended to make.

JUDGMENT.—The prisoner could not have intended to make two contradictory statements in the same deposition when asked whether he knew the defendants, he must have intended to say either that he did know them or that he did not know them. If he intended to say that he *did* know them, then his second statement that he did *not* know them was unintentional, and false evidence cannot be assigned upon it; while, in order that it may be assigned on the other intentional statement that he did know the defendants, it is necessary to prove that such statement was false. The same reasoning applies, if the prisoner intended to say that he did *not* know the defendants and it also applies to the two other contradictory statements made by the prisoner.

Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain: and the statement which the witness finally declares to be the true one, and that statement only—must be taken to be the statement which the witness intended to make.

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17 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Shaikh Chegan.*

Cantonement Act (III of 1867), Rule 48—Offensive trade—Proceedings—Declaration.

In the case of offensive trades, the Cantonement Magistrate should, before instituting proceedings, make the declaration specified in Chapter III, Rule 48 of the Rules and Regulations passed by his Excellency the Governor in Council of Bombay under Act III of 1867.

READ a return from the Session Judge of Ahmednagar No. 515 dated the 3rd August 1871 to the Courts' writ No. 1209 of the 25th July 1871

**Criminal Ruling.*

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certifying the Record and Proceeding in the case of the *Queen* v. *Shaik Chegun wulud Shaik Kureem* called for by the High Court on a review of the criminal return of the Magistrates, F. P. of Ahmednagar for the month of June 1871.

ORDER.—Return the Record and Proceedings. The Court is of opinion that in the case of offensive trades, the Cantonement Magistrate should before instituting proceedings make the declaration specified in Chapter III, Rule 48.

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28 August 1871 RESOLUTION IN CHAMBERS

Reg. v. Vrijvallabh.*

Criminal Procedure Code (Act XXV of 1861), Sec. 434—Subordinate Magistrate—Proceedings called for and examined—District Magistrate—Sessions Judge—Jurisdiction.

Where the proceedings of the Subordinate Magistrate have been called for and examined by the District Magistrate, such proceedings of the Subordinate Magistrate must be considered as incorporated in the case before the District Magistrate and can be called for by the Session Judge.

In order to the exercise by the Session Judge of his powers under Section 434 of the Code of Criminal Procedure it is not necessary that any complaint should be made before him.

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31 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Chhotiram Bhasker.*

District Police Act (Bom. Act VII of 1867), Sec. 31 (2)—River—Watering Place—Prohibitory notice.

A conviction under section 31, clause 2 of Bombay Act VII of 1867 is illegal, if the prohibitory notice mentioned therein has not been issued. A river is not a watering place within the meaning of the above clause.

ORDER.—The convictions and sentences are reversed on the ground stated by the Magistrate. The Court considers that even if a prohibitive notice had been issued, the law quoted would not apply, a river not coming within any of the definitions contained in clause 2, section 31 of the Bombay Act VII of 1867.

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31 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Mukta Manka.*

Penal Code (Act XLV of 1860), Sec. 397—Criminal Procedure Code (Act XXV of 1861) Sec. 234—Charge—Aggravating circumstances—Charge should state them—Accused.

When an offence falls within the provisions of such a section as section 397 of the Indian Penal Code, which, on account of the existence of aggravating circumstances, provides a minimum punishment for the offence, the existence of such aggravating circumstances should be set forth in the charge, so that the accused person may know what it is to which he pleads

*Criminal Ruling.

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guilty and the full effect of such plea; or in the event of his pleading not guilty, may know, what the material facts are, which he is called upon to rebut.

ORDER.—Records and Proceedings to be returned with remarks. Petition rejected.

The Session Judge to be informed that the Court consider that when an offence falls within the provisions of such a section as section 397, Indian Penal Code, which, on account of the existence of aggravating circumstances, provides a minimum punishment for the offence, the existence of such aggravating circumstances should be set forth in the charge, so that the accused person may know what it is to which he pleads guilty; and the full effect of such plea, or in the event of his pleading not guilty, may know what the material facts are which he is called upon the rebut.

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31 August 1871. MELVILL & KEMBALL, JJ.

Reg. v. Daya Ragh.*

Criminal Procedure Code (Act XXV of 1861), Sec. 269—Complaint—Dismissal—Application—Revival—Magistrate.

A complaint once dismissed under section 269 of the Code of Criminal Procedure should not as a rule be revived. It may however be revived, if the complainant can give satisfactory reasons for his absence, in which case he should make his application to the Magistrate by whom his complaint was dismissed and not to another Magistrate.

ORDER.—The Court is not prepared to say that it would be illegal for a Magistrate to entertain a complaint which had been dismissed by another Magistrate (see 4 Madras High Court Report, appendix VIII.). But the Court agrees with the Calcutta Court (See note in Prinsep's Code of Criminal Procedure to section 269) that a complaint once dismissed under section 269, should not, as a rule, be revived. If, however, the complainant can give satisfactory reasons for his absence, he should make his application to the Magistrate by whom his complaint was dismissed and not to another Magistrate.

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7 September 1871. GIBBS & WEST JJ.

Reg. v. Kashinath Bhaushet.*

Penal Code (Act XLV of 1860), Sec. 380—Dwelling house—Theft—Presence of the owner.

The accused person entered the dwelling house of the complainant and in his presence dishonestly took away certain property in spite of his remonstrances :—

Held, that this constituted an offence under section 380 of the Indian Penal Code, the aggravating circumstance under that section being the invasion of a dwelling or of a building used for the custody of property. Such invasion is not diminished in culpability by the presence of the owner in the house.

**Criminal Ruling.*

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THE District Magistrate of Colaba made this reference for the orders of the High Court, observing:—" In this case the accused was charged with theft in a dwelling house under section 380 of the Indian Penal Code, but I am of opinion that the facts of the case did not warrant the framing of a charge under this section. The accused was acquitted but as the Sub-Magistrates of the District generally interpret section 380 of the Indian Penal Code in the same way as has been done in this case, I do myself the honor to refer it for orders as I consider the interpretation of the section in question an erroneous one.

" In the case under reference the accused entered the dwelling house and in the presence of the owner took away certain property in spite of his remonstrances. In this case, it can hardly be said that the dwelling house in question had anything to do with the custody of the property which (the owner being present) may be said to have been in *his* custody and not in that of the dwelling house. I respectfully submit that the circumstance of the owner's presence reduced the offence to one of simple theft or misappropriation of property and that it was incorrect to treat it as a theft of property secured by its having been placed in a dwelling house for safe custody."

ORDER.—The Magistrate's view is incorrect. The aggravating circumstance under section 380 is the invasion of a dwelling or of a building used for the custody of property and such invasion is not diminished in culpability by the presence of the owner in the house.

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5 October 1871. MELVILL & KEMBALL, JJ.

Reg. v. Govind Jhilga.*

General Clauses Act (I of 1868), Section 5—Criminal Procedure Code (Act XXV of 1861), Secs. 21, 61—Fine—Levying of fines.

Section 5 of Act I of 1868 does not apply to fines levied under Regulations and Acts passed prior to the passing of Act I of 1868; but the provisions of Section 21 of the Code of Criminal Procedure, have the effect of making Section 61 applicable to the levy of such fines, whether imposed under the Indian Penal Code or under any special or local law except when a special mode of levying the fine may be prescribed by such law.

THE District Magistrate of Ratnagiri in making this reference observed:—" The Subordinate Magistrate of Vengurla has sentenced one Govind, who was convicted of an offence under Act XXXI of 1850, to imprisonment under section 61 of the Code of Criminal Procedure in default of payment of the fine, which course was declared to be illegal in your letter No. 2297.

**Criminal Ruling.*

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"Act XXXI of 1850 has no provision for distraining moveable property to recover the amount of a fine, I respectfully request the orders of the High Court whether an imprisonment in default is illegal, this course for recovery of a fine may not be adopted, as there does not appear to be any other alternative possible.

"Act I of 1868, section 5 declares that 'the provisions of sections 63 to 70 both inclusive of the Indian Penal Code and of section 61 of the Code of Criminal Procedure shall apply to all fines imposed under the authority of any Act *hereafter* to be passed.' In Criminal Ruling of the High Court from the 1st July to 31st December 1870, the Indian Income Tax Acts No. 9 of 1869 and No. 23 of 1869 are declared to be made liable to the provisions of sections 63 to 70 (both inclusive) of the Indian Penal Code under section 5 of Act I of 1868, because the Income Tax Acts were passed subsequently to the General Clauses Act I of 1868. It was on these grounds, as well as from the plain wording of section 5 of Act I of 1868 that I concluded this Act could not make applicable section 61 of the Criminal Procedure Code to fines imposed under an Act in 1850, *i. e.*, eighteen years before Act I of 1868 was passed."

ORDER.—The Magistrate should be informed that section 5 to Act I of 1868 does not apply to fines levied under Regulations or Acts passed prior to the passing of Act I of 1868; but that the provisions of section 21 of the Code of Criminal Procedure, have the effect of making section 61 applicable to the levy of such fines, whether imposed under the Indian Penal Code or under any special or local law except when a special mode of levying the fine may be prescribed by such law.

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7 December 1871. GIBBS & MELVILL, JJ.

Reg. v. Tukaram Kalu.*

Criminal Procedure Code (Act XXV of 1861), Sec. 61—Act XXVI of 1850—Act II of 1839—Penalties—Levy of penalties.

Where a Magistrate convicted an accused of the breach of one of the Municipal Rules under section 7 of Act XXVI of 1850 and sentenced him to pay a fine of Rs. 8 to be recovered in the terms of section 61 of the Code of Criminal Procedure or to suffer 4 days simple imprisonment, it was pointed out that penalties imposed under Act XXVI of 1850 were to be levied under Act II of 1839 and that it was illegal to pass a sentence of imprisonment in default of payment of fine, until a warrant for distress and sale has been issued and returned unsatisfied.

READ a return from the Session Judge of Khandesh No. 1033 dated the 15th September 1871 to the Court's writ No. 1454 of the 4th idem certifying the Records and Proceedings in the case of the *Queen* v. *Tookaram walad Kaloo* called for by the High Court on a review of the Criminal

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**Criminal Ruling.*

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Return of the Magistrate Full Power of Khandesh for the month of July 1871.

ORDER.—The Court will not interfere. The Magistrate to be informed that penalties imposed under Act XXVI of 1850 are to be levied under Act II of 1839 and that the Magistrate's order should have been to that effect.

It seems to the Court to be illegal to pass a sentence of imprisonment in default of payment of fine, until a warrant for distress and sale has been issued, and returned unsatisfied.

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14 December 1871. GIBBS & MELVILL, JJ.

Reg. v. Ganga.*

Penal Code (Act XLV of 1860), Sec. 205—Prosecution—Act III of 1852.

A prosecution under Act III of 1852 is a criminal prosecution within the meaning of section 205 of the Indian Penal Code.

READ a letter from the Magistrate of Thanna No. 4728 dated the 29th November 1871 referring under section 434 of the Code of Criminal Procedure, the proceedings of the Magistrate Full Power of Thanna in the case of the *Queen* v. *Gungoo widow of Bhewa* for the orders of the High Court.

ORDER.—The Court has no doubt that a prosecution under Act III of 1852 is a criminal prosecution within the meaning of section 205 of the Indian Penal Code.

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19 December 1871. RESOLUTION IN CHAMBERS.

Reg. v. Virbhadra.*

Criminal Procedure Code (Act XXV of 1861), Sec. 269—Assault—Complainant—Absence—Dismissal of complaint—Complainant incarcerated in a criminal jail—Revival of proceedings—Good cause.

A person after preferring a complaint of criminal assault is incarcerated in a criminal jail for an offence and is then not able to appear on the day of hearing. The complaint is in consequence dismissed under the provisions of section 269 of the Code of Criminal Procedure. On a subsequent day the complainant appears and states the facts which in the opinion of the Magistrate constitutes a just and reasonable cause for his non-appearance on the appointed day:—

Held, that under these circumstances, the case may be taken up and proceeded with again.

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20 December 1871. FULL BENCH.

[WESTROPP C. J., AND LLOYD, MELVILL & KEMBALL, JJ.]

Reg. v. Ganpatprasad *

Criminal Procedure Code (Act XXV of 1861), Ch. XX—Magistrate—Order—Judicial proceeding.

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*Criminal Ruling.

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A Magistrate's order made under Chapter XX of Code of Criminal Procedure is a judicial proceeding.

Ruling in *Collector of Houghly and another* v. *Tarak Nath Mukhopadhya* (7 Ben. L. R. 449) approved and *Ashburner* v. *Keshavvallad Taku* (4 Bom. H. C., 150). overruled.

JUDGMENT.—The Court are of opinion, that the view taken by the CALCUTTA BENCH in the case (7 Beng. L. R 449, 482) referred to in the order of reference, is correct and that so much of the decision in *Ashburner* v. *Keshvallad Tuku* (4 Bombay H. C. R. 150 A. C. J.) as declares that a Magistrate's order made under Chapter XX of the Code of Criminal Procedure, is not a judicial proceeding, cannot be sustained.

Proceedings under Chapter XX were treated as judicial proceedings in several cases previous—*In re Bipoo Cintamon* (*Couch* and *Tuker*, JJ); (6-4-64) *In re Kursondas Bechur* and another (*Westropp* and *Tuker*, JJ.) (5-12-63)—to that of *Ashburner* v. *Keshav vallad Tuke* and were revised by this Court under section 404. The provision in section 308, which requires the Magistrate to issue a notice to the person concerned to show cause why the order should not be enforced is in itself sufficient to shew that the order is to be regarded as a judicial proceeding.

The question referred by the Division Bench, must be answered in the affirmative. It will be for the Division Bench to call for the record and proceedings in this case and the Magistrate will have an opportunity if he pleases, of instructing counsel to appear in support of the legality of his proceedings.

1872.

11 January 1872. GIBBS & MELVILL, JJ.

Reg. v. Lingu.*

Penal Code* (*Act XLV of* 1860), *Sec.* 425—*Mischief by cattle—Cattle Traspass Act* (*Act I of* 1871), *Sec.* 25, 26—*Conviction—Intention—Knowledge.

Section 26 of Act I of 1871 provides for carelessly allowing *pigs* to do damage, but in case of other animals there must apparently be an intention to cause damage or a knowledge that damage is likely to be caused (Section 25 of Act I of 1871 and illustration (*h*) of section 425 of the Indian Penal Code.)

When the accused therefore admitted that he was the owner of a buffalo and that the buffalo had done damage to the complainant's property, but when intention or knowledge on the part of the owner was neither charged nor proved, the conviction and sentence were reversed.

THE accused was convicted of mischief under section 425 of the Indian Penal Code, in that she allowed her cattle to enter a church compound and destroy some trees.

**Criminal Ruling.*

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ORDER.—The Court reverse the conviction and sentence passed on the prisoner Lingoo *kom* Soma. The Court doubt, if the offence is established.

Section 26 Act I of 1871 provides for carelessly allowing *pigs* to do damage, but in case of other animals, there must apparently be an intention to cause damage or a knowledge that damage is likely to be caused. See section 25 Act I of 1871 and illustration (*b*), section 425, Indian Penal Code.

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11 January 1872. GIBBS & MELVILL, JJ.

Reg. v. Pandurang*

Criminal Procedure Code (Act XXV of 1861), Section 429—Orders—Petitions—Final orders.

Section 429 of the Code of Criminal Procedure does not apply to all orders on petitions, but only to final orders made in the trial and investigation of offences.

ORDER.—The subject of the Circular proposed by the Session Judge will be considered.

His reference purports to be given under "the seal of the Session Court at Poona" but no seal is affixed to it.

Mr. Johns should be directed to furnish the applicant with a copy of his order dismissing the charge.

He should be informed that all petitions and orders thereon, should be recorded in his office, copies of the orders if demanded, being given to the petitioners.

The Session Judge should be informed that section 429 does not apply to orders on petitions, but only to final orders made in the trial and investigation of offences (section 21).

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11 January 1872. GIBBS & MELVILL, JJ.

Reg. v. Sankra.†

Court Fees Act (VII of 1870), Sec. 31—Court-fees—Accused—Refund of fees—Order of refund must be directed jointly to the accused.

Where two persons are convicted of the offence of using criminal force, the Magistrate cannot order one only of the two convicted persons to refund the fee paid on the petition of complaint. In such a case the Magistrate must direct repayment of the amount of the fee by the convicted persons jointly and should recover it from both or either of them.

THE District Magistrate of Canara stated that "in a case of criminal force in which two persons were convicted, the Subordinate Magistrate 1st Class at Coompta ordered one of the accused to repay to the complain-

**Criminal Ruling.* † *Criminal Ruling.* Criminal Review No. 100 of 1891.

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ant the fee paid on the petition of complaint under the provisions of section 31, clause 1 of the Court Fees Act VII of 1870 and the Full Power Magistrate Mr. Bhathwayt, through whom the Criminal return passed, doubts if it is on the option of the Magistrate to order only one of the accused to repay complainant the petition-fee and thinks it should be recovered from the two accused. I have, therefore, the honour to solicit the favour of instructions of the High Court as to whether the petition fee above referred to is to be recovered from one of the several accused at the trying Magistrate's option, or whether it is to be apportioned between them."

ORDER.—The Court hold that a Magistrate cannot order one only of two convicted persons to pay the fee. The Court amending the Subordinate Magistrate's order, awards payment of the amount against the convicted persons jointly and directs that it be recovered from both or either of them.

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18 January 1872. GIBBS & MELVILL, JJ.

Reg. v. Aba Apaji.†

Regulation (Bom.) XXI of 1827—District Magistrate—Special Jurisdiction—Criminal Procedure Code (Act XXV of 1871).

The special jurisdiction vested in the Magistrate of the District by Regulation XXI of 1827 is not affected by the Code of Criminal Procedure, and it is therefore competent to him to try a charge against the opium laws even though the quantity of opium involved be so large that the fine leviable exceeds the Magistrate's jurisdiction under the Code of Criminal Procedure.

THE acting Sessions Judge of Surat in making the reference to the High Court observed :—" In accordance with the ruling in *Reg.* v. *Hira Jiva* (1), and *Reg.* v. *Lukhoo*, decided last September and reported in the *Bombay Gazette*, I have the honor to refer for the orders of the Honourable the Chief Justice and Judges, the case (1) of Ahmed Mehman and two others, and (2) of Aba Apaji and another, committed to this Court by Mr. Ramsay, Magistrate Full Power in charge of the District Magistrate's office.

" It will be seen that the amount of opium being very large, the fine leviable under Regulation XXI of 1827 exceeds the amount of fine which, under the Criminal Procedure Code, the District Magistrate is empowered to inflict and this appears to have been Mr. Ramsay's reason for committing the cases."

ORDER.—The special jurisdiction, granted to the District Magistrate

†*Criminal Ruling.* Criminal Referred Case, No. 3 of 1872. (1) 7 Bom. H. C. R., 59

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by Regulation XXI of 1827, is not affected by the Criminal Procedure Code and the cases must be tried by the District Magistrate.

The committal in each case is annulled and the case to be returned.

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23 February 1872. LLOYD & KEMBALL, JJ.

Reg. v. Bawaji *

Penal Code (Act XLV of 1860), Sections 304 A, 321—Beating—Spleen, rupture of—Death—Offence.

Where a person is beaten and death ensues in consequence of a rupture of a diseased spleen, section 321 of the Indian Penal Code is applicable to the case and not section 304 A.

THE accused were convicted by the Full Power Magistrate at Honawur, under sections 299 and 304 A of the Indian Penal Code for causing death by a rash and negligent act not amounting to culpable homicide, in that they caused the death of one Raghoo by beating him with their fists and by kicking him; whereby the deceased's spleen, which was in a deceased condition was ruptured, there being no intention on the part of the accused to cause death or such injury as would be likely to result in death or there being no knowledge that the act done was likely to result in death.

ORDER.—The Court holds that section 304A was not intended to provide for cases of the nature of the present one. The conviction therefore is altered to one of voluntarily causing hurt and the sentence to one of one year's rigorous imprisonment and a fine of Rs. 100 and in default rigorous imprisonment for three months.

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29 February 1872. GIBBS & MELVILL, JJ.

Reg. v. Bhuja.*

Criminal Procedure Code (Act XXV of 1861), Sec. 295—Magistrate—Security—Suspected characters—Persons having no ostensible means of subsistence.

Section 295 of the Code of Criminal Procedure provides for taking security not from persons suspected of a particular offence, but from persons lurking within the Magistrate's jurisdiction who have not ostensible means of subsistence or cannot give a satisfactory account of themselves.

ORDER.—It is not stated whether security has been furnished by Nos. 1 and 2, but the Court think the Magistrate's order requiring security must be cancelled. Section 295, Criminal Procedure Code, provides for taking security, not from persons suspected of a particular offence, but from persons lurking within the Magistrate's jurisdiction, who have no ostensible means of subsistence, or cannot give a satisfactory account of themselves. The Magistrate does not profess to have acted on the latter grounds, and has made no enquiry regarding them.

**Criminal Ruling.*

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25 April 1872. LLOYD & KEMBALL, JJ.

Reg. v. Atmaram Govind.*

Penal Code (Act XLV of 1860), Secs. 172, 174—Contempt of Court—Magistrate—Offence—Presence of the Magistrate—Jurisdiction.

Commitment to another Magistrate is necessary in all cases of contempt save where such contempt is committed in the presence or view of the Court first taking notice of it, and imprisonment without option or fine in excess of Rs. 200 is not deemed requisite.

THE accused was convicted by the Full Power Magistrate of Belgaum alternatively under sections 172 and 174 of the Indian Penal Code. He, thereupon, appealed to the Sessions Judge of Belgaum, and the learned Judge in dismissing the appeal remarked :—" In the case of *Queen* v. *Chunder Shekhur* (1), it was finally ruled by the CALCUTTA HIGH COURT on the 23rd April 1870 (*Jackson* and *Glover*, JJ.) that a Magistrate cannot take cognizance of an offence of this nature committed against his own Court, but is bound, under section 171, Criminal Procedure Code, to send the case for trial before another Magistrate. The BOMBAY HIGH COURT has, however, held otherwise on two occasions, first in 1868, *Reg.* v. *Gunnoo.* —and second in 1871—*Reg* v. *Jeejeebhai* (2). In the former of these the Magistrate who issued the summons, disposed of the case of contempt himself, and the High Court refused to quash the proceedings.

" A copy of the first summons was affixed to the house of the appellant, and a copy of the second was delivered to his son, the service was therefore duly made; the appellant, however, did not appear until his moveable property had been attached.

" The appellant was further well aware of the day of trial, and had agreed to have his witnesses in attendance. Only two were produced, and under the circumstances, I do not think that the Magistrate was bound, under section 266, Criminal Procedure Code, to stay proceedings and issue summons for the other witnesses. On the whole, I consider the evidence for the prosecution proves that the appellant Atmaram Govind either absconded to avoid service of the summons, or intentionally omitted to attend in obedience to the summons issued by the Magistrate Full Power, and I therefore reject the appeal."

ORDER.—The Court annul the proceedings of the Magistrate.

The Court consider that Full Power Magistrate had no power to dispose of the charge before him, and the Session Judge was wrong in inferring that the High Court (Messrs. JJ. *Gibbs* and *Melvill*) in their ruling in *Reg.* v. *Jijibhai Nathabhai et al* (2) overruled the dicision of the CALCUTTA HIGH COURT. As the point now raised was not before them

(1) 13 W. R., 66. (2) Vide *ante* p. 45.

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the power of a Full Power Magistrate with respect to a contempt committed before it was not then questioned.

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27 June 1872. LLOYD & KEMBALL, JJ.

Reg. v. Kalio Kerio.*

Penal Code (Act XLV of 1860), Section 390—Theft—Hurt committed in the act—Robbery.

Where hurt is caused not for one of the purposes specified in section 390, Indian Penal Code, but to avoid capture when surprised, the stealing is not converted by the said hurt into robbery.

ORDER.—The Court is of opinion that the stealing did not come within the definition of robbery and the hurt was not caused for the purpose of the theft but to avoid capture when surprized.

The hurt caused by Kalio Kerio accused No. 1, was grievous hurt and not hurt as charged by the Session Judge in the amended charge. The charges against the accused Kalio Kerio should have been theft and grievous hurt and against Chibro Rusyo theft and hurt and the charge against Kirio Kooberio should have been theft only. As the punishment awarded in each case is within that prescribed for the offences with which the Court is of opinion the accused should have been charged, they see no cause to interfere with the sentences.

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1 August 1872. LLOYD & KEMBALL, JJ.

Reg. v. Deoji Keru.*

Penal Code (Act XLV of 1860), Sections 34, 397—Hurt committed during offence—Enhanced punishment.

The liability to an enhanced punishment, under section 397 of the Indian Penal Code, is limited to the offender who, in the commission of robbery or dacoity actually causes grievous hurt.

ORDER.—The Court declines to interfere with the conviction and returns the case. The Court thinks that the Judge was wrong in reading section 397 of the Indian Penal Code as only applicable to the person actually using the deadly weapon or causing grievous hurt—the common intention of all appears clearly to have been to commit robbery and the grievous hurt was caused in furtherance of the common intention, so that under the amended section 34 of the Indian Penal Code, each person was equally liable. The Judge curiously enough convicts all the accused under section 397 of the Indian Penal Code but says the procedure prescribed therein is not applicable.

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*Criminal Ruling.

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8 August 1872. RESOLUTION IN CHAMBERS.

Nasick District Magistrate's Letter No. 2619.*

Prisoners' Testimony Act (XV of 1869), Section 3—Convict—Attendance—Magistrate—High Court.

A Magistrate can under section 3 of Act XV of 1869 procure the attendance of a convict as an accused person without the intervention of the High Court. Section 7 of the Act appears to apply only when a person's evidence is required. If the person, whose appearance to answer a criminal charge is required, be confined in a Jail in a District other than that in which the Court requiring the accused's appearance is situated, the proper procedure is under section 6 of the Act.

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11 September 1872. MELVILL & KEMBALL, JJ.

Reg. v. Jetha Ganesh.*

Practice—Magistrate—Witnesses—Taking statement out of Court and in the absence of the accused—Intention of proceeding against them if they changed their statements afterwards.

It is an improper procedure in a Magistrate to take, during the investigation by himself of a criminal case, the statements of certain witnesses on solemn affirmation out of Court and in the absence of the accused with the avowed object of proceeding criminally against the witnesses should they subsequently in open Court deviate from the statement formerly made.

RESUMED consideration of the petition of Jeytha Ganesh and 23 others, dated the 14th August 1872 by Vakil Messrs. Jafferson and Payne, and Counsel Mr. Ansty.

Read a return from the Magistrate of the District of Ahmedabad No. 1270 dated the 22nd August 1872 reporting on the petition of the above named petitioners as directed in the Court's letter No. 1141 dated the 14th August 1872, and forwarding a copy of Mr. Little's letter on the subject.

The Hon'ble Mr. Mayhew and Mr. Dhirajlal Muthuradas, Government Prosecutor.

ORDER.—Petition rejected. Magistrate should be informed to go on with the case.

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12 September 1872. LLOYD & KEMBALL, JJ.

Reg. v. Fakira.*

Salt—Removal for one's own use—Bed of a creek—Indian Penal Code—Act XXXI of 1850—Act XXVII of 1837—Detention of the salt.

Removal for one's own use of salt from the bed of a creek not forming part of any salt work, constitutes no offence either under the Indian Penal Code or Acts XXXI of 1850 or XXVII of 1837, though under section 7 of the Act made applicable by section 8 of the former, the salt removed becomes liable to detention.

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*Criminal Ruling.

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ORDER.—The Court is of opinion that the accused had not committed an offence which renders them liable to punishment under any provision of the Indian Penal Code or of Act XXXI of 1850, or Act XXVII of 1837, though under section 7 of Act XXVII of 1837 which has been made applicable by section 8 of Act XXXI of 1850 the salt which was removed was liable to detention.

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9 October 1872. LLOYD & KEMBALL, JJ.

Reg. v. Radkia Badru.*

Penal Code (Act XLV of 1860), Secs. 304A, 323—Drunken brawl—Injury—Death within twenty days—Offence—Grievous hurt—Death by negligence.

Where the accused upon being insulted by a companion in a drunken brawl throws him down upon the ground and stamps his feet twice upon his prostrate body and this act results in the death of the latter within twenty days; the act of the accused constitutes an offence of voluntarily causing hurt punishable under section 323 and not one under section 304A of the Indian Penal Code.

IT appeared that one Rutnia, a watandar of Wawan, on the 9th July 1872 went over to visit his brother, Bhagwantia at the neighbouring village of Sambari. These two, together with their relations Barkia and Radhika, sat down together in Bhagwantia's house and disposed of three bottles of liquor which Bhagwantia placed before them. Radhika then became quarrelsome and sneered at Ratnia for coming over to the village and as he said, begging for grain. The abusive language irritated Ratnia, and at last he struck Radhika a blow in the face. They were sitting down at the time, but they immediately got off the terrace into the Court yard where they closed with one another. Ratnia was thrown to the ground and Radhika there twice stamped with his bare-foot on Ratnia's right side. Ratnia died of the injury on the twelfth day.

ORDER.—With reference to Criminal Ruling of 23rd February 1872 in *Regina* v. *Bawaji Sabha* (1), the Court hold that section 304 A is not applicable to the circumstances under which the deceased came by his death in this case. The accused should have been convicted of voluntarily causing hurt under section 323 the punishment for which is limited to one year. The sentence is therefore reduced to one year.

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13 November 1872. LLOYD & KEMBALL, JJ.

Reg. v. Gajanan.*

Survey and Settlement Act (Bom. Act I of 1865), Secs. 10,14—City Surveys Act (Bom. Act IV of 1868), Sec. 12—Summons—Omission to attend—Sanad—Offence.

*Criminal Ruling. (1) Vide, *ante*, p. 63.

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A person cannot be convicted for omission to attend for the purpose of receiving a *sanad* which it is incumbent on the Collector to issue, if applied for under sections 12 of Bombay Act IV of 1868, because this purpose is not one of those contemplated under section 10 and 14 of Bombay Act I of 1865.

ORDER.—As it appears from the evidence of Mr. Waite that Gujjanun Mahipatrao was summoned for the purpose of receiving a Sanad which it was incumbent on the Collector to issue if applied for under section 10 of Bombay Act IV of 1868, it does not seem that this is one of the purposes contemplated under sections 10 and 14 of Act I of 1865, he was not legally bound to obey the summons and the conviction is therefore illegal and is reversed, and fine directed to be refunded.

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13 November 1872. LLOYD & KEMBALL, JJ.

Reg. v. Shekh Husen.*

Whipping Act (VI of 1864), Sec. 9—Whipping—Sentence—Appeal—Carrying out of the sentence.

When a Court, whose sentence is open to revision, pronounces a sentence awarding whipping in addition to imprisonment, it must be carried out immediately after the expiry of fifteen days from the date of the sentence or, if an appeal be made within that time, then immediately on the receipt of the order of the Appellate Court confirming the sentence if such order shall not be received within 15 days. It is illegal to direct in the sentence that the whipping shall be carried out at the expiration of the term of imprisonment.

THE accused was convicted of theft in a dwelling house, and was sentenced to undergo two years' rigorous imprisonment and to receive 30 stripes with a ratan after the expiration of the term of imprisonment.

ORDER.—The sentence of whipping to be inflicted at the expiration of 2 years' imprisonment is illegal and as the time within which the punishment of whipping could be legally inflicted has now elapsed, the Court cancels so much of the sentence as awards the punishment of whipping.

1873.

27 February 1873. LLOYD & MELVILL, JJ.

Reg. v. Ali Matya.*

Penal Code (Act XLV of 1860), Sec. 65—Criminal Procedure Code (Act X of 1872), Sec. 309 (3)—Fine—Default—Imprisonment—Magistrate—Jurisdiction.

Clause 3 of section 309 of the Code of Criminal Procedure does not remove the necessity of conforming to section 65 of the Indian Penal Code. It merely provides that, when the sentence is one of fine only, the Magistrate may award imprisonment in default upto the full extent of his powers, (provided always the amount do not exceed the limit allowed by section

**Criminal Ruling.*

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65 of the Indian Penal Code); whereas, when the sentence is one of imprisonment as well as fine, the period awarded in default may not exceed one-fourth of the amount which the Magistrate is competent to inflict.

READ a letter from the Magistrate of Khandesh No. 12/515 dated the 14th February 1873 reporting for the orders of the High Court that the 3rd Class Magistrate of Bhosawal has sentenced one Alli walud Mutya under section 510 of the Indian Penal Code to pay a fine of Rs. 3, or in default to simple imprisonment for 7 days. Under section 65 of the Indian Penal Code the sentence appears to be illegal but clause 3 of section 309 of the Criminal Procedure Code may possibly supersede this section in the present instance and requests instructions for future guidance.

ORDER.—The Court reduce the imprisonment in default of payment of fine to 6 hours. Clause 3, section 309 of the Code of Criminal Procedure does not remove the necessity of conforming to section 65 of the Indian Penal Code. It merely provides that, when the sentence is one of fine only, the Magistrate may award imprisonment in default upto the full extent of his powers, (provided always the amount does not exceed the limit allowed by section 65 of the Indian Penal Code.) Whereas, when the sentence is one of imprisonment as well as fine, the period awarded in default may not exceed one fourth of the amount which the Magistrate is competent to inflict.

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27 March 1873. MELVILL & KEMBALL, JJ.

Reg. v. Jaimal.

Penal Code (Act XLV of 1860), Sec. 228—Interruption—Judicial proceedings—Witness—Prevarication.

It is no where laid down that no amount of prevarication of a witness will constitute an offence under section 225 of the Indian Penal Code.

ORDER.—The Court are not prepared to hold as a matter of law, that no amount of prevarication on the part of a witness will constitute the offence specified in section 228 of the Indian Penal Code, nor do the Court think that the Judges who decided the cases of *Reg.* v. *Auba* (1) and *Reg.* v. *Pandu* (2) went so far as this. The head notes to those cases seem inaccurate. All that the decisions show is that the findings of the Magistrate did not clearly specify that there had been an interruption. In other words it was held, not that prevarication could not constitute an interruption, but that it was not necessarily so.

In the case of *Reg.* v. *Abdul Ruhiman* it was held that prevarication by a witness and refusal to answer a question might amount

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**Criminal Ruling.* (1) 4 Bom. H. C., 6. (2) 4 Bom. H. C., 7.

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to intentional interruption within the meaning of section 228 of the Indian Penal Code, and section 163 of the old Code of Criminal Procedure.

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4 April 1873. RESOLUTION IN CHAMBERS.

Nasik Magistrate's Reference No. 939.*

Court Fees Act (VII of 1870), Sec. 18 (16)—Complaint—Cognizable offence—Stamp.

No stamp is necessary to petitions of complaint made to Magistrates of cognizable offences.

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17 April 1873. MELVILL & WEST, JJ.

Reg. v. Mahomed Ismal.*

Penal Code (Act XLV of 1860), Sec. 174—Criminal Procedure Code (Act X of 1872), Sec. 473—Bhagdaree and Narvadaree Tenures Act (Bom. Act V of 1862),—Mamlatdar—Inquiry under the Bhagdaree and Narvadaree Tenures Act—Summons—Disobedience—Contempt—Offence.

Bombay Act V of 1862 does not provide for the attendance of persons before the Mamlatdar for the purpose of an inquiry under that Act. A conviction, therefore, for non-attendance in obedience to a summons issued under it by the Mamlatdar is illegal.

In this case the conviction was also held to be illegal under section 473 of the Code of Criminal Procedure on the ground that the trying Magistrate had no jurisdiction, his Court being the same against which the alleged contempt was committed.

THE District Magistrate of Broach made this reference to the High Court observing :—In this case the accused were convicted under section 174, Indian Penal Code, of non-attendance in obedience to a summons, issued by the Second Class Magistrate of Jambusar in his capacity of Mamlatdar.

"As Bombay Act V of 1862, under which the summons was issued has no provision for compelling the attendance of parties for the purpose of inquiry, the Mamlatdar was not legally competent to issue the summons, and the persons, convicted, were not legally bound to obey it."

ORDER.—The conviction and sentence annulled on the ground that the Second Class Magistrate had no jurisdiction both for the reasons stated by the District Magistrate and on account of the provisions of section 473 of the Code of Criminal Procedure.

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24 April 1873. MELVILL & WEST, JJ.

Reg. v. Annaji Krishna.†

Criminal Procedure Code (Act X of 1872), Secs. 315, 439, 45—Penal Code (Act XLV of 1860), Section 75—Accused—Previous convictions—Magistrate—Jurisdiction.

The High Court, though agreeing with the Magistrate of the District as to the advisability of the accused being dealt with under section 315 of the Criminal Procedure Code by reason of

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**Criminal Ruling.* †*Criminal Ruling.* Criminal Reference No. 38 of 1873.

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the alleged previous convictions, held that looking to the discretion vested in the trying Magistrate by section 315, they were unable to say that the 2nd Class Magistrate had no jurisdiction and the Court could not, therefore, order a new trial.

Where the previous convictions are not stated in the charge, as required by section 439 of the Code of Criminal Procedure they cannot be used for the purpose of enhancing the sentence.

THE District Magistrate of Belgaum, observed—"on reviewing the proceedings of the Second Class Magistrate in charge of Taluka Sumpgaum, in a case of house-breaking by night and theft in a dwelling house disposed of by him on the 26th February, I discovered that the sentence passed by the Second Class Magistrate against one named Annaji Krishna, one of 5 accused persons concerned in a case of 'House breaking by night' and 'theft in a dwelling house', was utterly inadequate to the offence committed for the reasons given below. I, therefore, have the honor to submit the proceedings in question for the orders of the Honourable Judges of the High Court, under section 296 of the Criminal Procedure Code.

The said Annaji Krishna was convicted of having opened the back door of the house or complainant, Seolingappa bin Bassappa, at midnight, by making a hole in the wall, and removing the bolt by which the door was fastened and of having stolen gold and silver ornament, clothes &c., of the aggregate value of Rupees 241-4-0 deposited in the house, and was sentenced, under section 380 of the Indian Penal Code, to undergo rigorous imprisonment for 6 months, and pay a fine of Rupees 200, or in default of payment, to suffer rigorous imprisonment for a further period of one month, and a half. In addition to this, he was also sentenced to receive 60 lashes under Act VI of 1864.

From the information recorded in the proceedings, it appears that Annaji had been previously convicted of similar offences and sentenced as follows:—

1. In 1865, to undergo 18 months rigorous imprisonment and receive 30 lashes, on a charge of house-breaking.

2. In 1868, to undergo 6 months rigorous imprisonment under section 380.

3. (Year not known) to undergo two years rigorous imprisonment and pay a fine of Rupees 500, under sections 457 and 380 of the Indian Penal Code.

4. In 1869, to suffer 2 years rigorous imprisonment, and pay a fine of Rupees 50, in default to undergo a further rigorous imprisonment for 6 months, under sections 457 and 380 of the Indian Penal Code.

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It thus appears to me that, as Annaji, in spite of the previous convictions and the heavy sentences passed upon him, has committed the same offence again; he is an habitual and incorrigible thief, and that therefore the sentence passed upon him by the Second Class Magistrate, in the present case is utterly inadequate. I, therefore, beg to recommend that the proceedings of the Second Class Magistrate be cancelled and a new trial, under section 75 of the Indian Penal Code, and section 315 of the Criminal Procedure Code, by the Session Court, sanctioned.

ORDER.—The Court agree with the District Magistrate that if there have been such previous convictions as the Magistrate states (though on what grounds does not very clearly appear) the sentence passed is very inadequate and the Second Class Magistrate ought not to have disposed of the case but have acted according to the provisions of the sections 45 and 315 of the Code of Criminal Procedure. But looking to the discretion vested in a Magistrate by section 315 of the Code, the Court is unable to say that the 2nd Class Magistrate had not jurisdiction and cannot therefore order a new trial. Moreover the Court is of opinion that as the fact of previous convictions is not stated in the charge such convictions cannot be used for the purpose of enhancing the sentence. See last para of section 439 of the Code of Criminal Procedure.

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24 April 1873. MELVILL & WEST, JJ.

Reg. v. Gopal Bhikaji.*

Penal Code (Act XLV of 1860), Secs. 182, 211—False-complaint—Police—Offence.

A petition made by a person to the Police falsely stating that the petitioner suspects another person of having committed an offence and praying for inquiry, does not amount to an institution of criminal proceedings against that person within the meaning of Section 211 of the Indian Penal Code. The petitioner should be charged under section 182 of the Code with having given false imformation with intent to cause a public servant to use his lawful power to the injury of another person.

ORDER.—The Court think that the petition made by the prisoner to the Police did not amount to an institution of criminal proceedings against the persons named therein within the meaning of the Indian Penal Code, section 211. The Court, therefore, alters the conviction to one under the Indian Penal Code, section 182 and reduces the sentence to one of 5 months' rigorous imprisonment, and fine of Rs. 100 or in default of six weeks.

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*Criminal Ruling.

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25 April 1873. RESOLUTION IN CHAMBERS.

Nasik Magistrate's Reference No. 1181.*

Criminal Procedure Code (Act X of 1872), Secs. 276, 464—Accused—Copy of Judgment—Language.

Sections 276 and 464 of the Code of Criminal Procedure are wholly distinct. Section 464 refers to the copy of the judgment in the language of the accused person affected by it, the grant of which is compulsory and independent of any request of that person; whereas section 276 applies to the copy grantable only on his application for the purpose of appeal.

An accused person is, therefore, entitled to a copy in his own language unconditionally under section 464, which applies to all Courts; and also to one in the language in which it is written under section 276 under the conditions therein specified.

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21 May 1873. BAYLEY & WEST, JJ.

Reg. v. Sangapa.*

Criminal Procedure Code (Act X of 1872), Sec. 215—Accused—Illegal arrest—Police—Magistrate—Discharge—Magistrate cannot discharge an accused illegally arrested by the Police, without taking evidence against the accused.

A Magistrate is not justified in discharging an accused person, merely because he has been illegally arrested by the Police without a warrant issued on complaint for a non-cognizable offence. He cannot in disposing of the case pass an order of discharge, (section 215 of the Code of Criminal Procedure) until he has taken the evidence against the accused.

ORDER.—It was no doubt irregular for the Police to arrest the accused without a warrant issued on complaint. But if as was probable the injured party Basapa was sent up to the Magistrate along with the accused in this case the Magistrate ought to have asked him whether he had a complaint to make and if he had taken it down and proceeded regularly according to the Code. The previous error of the Police needed not to prevent the proper and legal investigation. The Magistrate's order could not in a disposal of the case, be passed (section 215 of the Code of Criminal Procedure), until he had taken the evidence against the accused. It is annulled and the Magistrate directed to receive such complaint as Basapa may have to make, and thereupon to proceed according to law.

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21 May 1873. BAYLEY & WEST, JJ.

Reg. v. Pirkhan.†

Criminal Procedure Code (Act X of 1872), Secs. 297, 460—Accused—Improper acquittal—Magistrate—High Court—Revision—Appeal—Local Government—Procedure.

Where an accused person has been improperly acquitted by a Magistrate having jurisdiction, the High Court will not interfere in the exercise of its powers of revision and order a retrial on a fresh charge (sections 297 and 460 of the Code of Criminal Procedure). The proper remedy in such a case, appears to be for the Local Government to direct an appeal under section 272 of the Criminal Procedure Code.

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*Criminal Ruling. †Criminal Ruling. Criminal Reference No. 43 of 1873.

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READ a letter from the Magistrate of Khandesh No. 1528 dated the 22nd April 1873 referring under section 296 of the Code of Criminal Procedure, the proceedings of the 1st Class Magistrate of Khandesh in the case of the *Queen* v. *Pirkhan wulud Juma* and two others for the orders of the High Court.

ORDER.—This is not a case in which the High Court can interfere in the exercise of its powers of revision under section 297 of the Code of Criminal Procedure. That enactment provides expressly for the case of an improper discharge. It would doubtlessly have provided expressly for an improper acquittal if a similar course had been approved in such a case. The last sentence of section 460 shows that when the acquitting Court has jurisdiction, a trial on a fresh charge cannot be had. This prevents the Court ordering a trial under section 394 of the Indian Penal Code, though this enactment ought apparently to have been applied to this case. The proceedings of the Magistrate, Mr. Sinclair, taken with the report of the District Magistrate appear to disclose a case of extreme carelessness, but the proper remedy is to be found in an appeal under section 272 of the Code of Criminal Procedure. The Local Government, if it deems it expedient, should direct the requisite steps to be taken under that enactment.

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5 June 1873. MELVILL & WEST, JJ.

Reg. v. Mathur Laldas.*

Criminal Procedure Code (Act X of 1872), Sec. 278—Session Judge—Appeal—Rejection—Enhancement of sentence.

A Session Judge in rejecting an appeal under section 278 of the Code of Criminal Procedure has no power to enhance the sentence.

ORDER.—The Session Judge in rejecting the appeal of Muthoor Laldas under section 278, Criminal Procedure Code, had no power to enhance the sentence. The order of the Session Judge inflicting an additional punishment of six month's regorous imprisonment is accordingly annulled; but under the provisions of section 297 the Court orders that the conviction of the said Muthoor Laldas be altered to one under section 420, Indian Penal Code, and that in addition to the sentence passed upon him by the Magistrate he do pay a fine of Rs. 400 or in default be rigorously imprisoned for a further period of six months. The Court further orders that the said fine or any part thereof which may be recovered be paid as compensation to the complainant Raghu Morar.

In the case of the 2nd prisoner Jijee, the Court alters the conviction to one under sections 420 and 109, Indian Penal Code, and considering

*Criminal Ruling.

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that she has been sufficiently punished, remit any portion of the fine which has not been paid and any portion of the imprisonment in default which has not been undergone.

The attention of the trying Magistrate should be directed to his careless entry in the charge against the 2nd prisoner of section 517, when he appears to have intended section 417. The entry in the vernacular charge is sections 417 and 109, which is more nearly correct; but even under these sections the sentence of six months' imprisonment in default of payment of the fine would be illegal (section 65, Indian Penal Code).

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12 June 1873. MELVILL & WEST, JJ.

Reg. v. Guman.†

Penal Code (Act XLV of 1860), Sec. 174—Witness—Order to attend—Verbal order—Disobedience of the order.

A verbal order given to a witness by a Court to attend on a particular day at a particular hour is an order the disobedience of which is punishable under section 174 of the Indian Penal Code.

THE District Magistrate of Broach in referring the case to the High Court observed: "Accused appears to have been summoned as a witness in a certain case; the case had to be postponed and accused received a verbal order to appear on a certain day at 10 a. m. He appeared on the day fixed but not until 4 p. m. whereupon the Magistrate put him on his trial and convicted him of disobedience to his order. I am of opinion that a written order should have been given to warrant a prosecution under section 174 of the Penal Code and it further appears to me that under section 473 of the Criminal Procedure Code, the Magistrate was not competent to try the case himself."

ORDER.—The Court consider that as the accused was before the Court as a witness, an oral order for his attendance was not insufficient. The trying Magistrate had not jurisdiction (section 473 of the Code of Criminal Procedure) he should be so informed for his future guidance, but the Court will not cause additional hardship to the accused by directing his retrial.

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19 June 1873. WEST & NANABHAI, JJ.

Reg. v. Rama Zilu.*

Gambling (Prevention) Act (Bom. Act III of 1866), Sec. 11—Coin—Instrument of gaming.

A coin is not an instrument of gaming which means an implement devised or intended for that purpose.

**Criminal Ruling.* †*Criminal Ruling.* Criminal Reference No. 62 of 1873.

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ORDER.—A coin is not an instrument of gaming which means an implement devised or intended for that purpose. On the authority of *Watson* v. *Martin* (1), the conviction and sentence must be reversed.

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10 July 1873. MELVILL & WEST, JJ.

Reg. v. Suraji.†

Penal Code (Act XLV of 1860), Secs. 177, 182—False information—Police—Person not bound to give the information—Person not intending injury or annoyance to any particular person.

Where a person who is not legally bound to furnish information of an offence, falsely informs the Police that such an offence has been committed without intending to cause injury or annoyance to any particular person, he commits no offence either under section 177 or section 182 of the Indian Penal Code.

THE accused was convicted of an offence under section 177 of the Indian Penal Code for giving false information in that he falsely informed the police patel that some quantity of Ambadi worth Rs. 3-8-0 was robbed from his threshing floor in his garden knowing that such was not the case.

ORDER.—The accused not being legally bound to furnish information in the matter to which his statement related committed no offence under section 177, Indian Penal Code, nor can his conduct be brought within the provisions of section 182, since it does not appear that he intended to cause injury or annoyance to any person. The conviction and sentence are therefore reversed.

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17 July 1873. MELVILL & WEST, JJ.

Reg. v. Sidya.*

Criminal Procedure Code (Act X of 1872), Secs. 142, 44, 215, 296—Subordinate Magistrate—Accused—Discharge—Improper discharge—District Magistrate—Powers—Procedure.

When a Magistrate of the District finds that a Magistrate subordinate to him has improperly discharged an accused person under section 215 of the Code of Criminal Procedure, his proper course is, not to refer the proceedings to the High Court under section 296, but to take up the case under section 142, and, if need be, to refer it under section 44 for trial.

ORDER.—A discharge under section 215, Criminal Procedure Code, does not operate as an acquittal. The District Magistrate may therefore if he sees good reasons take up the present case under section 142, and if need be, refer it under section 44 for trial by a Subordinate Magistrate. It is better for Magistrates thus to deal with cases themselves when they can do so than to report them to the High Court. The procedure of the 2nd Class Magistrate too is reported not as contrary to law (section 296) but as involving a gross misappreciation of evidence. It is only in the case of

†*Criminal Ruling.* Criminal Reference No. 82 of 1873. **Criminal Ruling.* (1) 34 L.S.M.C., 50.

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an order apparently contrary to law that the District Magistrate can report the proceedings.

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24 July 1873. MELVILL & WEST, JJ.

Reg. v. Rama Sona.*

Penal Code (Act XLV of 1860), Secs. 494, 496—Offence—Marriage.

Section 496 of the Indian Penal Code applies to cases in which a ceremony is gone through which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage, or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose. Where the ceremony gone through does, but for the previous marriage, constitute a lawful marriage, and both parties are aware of the circumstance of the previous marriage, section 494 of the Code properly applies.

ORDER.—The Court consider that section 496, Indian Penal Code, is inapplicable. That section appears to apply to cases in which a ceremony is gone through which would in no case constitute a marriage and in which one of the parties is deceived by the other into the belief that it does constitute a marriage or effect is sought to be given by the proceeding to collateral fraudulent purpose. In this case the ceremony gone through would, but for the previous marriage, have constituted a lawful marriage; and both parties were aware of the circumstance of the previous marriage. Under these circumstances section 494 and not section 496 applies. The Court therefore reverse the convictions and sentences on the first head of charge, and they reduce the sentence on the 2nd prisoner, the woman, to 4 months' rigorous imprisonment; and considering that the first prisoner ought to have been convicted of abetment of an offence punishable under section 494 of the Code, he is also sentenced to 4 (four) months' rigorous imprisonment for that offence.

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28 July 1873. RESOLUTION IN CHAMBERS.

Khandesh Magistrate's Letter No. 3197.*

Criminal Procedure Code (Act X of 1872), Secs. 110, 146—Magistrate, third class—Powers—Police—Investigation—Non-cognizable offence.

A Magistrate third class can order the Police to investigate a non-cognizable offence when there is a complaint pending before him (section 146 of the Code of Procedure); but not otherwise (section 110 of the Code).

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11 September 1873. MELVILL & NANABHAI, JJ.

Reg. v. Fakira.†

Act XXVI of 1850, Secs. 7 (5), 10—Municipal rate—Non-payment—Penalty.

A person is not liable to a penalty for non-payment of a Municipal rate, notwithstanding that the rate is recoverable in the same manner as a penalty.

**Criminal Ruling.* †*Criminal Ruling.* Criminal Review No. 131 of 1873.

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ORDER.—A person is not liable to penalty for non-payment of a rate, though the rate is recoverable in the same manner as penalty. The Court therefore annul the conviction and sentence.

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2 October 1873. WEST & NANABHAI, JJ.

Reg. v. Jeykison.†

Whipping Act (VI of 1872), Secs. 2, 3, 4, 5—Whipping—Juvenile offenders.

Sections 2, 3, 4 of the Whipping Act VI of 1864 apply to juvenile offenders as well as the 5th. This section is not meant to supercede sections 3 and 4, but to be applied in the proper cases alternatively with those sections.

ORDER.—Section 5 of Act VI of 1864 is not meant to supercede sections 3 and 4 of the Act but to be applied in the proper cases alternatively with those sections.

The previous conviction ought to have been set forth in the charge by Magistrate, but its omission does not seem to have caused any failure of justice; and as the punishment has been undergone, the Court declines to interfere.

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2 October 1873. WEST & NANABHAI, JJ.

Reg. v. Pirtappa.*

Penal Code (Act XLV of 1860), Sec. 193—Criminal Procedure Code (Act X of 1872), Sec. 468—Session Judge—Finding containing an intimation of an intention to grant sanction—Sanction for prosecution—False evidence.

A person cannot be tried for giving false evidence in a judicial proceeding on the authority of a finding of a Court of Session, in which an intention to sanction the prosecution of that person was expressed but never carried out.

ORDER.—The proceedings do not show what offence the accused was really charged with. They should give the same details as the final illustration of Schedule III to the Criminal Procedure Code.

The finding of the Assistant Sessions Judge quoted by the Joint Session Judge as a sanction for the prosecution of the accused is not a sanction. It is merely the expression of the Assistant Session Judge's intention to sanction a prosecution and it does not appear that that intention was ever carried out.

The name of the accused does not occur in the finding recorded as a sanction. Probably he was witness No. 5 in that case but this should not have been left to conjecture.

The Court annul conviction and sentence, the trial having been held without authority.

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†*Criminal Ruling.* Criminal Reference No. 125 of 1873. **Criminal Ruling.*

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27 November 1873. MELVILL & PINHEY, JJ.

Reg. v. Chimaya.*

Court Fees Act (VII of 1870), Sec. 31—Court Fees—Refund—Complaint of non-cognizable offence—Conviction of cognizable offence.

Where a complaint of a non-cognizable offence results in a conviction for a cognizable offence, the stamp duty upon the complaint can properly be refunded.

ORDER.—The complaint having been of a non-cognizable offence it requires a stamp and the fine for refund of stamp was proper notwithstanding that the accused was convicted of a cognizable offence.

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11 December 1873. WEST & NANABHAI, JJ.

Reg. v. Govinda.*

Criminal Procedure Code (Act X of 1872), Sec. 454 (3)—Penal Code (Act XLV of 1860), Secs. 457, 380—House-breaking by night to commit theft and theft constitute one offence for the purpose of punishment—Separate sentences—Practice.

Under section 454, para 3, of the Code of Criminal Procedure, the offences of house-breaking by night in order to commit theft and theft in a dwelling house are, for the purpose of punishment, to be regarded as one; and therefore upon conviction of those offences a double sentence of imprisonment for one offence, and whipping for the other, cannot legally be inflicted.

ORDER.—In this case it does not appear that the 3rd and 4th prisoners had been previously convicted.

Under section 454, para 3, Criminal Procedure Code, their offences were for the purpose of punishment to be regarded as one and for one offence committed by an accused previously unconvicted, punishment of imprisonment and whipping cannot be legally inflicted. As more than 15 days after the date of the sentence had elapsed when the petition of the prisoners was made, the Court assuming that in accordance with section 310, Criminal Procedure Code, the sentence of whipping had been carried out, annuls that portion of the sentence which awards imprisonment to accused Nos. 3 and 4.

An intimation to be sent to the Superintendent of the Jail that in the event of the sentence of whipping not having been inflicted the fact should be reported before carrying out the order.

1874.

15 January 1874. MELVILL & WEST, JJ.

Reg. v. Bhimya.†

Court Fees Act (VII of 1870), Sec. 31—Complaint of non-cognizable offence—Conviction of cognizable offence—Court-fee—Refund.

**Criminal Ruling.* †*Criminal Ruling.* Criminal Reference No. 179 of 1873.

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Where a complaint of a non-cognizable offence results in a conviction for a cognizable offence the complainant is under section 31 of the Court Fees Act, entitled to be recouped by the accused to the amount of stamp fee paid upon his complaint: the test, by which to determine whether the recoupment should be made, being the nature of the complaint, not of the conviction.

ORDER.—Although the conviction was for an offence for which Police Officers may arrest without a warrant, yet the complaint appears to be one of voluntarily causing hurt which was not a cognizable offence, the complainant was therefore right in affixing a stamp to his petition and he appears to be entitled to a refund under section 31 of the Court Fees Act. The record and proceedings are therefore returned.

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15 January 1874. MELVILL & WEST, JJ.

Reg. v. Basapa.†

Arms Act (XXXI of 1860), Sec. 35—Magistrate—Jurisdiction—Criminal Procedure Code (Act X of 1872), Sec. 2.

A Magistrate of a grade lower than 1st class has no jurisdiction to try offences under Act XXXI of 1860. (See section 35 of the Act and the definition of the expression, "Officer exercising the powers of a Magistrate," in section 2 of the Code of Criminal Procedure.)

The term Magistrate in section 35 of Act XXXI of 1860 applies only to the Magistrate of a District.

ORDER.—With reference to the remarks made by the District Magistrate on the calendar, the Court is of opinion that a Magistrate of a grade lower than the first class has not jurisdiction to try offences under Act XXXI of 1860. (see, section 35 of the Act and the definition of the explanation) "officer exercising the power of a Magistrate" in section 2 of the Criminal Procedure Code.

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22 January 1874. MELVILL & WEST, JJ.

Reg. v. Gokaldas.*

Penal Code (Act XLV of 1860), Secs. 193, 194—False evidence—Offence.

To render a person liable under section 194 (as distinguished from section 193) of the Indian Penal Code, he must have given or fabricated false evidence in the final stage, *i. e.*, the trial and not in the preliminary inquiry into the case.

Where an accused had, in a preliminary inquiry before a Magistrate, made a deposition in which he falsely stated that he had seen the persons charged before the Magistrate in the act of committing a murder:—

Held, that section 194 of the Indian Penal Code was inapplicable, as the natural consequence of such false evidence would be nothing graver than a committal of the persons charged to the Court of Session, and not necessarily a conviction, and it must be presumed that accused intended the natural, that is, the ordinary consequence.

ORDER.—The charge in this case is gravely defective in not stating before what Court the alleged false statement was made. This error would

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†*Criminal Ruling.* Criminal Review No. 221 of 1873. **Criminal Ruling.*

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have been avoided by following the form given in Schedule III to the Code of Criminal Procedure.

The deposition was in fact made before a Magistrate in a preliminary inquiry and the question arises of whether the accused "intended" by such a deposition or knew that he was likely to procure the conviction of the person then accused of murder. Ordinarily only his deposition before the Court of Sessions could have this effect and the usual presumption of his intending the natural consequences of his act would fix him only with an intent to get the accused committed for trial. True the Sessions Judge might refer to the depositions in the preliminary inquiry, but this would be exceptional and cannot be supposed to have been contemplated by the prisoner. The words "in any stage of a judicial proceeding" which occurs in section 193 are not repeated in section 194 and the Court think the latter refers only to the final stage, *i. e.*, the trial of the case.

The prisoner does not appear to have been examined by the Sessions Judge.

The Court have felt some hesitation about the case, but upon the whole their Lordships do not think the Session Judge's view of the facts which it is plain was carefully formed, should be dissented from. The Court would not interfere.

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24 February 1874. RESOLUTION IN CHAMBERS.

The Kaira District Magistrate's Letter, No. 94.*

Criminal Procedure Code (Act X of 1872), Secs. 323, 327—Evidence Act (I of 1872), Sec. 33—Medical witness—Examination—Absence of accused.

Except in the case provided for in section 327, Criminal Procedure Code, the examination of a medical witness taken in the absence of the accused is inadmissible in evidence in a criminal trial. When however there is already sufficient *prima facie* evidence to warrant a commitment to the Sessions Court, and the evidence of the medical officer is likely to be of a purely formal character and great inconvenience would result from his being summoned to a Magistrate's Court at a distance from the Sudder station, the examination need not be taken before the Magistrate, but the attendance of the medical officer before the Session Court should be ensured by the committing Magistrate.

Under all other circumstances the Magistrate should invariably record the evidence of the medical officer before himself.

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11 June 1874. NANABHAI & LARPENT, JJ.

Reg. v. Bapuji Bechar.*

Penal Code (Act XLV of 1860), Sec. 188—Criminal Procedure Code (Act X of 1872), Secs.

* *Criminal Ruling.*

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518, 521—*Pruning of hedges—Order—Magistrate—Disobedience—Bombay District Police Act (Bom. Act VII of 1867), Sec. 33.*

Conviction under section 188, Indian Penal Code, for disobedience to the order of a Magistrate issued under section 578 of the Criminal Procedure Code directing the pruning of hedges:—

Held, that as the circumstances showed that there was no necessity for a speedy remedy, the Magistrate had no power to issue the order disobeyed, as Explanation 1 to section 578 points out another and less summary procedure in such circumstances.

The Magistrate was also informed that section 33 of Bombay Act VII of 1867 was more applicable to such cases.

THE accused in this case was convicted under section 188, Indian Penal Code, for disobedience to an order duly promulgated by a public servant, in that he disobeyed in pruning the obstructive hedges on the public road as ordered in a notice legally issued under section 518, Criminal Procedure Code.

ORDER.—It seems to the Court that section 518 of the Criminal Procedure Code did not empower the Third Class Magistrate to issue the order which the accused Bapuji disobeyed (see Explanation 1, section 518). It cannot be said that under the circumstances of this case a speedy remedy was desirable, or that the delay which would have been caused by a resort to the procedure contained in section 521 and the next following sections would have occasioned a greater evil than that suffered by the persons upon whom the order was made or would have defeated the intention of Chapter XXXIX of the Criminal Procedure Code. Section 188 of the Indian Penal Code requires that before a conviction can be had under that section, it must be shown that the order alleged to have been disobeyed was issued by an officer who had power to issue it which as stated above (having regard to Explanation 1, section 518 and to the circumstances of this case) the 3rd Class Magistrate had not. Moreover it is not found that the disobedience caused or tended to cause any of the consequences mentioned in section 188 of the Indian Penal Code. The Court therefore reverses the conviction and orders the fine if paid to be returned. The Magistrate to be informed that to cases, of this kind, section 33 of Bombay Act VII of 1867 is more applicable.

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18 June 1874. RESOLUTION IN CHAMBERS.

Surat Session Judge's Letter No. 1120.*

Criminal Procedure Code (Act X of 1872), Secs. 275, 276, 464—Appeal—Copy of Judgment—Judgment in the prisoner's language.

To comply with the requirements of section 275 of the Code of Criminal Procedure, which enacts that "every petition of appeal shall be accompanied by a copy of the judgment or order appealed against", a copy in the prisoner's own language is sufficient; as under section 464 of the

* *Criminal Ruling.*

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Code, amended by section 41 of the amending Act XI of 1874, such a copy is what is required to be given to the accused person, or person affected by the judgment or order.

A person desiring to obtain a copy of the judgment in the language of the Court may do so as a proceeding under the amended section 276, (see section 25 of Act XI of 1874).

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28 July 1874. RESOLUTION IN CHAMBERS.

Reg. v. Mirza Mahomed.*

Railway Act (XVIII of 1854), Secs. 30, 35—Criminal Procedure Code (Act X of 1872), Sec. 2—Offences—Trial—Magistrate—Jurisdiction.

Section 30 of Act XVIII of 1854, and section 2 of the Code of Criminal Procedure, show that offences under the Railway Act, punishable with a fine exceeding twenty rupees, are not triable by Magistrates inferior to a Magistrate of the first class.

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18 August 1874. RESOLUTION IN CHAMBERS.

Poona Magistrate's Letter No. 1431.*

Criminal Procedure Code (Act X of 1872), Sec. 469—Indian Penal Code (Act XLV of 1860) Sec. 466—Forgery—Evidence—Sanction.

A complaint of an offence under section 466 of the Indian Penal Code, *viz.*, forging a register kept by a public servant which forged document was given as evidence, cannot be entertained without the sanction of the Court in which it was given in evidence, or of some other Court to which such Court is subordinate, as that offence falls within the wider description of offences under section 463 of the Indian Penal Code, to which section 469 of the Criminal Procedure Code applies.

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20 August 1874. WEST & NANABHAI, JJ.

Reg. v. Jekison.†

Criminal Procedure Code (Act X of 1872), Sec. 209—Compensation—Dismissal—Acquittal—Complaint.

The provisions of section 209 of the Code of Criminal Procedure, as to award of compensation on dismissal of a complaint, do not apply to an adjudication of an acquittal.

ORDER.—The Court thinks that a distinction is meant to be drawn between dismissal of the complaint or an adjudication of acquittal. Otherwise it would not have been necessary to provide in section 212 that dismissal should "operate in like manner as the acquittal of the accused." If at the close of the complainant's case, the Magistrate finds it a vexatious complaint, he will dismiss it. If he finds it necessary to call on the accused for his defence, the complaint cannot well be deemed to have been frivolous and vexatious, though it may have been false. The remedy in the graver case is by a prosecution or a suit for malicious prosecution of the accused. Yet sometimes it may happen that the defence discloses a matter on which a re-examination of the complainant and his witnesses makes it plain that there was nothing between the parties

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*Criminal Ruling. †Criminal Ruling. Criminal Reference No. 75 of 1874.

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proper for the cognizance of a Criminal Court. In such a state of things, a Magistrate should dismiss the complaint instead of proceeding to a regular finding; but when there has been a finding, the provisions about dismissal do not apply. The order for the grant of compensation is therefore reversed.

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25 August 1874. KEMBALL & NANABHAI, JJ.

Reg. v. Sadoo.*

Confession—Co-accused—Admissibility against co-accused—Indian Evidence Act (I of 1872) Sec. 30.

Although a confession may be accepted for what it is worth against the person making it, yet if it does not amount to such a confession of his own guilt as is contemplated in section 30 of the Indian Evidence Act, it could not be taken into consideration by the Court as against the other persons being tried with him.

If a confession substantially implicates to the same extent, the person making it as well as the other accused in the offence for which they are jointly tried it is quite unnecessary to go beyond the actual confession to ascertain the object with which it is made.

JUDGMENT.—The case has been very fully and ably argued by the learned counsel in support of the appeals. That there are certain elements of doubt and difficulty in the case enhanced as they have been in some measure by the manner in which the committing Magistrate conducted certain of the proceedings—cannot be denied: and although we were not unprepared at the conclusion of the arguments to deliver our Judgment, we determined having in mind the grave consequence involved not to dispose of the appeals and the Judge's reference before again going carefully through the evidence for the prosecution.

The convictions of the four accused are based in the main on the evidence of the cooly Luxmon who was with the deceased when the assault took place which resulted in his death, and of the approver Rutna who was one of the gang of assailants and on the so called confessions of the first two accused. That the deceased was brutally assaulted and murdered by five persons—early one morning—there is not a shadow of doubt; the only question is whether the Judge and Assessors have rightly concluded on the evidence that the four accused at the bar were among the principals in the murder. And we think that if the evidence and statements above referred to can be accepted as valid and reliable there is little room for doubt that the convictions were right. With regard however to the statement of the second accused before the Magistrate we may at once say as we ruled in the course of the arguments that although it may be accepted for what

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*Confirmation Case No. 31 of 1874.

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it is worth against the accused person himself it does not amount to such a confession of his own guilt as is contemplated in section 30 of the Evidence Act and could not therefore be taken into consideration by the Court as against the other persons being tried with him. That being so, it becomes necessary to see under section 167 of the same Act, whether there remains sufficient evidence to justify the decision of the Judge. With regard however to the first accused the case appears to us to be widely different and after giving it the best consideration we can, we can come to but one conclusion and that is that he does state facts against himself which amount to a confession that he was a principal in the murder of Vithal Vishwanath Prabhu for he admits expressly, having gone with the others along the road on the morning of the murder, having concealed himself with the others from time to time to escape observation, having been aware at least in the course of the journey of the common object of the party, of having a stick in his hand and of accompanying the others to the place where the murdered man and his cooly were met and attacked —albeit he denies having personally had a hand in the actual assault. It has been contended that the accused did not intend to implicate himself and certain rulings of the BENGAL HIGH COURT have been quoted to show that under these circumstances his statement is not available for consideration against the other accused; but even assuming that any one of those rulings may be interpreted to have gone to that extent, we consider that if the confession substantially implicates to the same extent, the person making it as well as the other accused in the offence for which they were jointly tried it is quite unnecessary to go beyond the actual confession to ascertain the object with which it is made. It appears to us then that the Judge was right in considering the confession of the first accused against the several accused whom he implicated. We have then the direct evidence as against all four accused of the approver Rutna whose statement tallies in all material particulars with that of Luxmon the cooly who was travelling with the murdered man from Hurcheree to Ratnagiri and was with him when assaulted and killed and we have further the clear and graphic description by the first accused of the combination to murder the deceased and of the subsequent assault which again tallies with the evidence of the approver except that each favours himself as to the extent of his share in the actual assault. The first accused denied before the Judge the truth of his statement made before the Magistrate and alleged that he was tutored by the Police into making up the story. This is usually the course taken by accused persons when they have had time to reflect upon and repent of confessions made in the early part of an enquiry; but in this case not only was there no attempt made to show in what way

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the accused was tampered with by the Police but the Magistrate who committed the case for trial was careful to ascertain that the statement of the circumstances was spontaneously made and the accused had had no opportunity of comparing notes with either the approver or the second accused who also made a statement. And as regards the description itself it bears on its face strong marks of the truth of the main facts it describes and the account is borne out by the evidence of the two other eye-witnesses and in minor particulars by the other evidence in the case which the Judge and Assessors have believed. With regard to the evidence of Rutna the approver setting aside that part of his statement which describes the particular share which he himself took we see no reason to doubt its truthfulness. It has been supported by the evidence of the cooly Luxmon save as to the part taken by Rutna himself (the Judge has fairly commented on this) and tallies with the evidence on minor points of the other witnesses; and lastly as to the evidence of Laxmon. Strong stress has been laid—and no doubt not without good ground—upon the fact that in the first instance this witness only named the first accused out of the four persons subsequently charged, and the other persons whose names he gave were the brother of the second accused, the brother of the third accused and two members of the fourth accused's household. He explains this by saying that his life had been threatened by the murderers (this is spoken to by Rutna who interceded, for him) and that through fear and being obliged to give the names of some one he mentioned those of members of the different accused's household so as to put the police on the track without involving himself save as regards accused No. 1, none of whose household did he know. That Laxmon was threatened is sworn to and indeed is highly probable and we know what effect such threats do create in out-of-the-way places: the Judge and Assessors believe the explanation and there is this noteworthy fact that Laxmon went at once from the spot, gave notice of the death of Vithal Prabhu to the nearest authorities and brought them to where the body was lying. As regards the minor points in evidence, confirmatory in parts of the evidence we have commented on, we do not think it necessary to dwell on them; the matter of the blood on one of sticks is open to comment considering the time it had lain in the jungle and the fact that rain had fallen.

Looking at the evidence for the prosecution as a whole we cannot but come to the conclusion that it is sufficient to support the convictions of all four of the accused. Accused 3 and 4 produced certain evidence before the Session Court to prove alibis on their behalf, but the Judge and Assessors considered that they had failed in proving that point and we see

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no reason to take a different view. It has been pointed to us that all the Assessors were Brahmins, in fact of the same caste as the deceased, but in the first place we feel bound to assume the absence of all purpose in this circumstance and moreover there is nothing before us to induce the belief that the Assessors allowed themselves to be swayed by any consideration of caste or clanship.

With regard to the sentences passed on the four accused we should have confirmed them without further comment but for a note which the Session Judge makes of a request made to him after the sentences were passed on behalf of the Superintendent of Police for the commutation of the sentence as against the first accused "in consideration of the great assistance he gave to the Police in this matter." We are not in a position to know to what this remark refers though from a passing remark in the body of the Judge's judgment it may have reference to a, to say the least, somewhat extraordinary proceeding of obtaining the evidence of accused No. 1 in this case after his committal for trial on the charge of murder as a witness against certain persons charged in a preliminary enquiry with aiding and abetting the murder now under consideration. How far the Magistrate was justified in the course thus taken we will not here stop to enquire; but asssuming that we are correct in our inference we see no sufficient reason for commuting the sentence on this one prisoner. The deceased was beaten to death in the most brutal manner and for that act there can be in our view but one fitting sentence. We therefore confirm the sentences of death on all four accused. The suggestion of the Session Judge that the sentences if confirmed be carried into execution at Harcheree, we think, under the circumstances of the case, a wise one though that is a matter for the Session Judge and for this Court to direct and arrange.

Before concluding our observations we regret to have to note certain irregularities on the part of the committing Magistrate. In the first place we can trace no *record*, for any pardon having been granted on any condition whatever to the approver Rutna, or of reasons recorded before the pardon was tendered: that a pardon was tendered we know, and although the above omissions were not considered by us, when pressed upon us by the appellant's counsel, to invalidate the pardon they should not have been made by a Magistrate of Mr. Woodward's experience. Further we find that when Rutna was accepted as an approver the Magistrate contended himself with solemnly affirming him to the truth of the statement he had already made as an accused person instead of examining him afresh. This also was inexcusable.

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29 October 1874. KEMBALL & NANABHAI, JJ.

Reg. v. Shama.

Penal Code (Act XLV of 1860), Sec. 425—Mischief—Intention—Offence.

The gist of the offence of mischief lies in the intention.

ORDER.—The conviction of the accused in this case does but little credit to either the circumspection or the intelligence of the trying Magistrate, Mr. Fernandez. The evidence of the complainant Colonel Lucas, which indeed, was the only evidence recorded in the case, shows, in express terms, that the object of the accused was to get his cart out of the way and to avoid running against Colonel Lucas's carriage; but says Colonel Lucas :—" he pulled the bullock in the wrong direction thereby bringing the pole of his yoke against the foot-board of my cart ... causing a damage of from Rs. 20 to 30." Yet the Magistrate First Class records this finding :—" accused admits the truth of the complaint and does not show any reason why he should not be convicted. I convict of him accordingly of mischief under section 426 of the Indian Penal Code" and passes the following sentence :—" The Court directs that Shama Halla do pay a fine of Rs. 25, in default to suffer rigorous imprisonment for 15 days. The fine recoverable under section 307, Criminal Procedure Code. On recovery the whole of the amount to be paid to complainant as compensation under section 308 of the Criminal Procedure Code."

It is impossible to suppose that a Magistrate of Mr. Fernandez's position and experience was not perfectly well aware that the gist of the offence of mischief (vide section 425 of the Indian Penal Code) lies in the intention. It would be idle, therefore, to call upon him to justify his proceeding in the face of the statement of the only witness in the case to the effect that the injury to his property was the result of an accident caused by the accused's stupidity.

The question between Col. Lucas and the accused was one for adjudication solely in the Civil Court and the Magistrate has lamentably failed in his duty in holding the latter to be criminally liable.

The conviction and sentence must therefore be reversed, but as the fine was paid and made over to the complainant on the day the sentence was passed, the Hon'ble the Judges are unable to afford the accused any further redress.

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17 November 1874. RESOLUTION IN CHAMBERS.

Letter from the Sessions Judge of Tanna No. 4414.*

Criminal Procedure Code (Act X of 1872), Secs. 49, 141, 471—District Magistrate—Allocating business by districts—Court sending a case under section 471 not bound by such allocation.

*Criminal Ruling.

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Although section 49 of the Code of Criminal Procedure enables the Magistrate of the District to allocate the business arising within particular portions of such District to particular subordinates and that negatively, as well as affirmatively, yet a reference to section 141 shows that this power is intended to extend to complaints preferred by the party injured or by a Police Officer; and is not intended to control or limit the more special power conferred on a Court in contempt of which an offence has been commited from sending the criminal case, thence arising, for inquiry to any Magistrate having power to try or commit for trial according to the provisions of section 471. If the Magistrate to whom such a case is sent is compotent to transfer it to another Magistrate, he may exercise that power; but in default of such competence he must, in the words of the section cited," thereupon proceed according to law" *i. e.*, hold the inquiry directed by the Court.

1875.

11 January 1875. WEST & NANABHAI, JJ.

Reg. v. Lakshman Kalyan.†

Penal Code (Act XLV of 1860), Sec. 399—Wrongful restraint—Physical coercion—Giving evidence.

A invited B to his house in order to be ready to give evidence in a judicial proceeding. A used no physical coercion nor threat of any kind to detain B in the house, but B, from a mere general dislike or dread of giving offence to A, remained there—

Held, reversing a conviction for wrongful restraint, that the conduct of A did not constitute an offence.

ORDER.—The District Magistrate, Mr. Nairne, has disposed of the appeal to him on the ground that the " exercise of moral influence might amount to restraint. " The influence exercised appears to have been an invitation by the accused to the complainants to come to his house in order to be ready to give evidence in some judicial proceeding and the withholding of permission to return. There was no physical coercion and no threat of physical injury if they should pass beyond certain bounds. It does not indeed appear that any threat was used at all. The moral influence which could have operated under these circumstances must have been a mere general dislike or dread of giving offence to the accused, but if through the existence of a feeling like this an expression of a desire or mere silence is to be converted into the exercise of criminal restraint, no person of any social standing would be for a moment safe from criminal charges based on the weakness and folly of other people. The conviction and sentence are reversed.

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19 January 1875. RESOLUTOIN IN CHAMBERS.

Ratnagiri District Magistrate's Letter No. 3988.*

Criminal Procedure Code (Act X of 1872), Secs. 147, 298—Magistrate—Complaint—Dismissal—District Magistrate—Further inquiry.

†*Criminal Ruling.* Criminal appeal No. 74 of 1874. **Criminal Ruling.*

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When a complaint is, under section 147 of the Code of Criminal Procedure, dismissed by a Magistrate, it is competent to the Magistrate of the District, under section 298, to order further inquiry and refer it to the same or any other competent Magistrate subordinate to him under section 47.

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28 January 1875. KEMBALL & NANABHAI, JJ.

Reg. v. Gulab Karim.*

Criminal Procedure Code (Act X of 1872), Sec. 278—Indian Limitation Act (IX of 1871), Sch. II. Art 152—Appeal—Presentation after time—Hearing of appellant—Summary rejection.

An appeal, presented after the period of limitation, and in which the reason assigned for the delay in its presentation was insufficient, may be rejected as time barred, without hearing appellant. Section 278 of the Code of Criminal Procedure does not apply to such cases.

ORDER.—The Court does not think that the Session Jude has acted illegally as Section 278 of the Code of Criminal Procedure only applies to those cases where a man has presented an appeal who has a right of appeal; but where a man who has allowed the time prescribed by law for presentation of an appeal to expire it is for the Session Judge first under clause 6, section 5 of the Limitation Act to determine whether grace is to be allowed before he can determine whether to proceed according to the provisions of section 278.

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4 February 1875. WEST, J.

Ratnagiri Magistrate's Letter No. 205.*

Fine—Fine imposed jointly—Recovery—Appeal of one of the accused—Remission of the fine—Recovery from the others.

When payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or any one of them, and, if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent.

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8 June 1875. KEMBALL & NANABHAI, JJ.

In re Fateali.†

Magistrate—Warrant—Prospective offence.

It is not competent to a Magistrate to issue a warrant or order of arrest in anticipation of an offence being committed: such a case is purely one for the interference of the police.

ORDER.—The facts appear to the Court to be these:—Sahebu petitioned the Magistrate on 31st March charging her husband Fateali with having used abusive language to her. On the same day Fateali presented to the same Magistrate a petition charging Sarafali with having enticed away his wife Sahebu and Sulemanji with having abetted Sarafali in the

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*Criminal Ruling. †Reference No. 57 of 1875.

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commission of that offence. Both these petitions were enquired into and disposed of on the 13th April 1875 by the Magistrate who held that there was no evidence to support either charge.

On this day, *i. e.*, the 13th April Fateali made a second petition to the said Magistrate alleging that Sarafali took his wife away to his house and praying that the Magistrate would order the Police to apprehend Sahebu and any other persons found with her whenever he (Fateali) should give information to the Police. Upon this petition the Magistrate appears to have issued a warrant which has been brought to the Court's notice.

The Court is of opinion, on a cosideration of the above facts, that the Magistrate had no authority to issue any such warrant or order of arrest. It must therefore be quashed. The matter coming up in such a form is purely one for the interference of the Police. The Court observes that in the petition of Fateali dated 13th April 1875 there was no complaint against any one. The Court understands that it conveyed merely a piece of information as to the possibility of an offence being committed.

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15 June 1875. RESOLUTION IN CHAMBERS.

Surat District Magistrate's Letter No. 306.*

Criminal Procedure Code (Act X of 1872), Secs. 125, 188, 210—Complaint—Withdrawal—Magistrate—Police officer.

Section 125 of the Code of Criminal Procedure does not empower any Police Officer to entertain an application for withdrawal of a complaint. The permitting a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate by sections 188 and, 210 of the Code of Criminal Procedure, and the Police have no authority to interfere in such matters.

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21 June 1875. KEMBALL & NANABHAI, JJ.

Reg. v. Gulabchand. Reg. v. Mahipat.†

Criminal Procedure Code (Act X of 1872), Sec. 307—Penal Code (Act XLV of 1860), Sec. 64—District Municipal Act (Bom. Act VI of 1873)—General Clauses Act (I of 1868), Sec. 5—Default of payment of fine—imprisonment.

Award of imprisonmet in default of payment of fines imposed under enacments passed after the General Clauses Act I of 1868 came into operation (such as the District Municipal Act VI of 1873 and the General Stamp Act XVIII of 1869) is quite legal.

ORDER.—Section 5, Act I of 1868, declares that the provisions of sections 63-70 (both inclusive) of Indian Penal Code and section 307 (vide schedule 5) of the Code of Criminal Procedure shall apply to all fines imposed under the authority of any Act *hereafter* to be passed unless such Act shall contain a special provision to the contrary. In the Municipal

*Criminal Ruling. †Criminal Ruling. Criminal Reference No. 59 of 1875.

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Act under which defendant was sentenced, distinct and express reference is made to the Code of Criminal Procedure as the authority under which fines are to be levied. Section 307 (first para of it) shows that a fine may be levied whether or no sentence direct that in default of payment of fine the offender shall suffer imprisonment and section 64 of the Indian Penal Code provides for sentence of imprisonment in default of payment of fine. The imprisonment which the Court is authorized to impose in default of payment is intended as a punishment for non-payment, not as a satisfaction and discharge of the amount due.

The District Magistrate to be referred to section 5 of Act I of 1868 as offering a solution of his difficulty and return the papers.

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2 September 1875. KEMBALL & LARPENT, JJ.

Reg v. Fakira.†

Penal Code (Act XLV of 1860). Sec. 179—Refusing to answer questions put by police—Juryman.

A person can not be convicted of an offence under section 179, Indian Penal Code, for refusing, when required by a police officer, to look at the hands of a complainant and to answer whether there were any marks of tying with a rope on his hands.

THE accused was convicted under section 179, Indian Penal Code, for refusing to answer a public servant authorized to question, in that he refused to look at the hands of one Rama and to answer whether there were any marks of the tying with a rope on his hands when required to do so by the officer in charge of a Police station.

ORDER.—The Magistrate First Class ought to have known the law better than to have convicted the accused of a criminal offence upon the facts in evidence. It does not appear that the accused knew any of the circumstances of the case which the Police Officer was investigating; in fact he was merely summoned as a "Juryman" to testify to a matter which all the witnesses say was patent to every one. Sections 118 and 119 of the Code of Criminal Procedure did not justify the Police Officer in summoning and putting such a ridiculous question to the accused as was put to him, *viz.*, whether after looking at the hands of a certain individual he could say if there were marks of their being tied with a rope. The Court is not aware of any provision of the law which allows a Police Officer to summon persons to act as jurymen save in the case of sudden and unnatural deaths: *vide*, section 134 of the Code Criminal Procedure. The accused was therefore not legally bound to answer the question put

†Criminal Review No. 131 of 1855.

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to him under the above circumstances; and the conviction and sentence passed upon him must accordingly be reversed and the fine paid by him restored.

The First Class Magistrate should be directed to be more careful in interpreting Criminal Law in future.

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15 September 1875. WEST & NANABHAI, JJ.

Reg v. Hamal.*

Penal Code (Act XLV of 1860), Sec. 108—Abetment—Concert—Intention.

To constitute a man the abettor of another's crime, it must be clearly established that both intended to commit or to further the same crime.

JUDGMENT.—Th evidence in this case does present some of the difficulties ably commented on by the prisoner's counsel Mr. Branson; but there are two circumstances which tend materially to lessen the weight of those comments. One of them is that the whole transaction connected with the murder of the money lender Lakhu occurred within a few moments in the presence of a great many people excited by anger or resentment or through terror and astonishment. The second circumstance is that the witnesses in the case are men possessing neither the culture nor the capacity of so analysing facts as to enable them to present them for the information of others so as to be beyond question or cavil. Some of the witnesses as the Court karkun and the peon who went to attach the property of Hamal, are perfectly disinterested; and they clearly depose to the actual presence of Hamal, and the part taken by him in the murder. On a review of their evidence and the evidence of the other witnesses we are satisfied that Hamal did take an active part in the murderous assault.

We shall next consider the point of law raised by Mr. Branson. He urges that granting that Hamal did strike Lakhu a blow, it is impossible, in the absence of medical testimony as to the character of the wound inflicted by it, to say that that particular blow was the cause of death; for after Hamal had inflicted his blow, his brother Mulu, seeing that the deceased had not died, snatched the knife from Hamal's hands and inflicted two more blows which at once despatched Lakhu. It is quite possible, contends Mr. Branson, that there was no preconcert between Hamal and Mulu and that the two blows from the latter caused the death. The point is one that presents some difficulty. To constitute a man the abettor of another's crime, it must be clearly established that both intended to commit. or to further the same crime. Here it does not appear

*Confirmation case No. 47 of 1875.

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that Hamal in any way instigated his brother Mulu to commit murder. Hearing the disturbance, Mulu seems to have rushed up to the scene of the assault, and independently of Hamal's act to have taken possession of the knife and inflicted two wounds. In such a case, the offences of the two brothers, whatever they may amount to would be distinct even if of the same description and however it might be in the case of Mulu as an abettor of Hamal, Hamal could not, according to the definition in the Penal Code, be regarded as a murderer simply through abetment of Mulu's crime. But section 38 of the Indian Penal Code enacts "where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act;" and an illustration is given showing the difference in criminality of two persons assisting each other in causing death but one of them only under circumstances of grave provocation. The circumstances in that illustration are such as to lend partial exoneration to A without giving any exoneration to Z. That is a case where each one acts independently of the other's intention. If the differentiating circumstances of provocation be now withdrawn in the case of A his offence will still be distinct from Z's though no longer of a different class. In the present case notwithstadding the absence of medical testimony we are satisfied that the present is a case in which each of the brothers contributed though not in a precisely ascertained proportion to the death of Lakhu. Hamal did by the injury which he inflicted necessarily contribute to Lakhu's death, though to what exact extent, it is impossible on the evidence, to determine. His brother Mulu contributed in a similarly undefined proportion to the same end. Each inflicted an injury and each is responsible for the consequence, because both were actuated by an intention, such as is contemplated in section 299 of the Penal Code. Applying this principle, we cannot disturb the conviction of Hamal.

But we think there is one circumstance which should be weighed in considering the question as to the confirmation of the sentence of death. Viewing the evidence in the light most favourable to the prisoner we find that after inflicting a blow on the deceased, Hamal hesitates so as to induce Mulu to interfere and deal two more blows to make death certain. It is just possible that feelings of repentance and compunction may have come over Hamal; and but for the two blows which followed death might not have ensued. In this view of the matter, we shall not confirm the entence of death but pass a sentence of transportation for life.

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16 September 1875. WESTROPP, C. J., KEMBALL, WEST, AND NANABHAI, JJ.

Reg. v. Tukaya.*

Criminal Procedure Code (Act X of 1872), Sec. 454—House-breaking by night in order to commit theft and theft—Penal Code (Act XLV of 1860), Secs. 379, 380, 457—Sentence.

There should either be one sentence for both offences, in a case of conviction of house-breaking by night in order to commit theft, and theft, not exceeding that which may be given by law for the graver offence; or separate sentences for each offence, provided that in the aggregate the punishment awarded does not exceed that which may be given for the graver offence.

REFERRING JUDGMENT.—In this case the Magistrate having convicted the accused of house-breaking by night and of theft committed on the same occasion has sentenced him under sections 457 and 380 of the Indian Penal Code to 15 months' rigorous imprisonment. The sentence being a single one, the case has been called for to determine whether "it was a material error not to have passed separate sentences" for the house-breaking and the theft.

In the case of *Reg.* v. *Haridas Shamdas* and others disposed of on the 18th February last it was ruled that on a conviction of house-breaking and of theft the Court is bound to pass separate sentences for each of the two offences on each element of the joint offence. In the previous case of *Reg.* v. *Govinda* disposed of on the 4th December 1873 it had been laid down in a similar case that advertence being had to the provisions of section 454 of the Criminal Procedure Code the two offences were for the purpose of awarding punishment to be regarded as one. The accused having been sentenced to imprisonment for the house-breaking and to whipping for the theft was made subject to a punishment (imprisonment plus whipping) greater than could have been inflicted upon him for the graver of the two offences he not having been previously convicted. If a separate sentence must of necessity be passed for each offence of which an accused is convicted under the several heads of a multiple charge, and the sentence is in each instance to be controlled only by the law applicable to the offence regarded as standing apart from those embraced in the other heads of the charge it does not seem that the punishment of whipping for a theft added to one of imprisonment for a house-breaking could properly have been regarded as illegal. In *Reg.* v. *Govind* therefore the sentence of whipping ought to have been allowed to stand. But while section 220 and section 314 of the Code of Criminal Procedure are not to be deprived of their intended operation and may be consistent with the recognization of this principle that while they are allowed without qualification to govern the ordinary cases of offences not closely connected together and forming the embodiment of a substantially single criminal

*Criminal Ruling.

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intent the provisions of section 454 shall be held to apply as those of a more special enactment to the class of cases embraced within the scope of that section and so far to act in the particular instances by way of modification of the more general earlier rules. The illustration to paragraph 3 of section 454 indicates that house-breaking plus an offence for the perpetration of which the house-breaking was committed are regarded by the Legislature for purposes of punishment as one combined offence. Paragraph 3 says that the aggregate punishment is not to exceed that of the combined or graver offence, and it seems unlikely that separate sentences were meant to be insisted on which in the aggregate could not award more punishment than could be awarded by a single sentence. The paragraph while it speaks of separate charges for each elementary offence says nothing of separate sentences, and its mention of "*a punishment*" not "punishments" seems to indicate that a single punishment by a single sentence was rather contemplated in the case of complex crimes. It is no doubt legal to pass sentences on each head of a charge though those heads together go to make up a charge of a single complex offence if these in their aggregate satisfy the provision of para 3 of section 454 but it does not seem to be illegal to pass a single sentence in such cases by which precisely the same result may be obtained and the apparent purpose of the Legislature in some instances more completely secured. But it is necessary that this question should be disposed of by a Full Bench to which we accordingly refer it.

The reference having come before the Full Bench, the Full Bench recorded the following opinion :—

There should either be one sentence for both offences not exceeding that which may be given by law for the graver offence or separate sentences for each offence provided that in the aggregate the punishment awarded does not exceed that which may be given for the graver offence.

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23 September 1875. WEST & NANABHAI, JJ.

Reg. v. Bavaji.*

Penal Code (Act XLV of 1860), Secs. 417, 420—*Cheating—Distinction between section* 417 *and section* 420.

Cheating, unaccompanied by delivery of property, is an offence punishable under section 417, Indian Penal Code and within the competence of a Second Class Magistrate; but where property passes, it is an offence, punishable under section 420, triable by a Court of Session or a First Class Magistrate.

ORDER.—The definition of the offence of cheating in section 415 of the Indian Penal Code embraces some cases in which no transfer of pro-

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**Criminal Ruling.* Criminal Reference No. 118 of 1875.

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perty is occasioned by the deception and some in which such a transfer occurs; for these cases generally a general provision is made in section 417 of the Code; for the cases in which property is transferred a more specific provision is made by section 420 and the jurisdiction in such cases is confined to Magistrates of the First Class. If the Court were called on to express an opinion as to the propriety of thus limiting the jurisdiction under section 420 the mode in which the Second Class Magistrate has dealt with the case, would form a sufficient justification according to its view of the existing restriction. What has to be dealt with however is the legality of the order of the Session Judge and the Court is not able to pronounce that order illegal. Record and Proceedings are therefore returned.

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12 November 1875. WEST & NANABHAI, JJ.

Reg. v. Kahandas.*

Extradition Act (XI of 1872), Secs. 3, 9—Criminal Procedure Code (Act X of 1872), Secs. 174,175—Indian British subject—Offence in a Native State—Political Agent—Arrest in British India under a warrant issued by a British Magistrate—Inquiry.

Where an offence was suspected to have been committed by Native British Subjects in Laktar in the Province of Kathiawar, *i. e.*, in a place without and beyond the Indian Territories under the dominion of Her Majesty (section 3 of Act XI of 1872) and the offenders arrested in the Surat District under the authority of a warrant from a Magistrate, First Class, there :—

Held that, under section 9, Act XI of 1872, the Magistrate was authorized to complete the inquiry himself, and section 174, Criminal Procedure Code made it unnecessary for him to send the accused to the District Magistrate under section 175, as the certificate required by section 9 of Act XI of 1872 had been duly furnished by the Political Agent.

JUDGMENT.—We must remark at the outset that an appeal in the strict sense of the term does not lie in this case, none being provided for by section 272 of the Code of Criminal Procedure which empowers the Local Government to direct an appeal by the Public Prosecutor from an original or appellate judgment of acquittal. However the case having come to our knowledge we can deal with it under section 297 and we proceed to examine it to see if there is any material error affecting the decision.

The offence imputed to the accused appears to have been committed at a place called Laktar in the Province of Kathyawad; and they were arrested under a warrant from Mr. Shankar Pandit Magistrate First Class in British territory at some place in the Surat District. The Session Judge has expressed an opinion that as the arrest was made under a warrant issued on the authority of section 157 of the Code, the case became subject to the provision of section 175; and he considered that Mr. Pandit

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* *Criminal Ruling.* Criminal Appeal No. 292 of 1875.

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was bound to send up the accused persons to the District Magistrate in the absence of a warrant from the Magistrate in whose jurisdiction the offence was suspected to have been committed.

The Code of Criminal Procedure must for the purposes of this case be regarded as in *pari materia* with the Extradition Act XI of 1872, section 8 of which enacts that the law relating to offences and to Criminal Procedure for the time being in force in British India shall, subject to certain modifications, extend to all British Subjects European and Native, in Native States. That being so when the warrant was issued under section 157 the accused would ordinarily be in the same position as if being suspected of offences committed in one District they had been arrested in another District of British territory; and the Magistrate under whose warrant the accused were arrested would be bound to forward them to the Magistrate of the District. But section 9 of the Extradition Act supervenes and under it British subjects may be dealt with in respect of offences committed by them in any Native State, as if such offences had been committed in any place within British India in which they may be found. If they had committed the offences charged where they were in custody they would have been subject to the jurisdiction of the Magistrate at that place. The accused consequently were properly tried by Mr. Pandit under whose warrant they were apprehended, the condition enacted in the section as to the certificate of the Political Agent having been satisfied. As Mr. Pandit was thus authorised to complete the inquiry himself, section 174, Criminal Procedure Code, made it unnecessary for him to send the accused to the Magistrate of the District who would in all probability simply have, sent them back again. It was not the purpose of the Legislature to impose profitless pedestran exercise on prisoners unconvicted and the police who would have to accompany them. Section 9 of the Act gives full power to a Magistrate First Class to proceed with the trial in a case like the present if the Political Agent furnishes the requisite certificate and this power Mr. Pandit seems to have properly exercised.

We must therefore reverse the order of the Session Judge annulling the convictions and sentences and direct him to proceed with the appeal according to law.

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25 November 1875. WEST & NANABHAI, JJ.

Reg. v. Shivram.*

Penal Code (Act XLV of 1860), Sec. 411—Receiving stolen Property—Conviction —Evidence of theft.

**Criminal Ruling.* Criminal Review No. 145 of 1875.

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The complainant gave into the custody of Police certain logs of wood as property which he suspected had been stolen from him. The accused rescued the logs from the Police custody by violence. The Magistrate in the First Court and the Session Judge in the Court of Appeal both convicted the accused of dishonestly receiving stolen property, known to have been stolen, and of rioting, though, as to the former charge, they were of opinion that there was no proof, failing that derived from the recapture of the property, that the logs had in fact been stolen.

Held, that the conduct of the accused in rescuing the wood might be evidence that he knew or had reason to believe that the wood was stolen, but it could not establish the fact that it was actually stolen. And, in the absence of evidence reasonably proving dishonest transfer of the wood from the complainant to the accused, the conviction on the charge of dishonestly receiving stolen property could not be sustained, the Court being of opinion that a mere scintilla of evidence in support of the proposition that the property was really stolen ought not to be left to a Jury even in a civil case, much less ought it to be left to a Jury in a criminal case, least of all should it be made the basis of a conviction by a Magistrate.

ORDER.—The Court reverses the conviction and sentence on charge of receiving stolen property. It upholds the conviction and sentence on charge of rioting.

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8 December 1875. WEST & NANABHAI, JJ.

Reg. v. Ganu.†

Penal Code (Act XLV of 1860), Sec, 141—Unlawful assembly—Rioting.

If any person encourages, or promotes, or takes part in riots, whether by words, signs or gestures or by wearing the badge or ensign of the rioteers; he is himself to be considered a rioteer. Active participation in actual violence is not necessary. Some may encourage by words, others by signs, and others again may actually cause hurt and yet all would be equally guilty of rioting.

JUDGMENT.—In this case the Magistrate has found the accused guilty of rioting and Session Judge has upheld the convictions in terms which we must construe to mean that in his opinion the accused were some of the rioters. The findings of the Courts below on questions of facts are not to be interfered with by us in revision except where there is no evidence whatever to support the conviction. It is contended by Mr. Branson that that is the case here ; and a reference was made to the definition of the phrase "unlawful assembly" in section 141 of the Indian Penal Code. That section runs thus :—"An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is.....to commit an offence....." The party opposed to the Swami some of whom had assembled in the lecture room in Bhide's *wada* commenced by bringing upon the scene an ass so as to represent the Swami—whether the dress alone would have been sufficient to suggest a caricature of the Swami or not is not very material for the shouts of "Swami the ass" which proceeded from the leaders of the

†Criminal Review No 166 of 1875.

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procession showed clearly that their object was to hurt the feelings of the Swami's partizans. Those shouts were followed by stone throwing and thus not unnaturally resulted in the use of criminal force and voluntary infliction of hurt. The degree of connection between those who threw the stones and inflicted hurt and those who raised the shouts and whether the connection was sufficient to indicate that the object of both was a common one is a question of degree. Whether the sign and symbols exhibited by one party were so intimately or remotely connected as to show that the acts of the other were or were not related as cause and effect or as springing from the same design is a question of the appreciation of evidence within the province of the Lower Courts. They have held that the ass was led by the accused and attended by a crowd to the place where mischief ultimately resulted. We are quite unable to say that there is no evidence of riot having occurred or that the accused were not connected with its occurrence. On the authority of several cases it is said in Burn's Justice of the Peace Vol. V, page 143, Ed. of 1869, that "If any person encourages, or promotes, or takes part in riots, whether by words, signs or gestures or by wearing the badge or ensign of the rioters he is himself to be considered a rioter." Active participation in actual violence is not necessary. Some may encourage by words, others by signs and others again may actually cause hurt and yet all would be equally guilty of rioting.

Even if there were in this case absence of evidence to support the conviction of rioting we should not be justified in releasing the prisoners for we should be bound if we altered the conviction to one under section 153 of the Indian Penal Code, for wantonly giving provocation with intent to cause rioting to sustain the punishment awarded by the Session Judge. Under sections 283 and 300 of the Code of Criminal Procedure we should be bound to follow this course if our doing so would not prejudice the accused. But taking the view which we have expressed this course is not necessary. We think there is evidence to support the convictions of rioting. We shall therefore reject the petition and return the proceedings.

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10 January 1876. WEST & NANABHAI, JJ.

Reg. v. Sita.*

Criminal Procedure Code (Act X of 1872), Secs. 193, 248, 342, 357—Commitment—Preliminary inquiry—Magistrate—Accused—Examination.

A commitment made without taking any evidence on a preliminary inquiry held to be illegal, and as such, annulled.

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* *Criminal Ruling.* Criminal Reference No. 159 of 1875.

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Under sections 193 and 242 of the Criminal Procedure Code, it is not imperative on a Magistrate to examine the accused; but section 248 contemplates such an examination: and, according to section 357, the accused ought also to have the opportunity of adducing evidence on his behalf, which the Magistrate cannot refuse to take without recording his reasons.

ORDER.—Mr. Hamilton, acted illegally in committing the accused for trial without taking some evidence on a preliminary inquiry against them. The Magistrate is not perhaps bound to examine the accused, sections 193 and 342, Criminal Procedure Code, but section 248 contemplates such an examination. The accused according to section 357 ought also to have the opportunity of adducing the evidence before the Magistrate and unless there be some particular reason which the Magistrate should record against summoning his witnesses any that he requires should be summoned.

The Court therefore annuls the commitment and directs Mr. Hamilton to proceed with the inquiry according to law.

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10 January 1876. WEST & NANABHAI, JJ.

Reg. v. Fakir Parshottam.†

Salt Act (Bom. Act VII of 1873), Secs. 3, 18, 19, 49—Salt Department—Peon—Possession of naturally formed salt.

A peon in the employ of the Salt Revenue Department was found to be in possession of naturally formed salt, which he had collected for his private use:—

Held, that section 18 of the Bombay Salt Act did not apply to the act of the accused person, which, however, when viewed by the light of section 3 which defines the word "manufacture" to include the collection of salt, is rendered penal by section 19 and made punishable by section 49.

ORDER.—Section 18 of the Bombay Salt Act VII of 1873 is not applicable to the present case. It could operate, if at all, only by way of exoneration, if the accused, admitting that he had taken possession of the salt found in his house, had alleged that he had taken, not retained it only in the discharge of his duty. He did not rely on any such defence as this and it is found that his duty was to destroy salt naturally formed not collect it, though the order to this effect does not appear on the record. Section 18 is merely an empowering section giving to salt officers a license to go to certain places and to act there as other persons are not at liberty to do. It does not of itself impose any duty or imply any duty, except towards the owner or possessor intruded on who is not to be vexed expect for the purposes specified in the section.

But as the Magistrate has believed that the accused had taken possession of naturally formed salt for his private use, his finding makes the accused guilty, according to the arbitrary definition given in section 3

†*Criminal Ruling.* Criminal Reference No. 157 of 1875.

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of the offence of manufacturing salt without being duly licensed. This offence constituted by section 19 is committed, by the mere "collection of salt" and the accused is found to have collected what he had in his possession. He was subject therefore to the penalty imposed by section 49. The Court therefore directs that the conviction be altered to one under section 19 of the Bombay Act VII of 1873 punishable under section 49 thereof.

What the Session Judge has said on the subject of the Inspector's entering the accused's house could not properly affect the disposal of this case. If he entered illegally that may form a ground for civil or criminal proceedings against him on the part of the accused, but it does not deprive his discovery of its character of evidence. As to the questions put to the accused if they were such as he might legally refuse to answer he might have used his privilege of silence. As he chose to give replies those replies became evidence against him.

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17 January 1876. WEST & NANABHAI, JJ.

Reg. v. Chatur.* Reg. v. Nankukhan.*

Evidence Act (I of 1872), Secs. 133, 144, Ill (b)—Accomplices—Evidence.

The Indian law on the subject of the testimony of accomplices as embodied in section 133 and section 114, Illustration (*b*) of the Indian Evidence Act is substantially identical with the law of England in that respect, *viz*:—that not only as to persons spoken of an accomplice must there be corroborative evidence, but also as to the *corpus delicti* there must be some *prima facie* evidence pointing the same direction.

Hence, letters found in the possession of an accomplice, which were so ambiguously worded as to admit of no unfavourable inference being drawn against the accused person, without, in the first place, accepting as correct the interpretation suggested by the accomplice himself, were held not to afford any corroboration of the story told by the accomplice.

JUDGMENT.—The accused Chatur Parshottam was charged along with his brother Vakhatchand, and Chhotalal, Nankukhan and Balaji before the Session Court of Ahmedabad with the offence of abetment of murder by instigating one Meheralisha Fakir to Nasibkhan, Navab of Bajana.

It is asserted on behalf of the prosecution that the object of the contemplated murder, was to place the Navab's son on the Bajana *gadi* and restore to Chatur the post of Dewan which he had lost; that Chhotalal, Chatur's friend, induced one Nemidas, an inhabitant of Poona, to hire the Fakir with the avowed object of getting rid of the Navab by magic but really by any means whatsoever; that Nankukhan, Balaji and Yashin helped Nemidas in procuring the services of the magician; that the whole gang with the above object in view came down from Poona to Ahmedabad, where Chhotalal joined them: that all of them thence proceeded to Patri,

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**Criminal Ruling.* Criminal appeals Nos. 247 and 251 of 1875.

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a village not far from Bajana, and put themselves in communication with Chatur and his brother; and that at Patri the Fakir, after preparing a flour image, and saying incantations over it, gave information of the contemplated crime to a person who communicated with the Police and thus the gang was apprehended.

Meheralisha, the Fakir, Namidas and Yashin were granted a conditional pardon; and their evidence thus made available for the prosecution. The evidence of Yashin was rejected by the Judge below as entirely untrustworthy; but on the evidence of the other two which he considered was corroborated by certain telegrams and letters found on Chhotalal's person when he was arrested at Patri and certain letters which were found in the house of Nemidas at Poona, by a loan of certain quilts by Chatur and by the circumstance of a sum of Rs. 100, alleged to have been supplied by Chatur being found with Chhotalal, the Judge convicted Chatur, Chhotalal and Nankukhan.

Chhotalal is reported to have died since his conviction and appeal. No order therefore, is necessary in his case; and as no one appears for or against Nankukhan we shall first consider the appeal of Chatur.

And at the outset we have to see whether on the evidence before us the prisoner Chatur is so connected with the conduct and intention of Chhotalal as to make him an accomplice in the act of Chhotalal, whatever it may amount to in the view of the criminal law. The principal testimony directly implicating Chatur—indeed we may say the only testimony is that of accomplices; and of these only one speaks directly to the point of Chatur's consciousness of the crime and his intention to perpetrate it. It is therefore important to see whether the testimony of accomplices requires corroboration and if so to what extent.

The general principles on which such testimony is admitted and weighed has received considerable attention in numerous cases in England. The result of those principles has been embodied in two rules to be found in section 133 and section 114, illustration (*b*) of the Indian Evidence Act I of 1872. The former runs thus: An accomplice shall be a competent witness against an accused person: and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. In other words there is no legal bar to the admission of an accomplice's evidence and should there be circumstances in the case which seem to the Court to make that evidence in any particular instance specially worthy of reliance, the conviction based upon it will be maintained. But the Act also lays down another rule which the Judges in England never forget to consider, *viz.*, that the general course of human

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experience and particularly experience connected with the conduct of criminal trials shows that the testimony of accomplices is not in general to be implicitly relied on unless corroborated (Section 114, Illustration (*b*)). The law of England is therefore substantially the same as the law of this country in this respect and we can look to English cases to see the extent of corroboration which is required to supplement the evidence of accomplices. We speak of accomplices in the plural advisedly in this place because the statement of one accomplice is not strengthened by the concurrent statements of any number of accomplices. The corroboration must proceed from an independent source. The most important case known to us on this subject is the trial of Col. Despard for High Treason at page 346 of the 28th volume of State Trials 1803. The remarks of the Attorney General adopted in a great measure by Lord *Ellenborough* who presided at the trial contain an exhaustive expression of the law on the subject. "When I say accomplices ought to be confirmed by collateral testimony do not mistake me to state that every word which an accomplice utters must be spoken to by some other witness because if that were so there would be no need of an accomplice in any case but that of treason; but the confirmation that is to be required for an accomplice, is to show that the story, as related by him coincides with other circumstances, which are by unexceptional testimony proved to have existed, and when such circumstances falling in with the testimony of the accomplice, cannot so easily be accounted for upon any other supposition than that of the truth of the story. When I say that is the state of the evidence, I apprehend the accomplice is sufficiently confirmed, and that there can be no difficulty in giving complete credit to his testimoney."..... "I state distinctly that the evidence of these papers, found in the possession of some of the prisoners, and at the meeting, necessarily gives a character of guilt to it; for what innocent purpose or by what strange accident, could these papers and engagements have got into their possession" ....." If the nature of these papers is such that they could not be acted upon without treason, let me ask how consistently for innocent purpose they were possessed? If they were so, it is incumbent upon them to prove it; but without any proof I am sure the fair presumption from the possession of these papers which could not be used but for purposes of guilt, must be that they were *possessed* for such purpose; and that they were possessed for precisely those guilty purposes for which they were peculiarly calculated to be employed."....."Then I put it to you whether there can be a greater or stronger confirmation of the testimony of an accomplice than by proving such circumstances as these —circumstances which cannot possibly be accounted for except upon the

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supposition of the criminal purpose existing in the mind of the person on whom the accomplice charged it? Whether there can be a stronger confirmation of an accomplice than showing other facts with which his story perfectly coincides and which are perfectly irreconcileable with the idea of innocence, and unaccountable upon any other grounds."

In summing up the evidence Lord *Ellenborough* said: "But the witness who comes thus *prima facie* contaminated may be so confirmed by the consistency and clearness of his own narration, and still more by its conformity to and coincidence with the substance of the testimony delivered by others, not likely to have conspired with him in the crime itself, or to have had the means of concerting and colluding with him as to the matter of his testimony, and still more, if such a witness is found to be confirmed by a variety of collateral and independent facts and circumstances, involving the names, characters, and transactions of multitudes of persons, and if, at last, the whole of his testimony should appear to be broken in upon by no one fact of contrary testimony, during a discussion and hearing occupying so many hours as this has done, and in the course of which the names of so many persons have been brought forward as actors in very extraordinary scenes, described as having passed in so many places. I say if the entire narrative as to persons, places, and things, not in itself inconsistent or improbable, should ultimately appear to be falsified in no instance whatever, in such case, a person originally standing under some degree of doubt and suspicion from the nature of his situation and from the quality of his testimony, becomes, at last, entitled to be believed in the fullest manner, accredited and confirmed as he then is in the manner of his testimony, by such a body of collateral evidence, as I have, by way of supposition, assumed."

What we gather from the above discussion is that not only as to persons spoken of by an accomplice must there be corroborative evidence but which is more important still—as to the *corpus delicti* there must be some *prima facie* evidence pointing the same way to make the evidence of an accomplice satisfactory. As has been recognized in many cases the man who charges another with the commission of a crime in which he is himself implicated requires as to the particular person but still more as to the existence itself of any crime or of the particular crime from the penalty for which he is made free—on the understanding that his testimony will be valuable for the prosecution.

Applying the principles we have enunciated we have now to consider whether the letters found in Nemidas' house afford corroboration to his testimony. We are of opinion that they do not. No unfavourable inference

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can be drawn from them unless we in the first place accept as true the explanation given of their meaning by Nemidas himself. They are ambiguously worded and by themselves do not essentially establish any circumstances which can be taken as corroborative of Nemidas' or any other accomplice's story. The letters lean upon Nemidas and Nemidas leans upon them. The Session Judge with respect to them says "There is no more suggestion of partnership in them than there is of murder." Upon this we must observe that to make them corroborative evidence in this case they must be suggestive of murder and of nothing else.

Then the evidence as to the implication of Chatur is again the testimony of Nemidas for that of Yeshin must be set aside altogether as was done by the Judge. The learned Advocate General laid great stress on the circumstance that Chatur had an object to gain in procuring the death of the Nawab of Bajana; but he pointed to no evidence of an engagement that Chatur was to be installed as Dewan to the Nawab's son. A mere hypothesis to that effect cannot be made the basis of a conviction of conspiracy such as has been alleged against Chatur; otherwise there is not a son of a wealthy father but may fall a victim to the designs of intriguing villains.

The Advocate General next urged that Chatur supplied Nemidas with money when he was at Patri; and that this afforded corroboration to Nemidas' story. We must observe here that the Advocate General did not in the Court below either from forgetfulness or any other cause, call evidence to show that when Nemidas was first apprehended no money was found on his person. It would, in the absence of such evidence, be as wrong to depend on Nemidas' testimony on this point as it would be to depend on his own explanation of the letters found with him.

Lastly it was urged that Chatur supplied the party with a couple of quilts from his own house. This we think can be explained by the circumstance of Chatur's acquaintance with Chhotalal which notwithstanding Chatur's denial we hold to be sufficiently established. This is the last link in the chain of evidence supposed to corroborate the story of accomplices. Every link is of the weakest possible description. Had the party which came from Poona sued Chatur for wages for service done him, no civil Court, we think, would on this evidence hold Chhotalal to be an agent of Chatur. Still more deficient is it as a means whereby to establish so grave a charge against Chatur.

The motive of these people in coming down from Poona to Patri remains unexplained. Had there been stronger evidence in the case the mystery would have required explanation at their hands. But in the absence

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of a design on the part of Chatur to murder the Nawab of Bajana proved at least *prima facie* by evidence on which the Court could safely act they cannot be required to explain their motive.

There is one circumstance which tells somewhat against Chatur and that is his denial of acquaintance with Chhotalal and the loan of the quilts. If the former denial however was true, it would make it improbable that Chhotalal was acting as Chatur's agent taking it as untrue the lending of the quilts is quite consistent with Chatur's innocence. That Chatur should have falsely denied the loan is not a matter affording a ground for any strong inference to his disadvantage.

On the whole therefore we must reverse the conviction and sentence passed on Chatur.

Then with regard to Nankukhan who has separately appealed. To his case many of the observations apply which are given expression in the case of Chatur. That Nankukhan went from Poona to Patri for some evil purpose appears not improbable. He has not accounted for that journey in such a way as to satisfy our minds that he was a perfectly innocent party, but it is necessary in order to establish a case of abetment of murder not only that the person accused should have entertained an evil design in general but that he should have entertained the specific design or participated in the design forming the basis of the charge. For the existence of such a design and of Nankukhan's participation in it we have in this case to rely wholly on the testimony of accomplices. There is no other independent testimony tending to fix him with the particular offence of which he has been convicted. We must therefore reverse the conviction and sentence passed on Nankukhan also.

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3 February 1876. MELVILL & NANABHAI, JJ.

Reg. v. Jethya Alliaji.*

Police Act (Bom. Act VII of 1867), Sec. 3—Police—Duties.

The duties of the Police are divisible into three heads:—(1) those imposed upon them by the rules framed by the Commissioner and approved by the Government; (2) those imposed by rules or orders which the Commissioner may make preventing abuse or neglect of duty and (3) those imposed by law.

THE accused was charged under section 26 of Bombay Act VII of 1867, of wilful neglect of lawful order made by a competent authority, in having refused to destroy stray dogs when directed to do so by the Superintendent of Police.

ORDER.—The duties of the Police may be divided into three heads, *viz*:—

*Criminal Review No. 229 of 1875.

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(1) Those imposed upon them by rules framed by the Commissioner and approved by Government (Bombay Act VII of 1867, section 13); (2) Those imposed by rules or orders which the Commissioner may make preventing abuse or neglect of duty &c. (same section); (3) Those imposed by law.

The duty of destroying stray dogs is one which can only be brought under the first of these heads,—and as the rule relating to it, though it has been in force for years, is stated not to have received the approval of Government, it is on this account invalid and a conviction for a breach of it is illegal.

On this ground the Court would reverse the conviction and sentence.

The destruction of stray dogs may be very necessary and if legally made one of the duties of the Police. No Policeman has a right to complain of what is one of the conditions of his services, but this Court cannot uphold such convictions as the present, until the existing rule has been rendered valid by the formal approval of Government.

The Court therefore reverses the conviction and sentence.

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7 June 1876. MELVILL & KEMBALL, JJ.

Reg. v. Wasapa.* Reg. v. Timava.*

Evidence Act (I of 1872), Sec. 30—Retracted confession—Accomplice—Evidence.

The retracted confessions of accomplices may be taken into consideration under section 30 of the Indian Evidence Act, when there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever.

JUDGMENT.—We have not thought it necessary to hear the counsel for the second prisoner Timava. It is not the practice of our Courts to convict an accused person on the uncorroborated evidence of accomplices. In the case of the prisoner Timava we have not even the evidence of accomplices: we have nothing but the retracted confessions of accomplices, which under section 30 of the Evidence Act may be taken into consideration when there is evidence tending to conviction, but which cannot form the basis of a conviction when there is no evidence whatever.

On this point, we concur in the views expressed by the CALCUTTA and MADRAS HIGH COURTS, (24 W. R., Criminal Rulings, 42—7 Madras High Court, app. 15).

The conviction of the first prisoner Wasapa for abetment of murder, when the charge against him, was a charge of murder only, was illegal (11 Bom. H. C., 240). But the evidence shows that Wasapa not only abetted the murder but was present when the murder was committed, and there-

*Confirmation case No. 19 of 1876.

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fore he must be deemed to have committed murder (Indian Penal Code, section 114). We are therefore, sitting as a Court of Appeal, able to alter the finding to one of murder, the offence with which the prisoner was charged, and it is not necessary for us to order a new trial.

We accordingly alter the finding of the Sessions Court in the case of prisoner No. 1 Wasapa to one of culpable homicide amounting to murder. Having regard to all the circumstances of the case, we commute the sentence to one of transportation for life.

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8 June 1876. KEMBALL & NANABHAI, JJ.

Reg. v. Ganpaya.*

Criminal Procedure Code (Act X of 1872), Sec. 318—Juvenile offender—Theft in a dwelling house—Sentence—Confinement—Reformatory School.

A Magistrate finding a juvenile offender guilty of theft in a building sentenced him to three months' rigorous imprisonment and ordered that in place of this sentence the offender should be confined in a Reformatory for fourteen months:—

Held, that the Magistrate having once passed a sentence of imprisonment for a particular term cannot direct that the offender shall be confined in a Reformatory for a longer term.

THE accused aged 14 years was convicted by the Second Class Magistrate of Bhiwndi of theft under section 380, Indian Penal Code. The Magistrate in passing the sentence ordered that in the place of the lad undergoing three months' rigorous imprisonment, he should under section 318 of the Criminal Procedure Code, be sent to a reformatory for fourteen months. The District Magistrate of Thana referred the case to the High Court observing—"I submit that the order of the Second Class Magistrate was illegal, because, there not being, that I am aware of, any law prescribing that a certain period of confinement in a reformatory shall be considered equal to a certain period of imprisonment it must be presumed that a Magistrate has not power to make an order for such confinement for a longer period than that for which he could order imprisonment."

ORDER.—It was not competent to the Magistrate having once sentenced the accused to 3 months' rigorous imprisonment, to direct that he should be detained in lieu thereof to 14 months in a Reformatory. However having regard to the circumstances of the case, the Court alters the sentence from that of 3 months' rigorous imprisonment to that of 6 months, and that he be detained for the latter period in the Reformatory.

**Criminal Ruling.* Criminal Reference No. 36 of 1876.

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25 July 1876. RESOLUTION IN CHAMBERS.

Sholapur Session Judge's Letter No. 338.*

Criminal Procedure Code (Act X of 1872), Sec. 197—Magistrate—Leave—Committal—Illegality—High Court.

A Magistrate about to go on leave exercises an improper discretion in committing to the Court of Session, a case properly triable by the Magistrate, merely on the ground that the witnesses for the defence are not in attendance, and that it would be inconvenient for his successor to commence the trial anew: but in so doing he does not commit any such illegality as will justify the High Court in quashing the commitment.

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5 October 1876. FULL BENCH.

[*Present*: WESTROPP, C. J., AND MELVILL, KEMBALL & NANABHAI, JJ.]

Reg. v. Appa Mallya.*

High Court—Amended Letters Patent, Sec. 29—Transfer—Criminal appeal.

Under section 29 of the Amended Letters Patent of 28th December 1865, the High Court can transfer for hearing by itself, a criminal appeal filed in a Court of Session.

The accused in this case, applied to the High Court, for transferring to itself his appeal then pending before the Sessions Judge of Kanara. The Sessions Judge in his report also expressed an opinion that as in the previous case, he had formed his opinion about the case, it would be satisfactory to himself and to the appellant if the appeal were transferred from his Court.

The High Court, in transferring the appeal to itself, recorded the following

ORDER.—As it will be necessary for this Court to consider the proceedings in the case of the *Queen* v. *Appa Mallay* for the purpose of determining whether the sanad of Appa Mallay as a pleader should be cancelled or revived it is convenient that, the appeal should be heard by this Court. For this reason and also for the reason stated in the letter from the Sessions Judge of Kanara No. 778 dated 18th August 1876, this Court under the provision of Section 29 of the Letters Patent orders that the hearing of the said appeal be transferred from the Sessions Court of Kanara to this Court.

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5 October 1876. MELVILL & NANABHAI, JJ.

Reg. v. Appa Mallya.†

Fraud—Creditor—Assignment of property—Discharge of debt.

A creditor commits no fraud, who anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor.

**Criminal Ruling.* †Criminal Appeal No. 207 of 1876.

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THIS appeal was, as will be seen, from the preceding case transferred to the High Court, from the Court of Sessions at Kanara.

The appeal came on for hearing before a Bench composed of *Melvill* and *Nanabhai Haridas*, JJ. who delivered the following

JUDGMENT.—The Appellant, Appa Mallya, is a pleader in the Court of the Subordinate Judge at Carwar, and has been convicted under section 207 of the Indian Penal Code, of fraudulently accepting property, intending thereby to prevent it from being taken in satisfaction of a decree of a Court of Justice.

The circumstances of the case are these. The appellant was pleader for one Lakshman in a suit brought against Timapa and another in the Court of the Subordinate Judge at Carwar. A decree was passed in Lakshman's favour on the 26th June 1873, and this decree was assigned by Lakshman to the Appellant by a formal conveyance, executed on the 23rd July 1873. The consideration for the assignment is stated by Lakshman and the Appellant to have been a balance of account amounting to Rs. 400. The prosecution alleges that there was no such debt due by Lakshman to the Appellant, and that the assignment was a mere colorable transaction.

The motive for the transaction is thus stated by the prosecution. One Pandurang had obtained several decrees against Lakshman in the Court of the Subordinate Judge at Belgaum. On or before the 11th July 1873, he applied to the Court of Belgaum for execution of one of these decrees by attachment (as the prosecution allege) of Lakshman's decree against Timapa: and to avoid this execution, the decree was assigned by Lakshman to the appellant, who was to hold it as a trustee for Lakshman.

The *darkhast* presented by Pandurang is not in the case; so that there is no direct evidence that Pandurang asked for the attachment of Lakshman's decree, and not for some other form of relief. This omission is the only fault which we have to find with the proceedings in the case, which has been most carefully and ably tried by the Magistrate, Mr. Ingle. But, assuming that the *darkhast* was for the attachment of the decree, it is certain that, at the date of the assignment to the Appellant Lakshman had received no official notice of Pandurang's application. The assignment was on the 23rd July, and the notice of Pandurang's application was not posted on Lakshman's door at Nandigad until the 22nd July, on which date Lakshman was absent at Karwar. The Magistrate says that "probably they" (Lakshman and the Appellant) "may have received private information." No doubt this is possible, and this is all that can be said. There is indeed the evidence of four witnesses

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(Nos. 2, 5, 8 and 9) who relate certain conversations, which (if the witnesses were believed) would show that Lakshman was aware of Pandurang's application and that he and the appellant were conspiring to defeat it. But the statements of two of these witnesses have been wholly disbelieved by the Magistrate and a third he does not consider altogether reliable. We have no hesitation in rejecting the evidence of all these witnesses as untrustworthy. There is in our opinion no proof that either Lakshman or the appellant knew of Pandurang's application :—though of course Lakshman knew that Pandurang held decree against him, which he might at any time attempt to execute.

But, assuming that Pandurang's application was for an attachment of Lakshman's decree and assuming further that Lakshman and the appellant were both aware of the application, and that the intention of the sale of the decree was to prevent it from being taken in execution by Pandurang, the appellant has still not committed any offence, provided that the sale was a *bona fide* one and in consideration of a debt really due. A creditor commits no fraud, who anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor. If therefore every thing else be assumed in its favour, the prosecution is still bound to show that the sale of the decree was not a real, but a fictitious transaction ; and this amounts to saying that the prosecution is bound to prove that the sum of Rs. 400, which purports to have been the consideration for the sale, was not due by Lakshman to the Appellant.

On this point the prosecution has offered no evidence, and it is of course, difficult to prove a negative. What tells against the appellant is not any evidence that the debt was *not* due, but the very unsatisfactory nature of evidence produced by the appellant to show that the debt *was* due. This evidence consists of a piece of paper (Exhibit I) purporting to be a memorandum of advances made to Lukshman between the 1st December 1870, and the 23rd July 1873, signed from time to time by Lukshman, and showing a final total of Rs. 400, as ascertained on the last mentioned date on the occasion of executing the deed of sale of the decree. We quite agree with the Magistrate that this memorandum is a very suspicious document. It is not likely that a pleader would lend sum of Rs. 100 (for Exhibit I shews two loans of that amount) without taking some better security than an unstamped I. O. U. It is not likely that if Exhibit I had been in existence, it would not have been produced before this criminal trial took place. The appellant brought a civil suit to raise Pandurang's attachment on the decree. In that suit the Subordinate Judge found that the sale of the decree to the appellant was a collusive, and that the

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appellant had not proved that Rs.400 were really due to him by Lakshman: The District Judge in appeal came to the same conclusion. Yet, through the whole course of that suit, although not only his money, but his professional reputation was at stake, the appellant never produced, nor even alluded to the existence of the memorandum Exhibit I. His explanation is that, as the memorandum was unstamped, he could not have appeared it in evidence ; and this is no doubt true. But all that the memorandum required to render it admissible was that one or more adhesive stamps of the value of one anna should be affixed to it. We do not say that the appellant would have been legally justified in affixing such stamps: but we are inclined to think that, if the memorandum had been in existence, he most likely would have done so.

If we had to decide the question raised in the civil suit, *viz.*, whether the appellant had proved the sale to be a *bona fide* one, we should not hesitate to decide that question in the negative. We should say that he ought to be in a position to give satisfactory evidence that Rs. 400 were due to him, and that the only evidence which he offers is most unsatisfactory. But this being a criminal trial, it is not for the accused to prove that the debt was due, but for the prosecution to prove that it was not due: and in the absence of evidence for the prosecution, we cannot uphold the conviction, merely on the ground that we entertain a strong suspicion that the Exhibit I put in by the accused has been fabricated for the purpose of the defence.

The conviction and sentence are reversed.

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16 November 1876. MELVILL & NANABHAI, JJ.

Reg. v. Yeshwant.*

Evidence—Presumption—Rebutting evidence.

It cannot be accepted as a rule of law that any presumption, however weak, is sufficient to sustain the conviction of an accused person, unless such person be able to give direc evidence to rebut such presumption.

JUDGMENT.—In this case the Appellant, who is pleader in the Court of the Subordinate Judge at Melwan, presented on behalf of one Camil De Souza a plaint for the recovery of Rs. 76-3-7 principal and interest due on a bond. The bond was dated 10th April 1873 and became due on the 10th July 1873, so that the period of limitation expired on the 10th July 1876. The plaint however was not presented until the 17th July 1876, and in order to conceal the fact that the suit was barred by limitation; the figures " 10 " were altered into "19" in the bond, and in the plaint

*Criminal Appeal No. 212 of 1876.

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a similar alteration was made in that portion of it which declared the date on which the cause of action arose. In consequence of an oversight however, the date of the bond, as stated in the plaint, was not altered, so that the detection of the forgery was almost inevitable. The case for the prosecution is that the Appellant had procrastinated in bringing the suit (although the bond, and the plaint together with a power of attorney were in his hands before the 10th July) because the defendant was one Moro, a brother Vakil. The defence of the Appellant is that the bond, the plaint and the power of attorney, did not reach him until the 17th July, and that he immediately presented the plaint, without having carefully examined it, or detected the alterations which had been made in the plaint and in the bond. This statement of the appellant receives strong support from a letter, Exhibit 33, which both the Session Judge and the Assessors have found to have been written by one Ganesh, an active witness for the prosecution. If this letter was written, as the Assessors believe, on the date which it purports to bear, the case against the Appellant necessarily falls to the ground; and it appears to this Court that the Session Judge's hypothesis that a false date was inserted in the letter, has no sufficient basis. It is not however necessary to lay any great stress upon this point. The evidence for the prosecution has been discredited by the Assessors who have given a very careful and intelligent consideration to the case and in his appreciation of the evidence the Session Judge has not materially differed from the Assessors. The Session Judge says—" a comparison of the Assessors' opinion with my Judgment will, I think, show that the difference arises from the requirements of the law as to the burden of proof, and not because I have not accepted their appreciation of the evidence." The Session Judge therefore would have concurred with the Assessors in acquitting the appellant if it had not been that he considered that the burden of proving his innocence lay upon the appellant and that he had failed to discharge himself of that burden. It is not therefore necessary for this Court to consider the evidence in detail, and the only question for consideration is whether the circumstances of the case raised such a presumption of guilt that, in the absence of any other reliable evidence of his guilt, the appellant ought to have been convicted. The judgment of the Session Judge upon this point is founded upon sections 106 and 114 of the Indian Evidence Act. Section 106 says,—" when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." Section 114 is as follows—" The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in

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their relation to the facts of the particular case." The facts which the Session Judge considers to have been especially within the knowledge of the Appellant is the fact that he presented the bond and the plaint without having carefully examined them. But it is manifest that this is a fact of which it would be almost impossible for the appellant to give any evidence. The presumption on which the Session Judge has acted, as arising under section 114 of the Evidence Act, is the presumption that a pleader would not be likely to present a plaint without having carefully perused it and compared it with the document on which it was founded. This is no doubt a legitimate presumption, but a presumption may be strong or weak, and it may be balanced or outweighed by other presumption equally strong or stronger; and it cannot be accepted as a rule of law that any presumption, however weak, is sufficient to sustain the conviction of an accused person, unless such person be able to give direct evidence to rebut such presumption. It may no doubt be said that it is the duty of a pleader carefully to examine all applications presented by him in Court, and it may fairly be presumed that a pleader will generally do so. But it is manifest that the strength of such a presumption depends upon many considerations. A pleader in large practice must leave a good deal to his clerk, and he will be likely to scrutinise documents prepared for his signature by his clerk with a greater or less degree of care, according as he has greater or less confidence in the honesty and accuracy of his clerk. Again the necessity of a careful personal scrunity of a plaint will depend very much on the nature of the plaint. In a suit of a complicated nature it would be strange if the pleadings were not drawn, or at least carefully examined by the pleader himself:—but in a suit on a mere money bond, or promissory note in which the plaint is drawn in a stereotyped form, a pleader might, without being liable to any imputation of great carelessness, trust an experienced subordinate to make the necessary entry of dates and other formal matters: still more, if the pleader had previously examined the plaint (as he may well have done in the present case) and found it correct, when it was sent for the signature of the plaintiff, may he have signed and presented it without further examination when it was returned to him with the signature of the plaintiff attached. Looking to the nature of the plaint in this case and to the manner in which the alterations have been made, it appears to this Court, that the presumption that the Appellant must have examined the plaint and the bond before he presented them, and that he could not have failed to detect the alterations, is not in itself a very strong presumption. On the other hand there are counter-presumptions equally coming within the scope of section 114 of the Evidence Act, which appear to

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this Court much more weighty than that on which the Session Judge has acted. It is a presumption from the common course of human conduct that a man will not without adequate motive expose himself to the risk of disgrace and ruin. The theory of the prosecution is that the appellant acting as a Camil De Souza's legal adviser, had interposed every possible delay the way of bringing a suit against Moro, (and this, in spite of De Souza's urgent remonstrances) because Moro was a brother Vakil. There is no evidence whatever that the accused and Moro were on such intimately friendly terms that the appellant would be likely to take any special pains to enable Moro to evade payment of his debts: and it seems very unlikely that the accused should, merely because Moro was a member of the same profession as himself, have run the risk of disgusting such and old and profitable client of his own, as De Souza is shown to have been, and for whom he was actually at the time professionally engaged in several other suits. And again, supposing that through his procrastination and carelessness (for it is not suggested that it was done wilfully) the Appellant had allowed the period of limitation to elapse, it seems in the highest degree improbable that he should have attempted to repair his error by perpetrating such a fraud as that of which he has been convicted. If he had done nothing, then at the worst nothing more could have happened to him than to be called upon to pay to De Souza the very trifling amount due to him by Moro. On the other hand if he attempted to palm off upon the Court a clumsily forged document, he was almost certain to be detected and the consequences to himself would be absolutely ruinous. The forgery is, as the Session Judge observes, of a very manifest kind, care not having been taken to alter the date of the bond, as stated in the plaint, so as to make it correspond with the fraudulent alteration in the bond and in another part of the plaint. The Session Judge says:—"what weighs with me most in this case is what appears to me to be the extreme improbability of a person like Camil De Souza attempting to play such a trick as the defence theory supposes upon an intelligent and experienced Vakil". But surely there is a still more extreme improbability in a person like the appellant attempting to play such a trick as the prosecution theory supposes on an intelligent and experienced Judge, who would be assisted in discovering the trick by an intelligent and experienced Vakil, who, as being himself defendant in the suit, would be personally interested in exposing the fraud.

On the whole it appears to this Court that the Assessors were right in acquitting the appellant. *Prima facie* the probability that the fraud was perpetrated by Camil De Souza, or one of his clerks, is much greater

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than that it was perpetrated by the appellant. The letter Exhibit 33 is strongly in favour of the appellant. The rest of the evidence was in the opinion of the Session Judge as well as of the Assessors, wholly insufficient for conviction. The legal presumption on which the Session Judge has almost exclusively acted, is in itself very weak, and is, in the opinion of this Court, rebutted by counter presumptions similar in kind and very much more weighty.

The conviction and sentence must be reversed.

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20 November 1876. MELVILL & NANABHAI, JJ.

Reg. v. Isub Musa.*

Penal Code (Act XLV of 1860), Sec. 21 (9)—Broach Thakurs' Relief Act (XV of 1872)—Manager—Karkoon—Public servant.

A Karkun employed to execute revenue-processes and receive rents by a manager appointed under the Broach Thakurs' Relief Act is a public servant within the meaning of section 21 (9) of the Indian Penal Code, as such Karkun receives rents not only on behalf of the Thakur but also on behalf of Government.

ORDER.—A manager appointed under Act XV of 1871 has the same powers as a Collector for the purpose of realising and recovering the rents and profits of a Thakore's estate (section 17). The Government Revenue is a first charge upon the rents and profits so recovered (section 5). The Court thinks that a Karkun employed by the Manager to execute revenue process and to receive rents not only on behalf of the Thakore, but also on behalf of Government comes within the definition of a public servant contained in section 21, clause 9 of the Indian Penal Code. The Court accordingly reverses the order of the District Magistrate and restores the conviction and sentence passed by the 2nd Class Magistrate.

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21 November 1876. MELVILL & NANABHAI, JJ.

Reg. v. Gopala.†

Penal Code (Act XLV of 1860), Sec. 75—Previous conviction—Sentence.

The accused having been previously convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, was subsequently convicted of an offence under one of these chapters punishable with imprisonment which may extend to three years :—

Held, that a sentence of ten years' transportation is an illegal one. Under section 75 of the Indian Penal Code the accused may be transported for life but he cannot be imprisoned for a longer period than six years.

**Criminal Ruling.* Criminal Appeal No. 110 of 1876.

†*Criminal Ruling.* Criminal Review No. 186 of 1876; Criminal appeal No. 210 of 1876.

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THE accused in this case was charged under section 411, Indian Penal Code, with having dishonestly received stolen property, and under section 414 of the Code with assisting in concealment of stolen property. The accused having been previously convicted of theft on 17th October 1865 and again of house-breaking by night on the 18th February 1873, was in this case sentenced "in consideration of previous convictions of offences punishable under Chapter XVII of the Indian Penal Code" to be transported for ten years, the sentence of transportation being awarded in place of rigorous imprisonment under sections 59-75 of the Indian Penal Code.

ORDER.—The sentence is illegal under section 75 of the Indian Penal Code: the prisoner might have been transported for life, but not for a shorter term, nor for imprisonment, for more than six years, being double the amount of punishment to which he was liable under section 414 of the Indian Penal Code.

The offence in this case is not a serious one, and was committed previously to the last conviction, under which the prisoner is already undergoing a sentence of 5 years' imprisonment. The Court therefore reduces the sentence to one of two years' rigorous imprisonment.

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21 November 1876. MELVILL & NANABHAI, JJ.

Reg. v. Dhondi.*

Criminal Procedure Code (Act X of 1872), Sec. 468—Bombay Act II of 1866—Mamlatdar's Court—Collector's Court—Sanction.

The Collector's Court having been abolished since the passing of Bombay Act II of 1866, and the Mamlatdars having thereby, for the purposes of Bombay Act V of 1864, ceased to be subordinate to the Collector, the sanction of the Collector is not sufficient to authorize the prosecution of a person for having intentionally given false evidence before a Mamlatdar in a suit under Bombay Act V of 1864.

ORDER.—In this case the sanction to the prosecution was given by the Collector. Since the passing of Bombay Act II of 1866 the Collector's Court has been abolished, and a Mamlatdar's Court has ceased to be subordinate to the Collector. A sanction for prosecution under section 468 of the Code of Criminal Procedure must be given by the Court before which the offence was committed or by some other Court to which such Court is subordinate. It follows that the sanction of the Collector was not sufficient to authorize the prosecution. The conviction and sentence are accordingly annulled.

**Criminal Ruling.* Criminal Review No. 188 of 1876.

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1877.

31 January 1877. MELVILL & KEMBALL, JJ.

Queen-Empress v. Kushya.* Queen-Empress v. Vithalbhat.*

Criminal Procedure Code (Act X of 1872), Sec. 349—Tender of pardon—Breach of conditions—Trial.

The accused accepted the tender of a pardon from the committing Magistrate, and gave evidence before the Sessions Court; but as the Sessions Judge and assessors considered that he had wilfully concealed essential facts, the Sessions Judge at once ordered him to be placed in the dock and convicted him on his own plea of guilty:—

Held, that the conviction was illegal and must be quashed, as the Sessions Judge was not competent to take cognizance of the offence without a commitment as directed under section 349 of the Criminal Procedure Code.

JUDGMENT.—We think that the convictions in this case cannot be sustained.

We will deal first with the case of Vithalbhat Prisoner No. 6. He received a pardon from the committing Magistrate, and gave evidence before the Session Court; but as the Session Judge and Assessors considered that he had wilfully concealed essential facts, the Session Judge at once ordered him to be placed in the dock, and convicted him on his plea of guilty. The Session Judge has quoted section 349 of the Criminal Procedure Code as his authority for this procedure, but it is clear that under section 349 the Session Court ought to have ordered Vithalbhat's committal by a Magistrate, and that without such committal it was not competent to the Court to take cognizance of any offence committed by Vithalbhat (section 231). On this ground alone it is necessary to quash the conviction of Vithalbhat. But we will go further and say that in our opinion there was no sufficient ground for withdrawing the pardon given to Vithalbhat. The deposition made by Vithalbhat on the 8th September, agreed with his deposition before the committing Magistrate, which the Magistrate must have considered to be a sufficient compliance with the conditions of pardon. In that deposition Vithalbhat admitted that he had affixed his signature as an attesting witness on a bond which he knew to be fabricated. He says that he did this at the request of the obligee Prisoner No. 1. This appears probable enough, and there would seem to be no *a priori* reason for saying that an attesting witness must necessarily have come into communication with any person connected with the fabrication of the bond except the obligee. On the 9th September the Session Judge proceeded to put what we must consider a rather undue pressure on Vithalbhat. The Session Judge said to him "you have only given evidence about yourself; you have not stated anything worth hearing about the accused." Under this pressure

*Criminal Ruling. Criminal Appeals Nos. 242 and 260 of 1876.

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Vithalbhat gave evidence that he had heard the other prisoners admit their share in the forgery. This evidence is not very probable; and we are inclined to think that Vithalbhat stated more and not less than he knew. It certainly appears to us the Sessions Court had no sufficient ground for saying that Vithalbhat had wilfully concealed anything essential, we think that the withdrawal of the pardon which had been granted to him was not justified.

The immediate effect of quashing the conviction against Vithalbhat is that the deposition given by him becomes admissible as evidence against the other prisoners. But so viewed, it is the evidence of an accomplice and requires corroboration. Now the only direct evidence in the case, that of witnesses 9, 10, and 11 has been entirely disbelieved, and, as we think, very properly disbelieved by the Session Judge and the Assessors. The evidence of witness No. 12 appears to us equally worthless. What the Session Judge has relied upon is certain inferences unfavourable to the prisoners which he has drawn from the circumstances of the case. The Session Judge thinks that it is improbable that prisoner No. 2 should have executed a mortgage to prisoner No. 1 on the 25th May 1863, when he had already mortgaged the same property to Narayan on the 12th February 1863. We do not think that this inference is entitled to much weight. Concealment of a prior mortgage from a puisne mortgage is unfortunately but too common, and it is clear from the conduct of prisoner No. 2 in executing a mortgage (Exhibit 24) of his property at a time when he had ceased to have any interest in it, that he is not very particular in such matters. Again the Session Judge lays great stress on the circumstance that in the course of certain proceedings taken by prisoner No. 2, to set aside the Court sale of the property in 1873, nothing was said by prisoner No. 2, nor by the father of prisoner No. 1, who gave evidence in the case, regarding the existence of a mortgage in favour of prisoner No. 1. But it must be remembered that the object of prisoner No. 2, in those proceedings was to show that the property had been sold at an undervalue, and it would not have served that purpose to show that the property was burdened with a mortgage. There was no immediate necessity for putting forward the mortgage, which, if genuine, was not imperilled by an auction sale of the right, title and interest of the mortgagor. There are no doubt certain circumstances which throw considerable suspicion on the bond Exhibit 5, which is alleged to have been forged. It is unlikely that prisoner No. 2 should have bought a stamp of 8 annas from his father. It is suspicious that the writer of the endorsement, transferring the stamp paper, should have first written the figure 7 instead of 6 in the date 1863. Such a slip of the pen would be much more likely to occur, if

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the writer were writing in 1873 than if he were writing in 1863. It is also strange that prisoner No. 1 should have brought no suit against his mortgagor until 1875—these circumstances create great suspicion as to the genuineness of Exhibit 5; but we do not think that we should be justified, merely, on such suspicion, and on the evidence of an accomplice which, so far at least as it affects all the prisoners except the first, is for a reason which we have already stated, even more unreliable than the evidence of accomplices ordinarily is, in upholding the convictions and sentences which have been recorded against the prisoners.

These convictions and sentences are accordingly reversed and it is ordered that the prisoners be discharged.

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15 March 1877. RESOLUTION IN CHAMBERS.

Kaladgi Magistrate's Letter No. 597.*

Criminal Procedure Code (Act X of 1872), Sec. 215, Exp. 3.—Accused—Discharge.

Explanation 3 of section 215 of the Code of Criminal Procedure does not prevent the discharge of an accused person, if all the witnesses named for the prosecution, who are forthcoming and accessible, have been examined.

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21 March 1877. RESOLUTION IN CHAMBERS.

Ratnagiri Magistrate's Letter No. 675.*

Criminal Procedure Code (Act X of 1872), Sec. 125—Police officer—Bail—Magistrate—Prima facie case—Committal—Re-arrest.

A Police officer reports for the orders of a Magistrate a nonbailable case under section 125 of the Code of Criminal Procedure, admitting the accused to bail, there not being in the Police officer's opinion sufficient evidence to justify the immediate transmission of the accused to the Magistrate. The Magistrate, however, considers that the evidence does establish a *prima facie* case, and he, accordingly, orders its committal to him:—

Resolved, that the admission to bail by the Police under section 125 of the Code being a purely provisional arrangement, when the Magistrate determines that there is a *prima facie* case of a non-bailable offence, he should be re-arrested and forwarded to the Magistrate in custody.

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31 March 1877. RESOLUTION IN CHAMBERS.

Thana Magistrate's Letter No. 767.*

Criminal Procedure Code (Act X of 1872), Sec. 122—Confession—Accused—Magistrate.

A Magistrate is not debarred from recording the confession of an accused person under section 122 of the Code of Criminal Procedure by the circumstance that it may afterwards be that Magistrate's duty to hold a preliminary inquiry under Chapter XV of the Code.

*Criminal Ruling.

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5 April 1877. KEMBALL & NANABHAI, JJ.

Queen-Empress v. Bhow.†

Penal Code (Act XLV of 1860), Sec. 440—Trespass—Compound.

When a person unauthorizedly enters the compound of a house, he commits the offence of criminal trespass and not of house-trespass.

ORDER.—The Court remits the remaining portion of the sentence in this case for the "brief statement of reasons" does not show any necessity for so severe a sentence. The Court observes from the "Extract from the Criminal Monthly Return" vide abstract in col. 7—that the *house* of the complainant is said to have been entered; whereas in "Extract in the Register" a copy of which is now submitted it appears that the *compound* only of the complainant is entered. If the latter statement is correct the conviction should have been under section 440 of the Indian Penal Code of criminal trespass and not of house-trespass and the criminal return has been carelessly prepared.

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26 April 1877. KEMBALL & NANABHAI, JJ.

Queen-Empress v. Dhira.*

Offence—Nature—State of mind Prisoner—Commission of the act.

The character of an offence is determined by the state of the prisoner's mind at the time of the commission of the offence. Where, therefore, grave and sudden provocation is pleaded in a case of murder, the question that the Court has to decide is whether between the cause of the grave and sudden provocation and the dealing of the fatal blow, there was time for the blood to cool and for reason to resume its seat.

ORDER.—The Court is not clear that the view taken of this case by the Assessors is wrong. That there was some provocation cannot be doubted. It was caused in the first instance by the deceased going at night to the field of the prisoner and enticing away his wife from her bed. This would appear to have been done by him in defiance of frequent previous remonstrances and warnings by the prisoner. To punish this persistent disturber of his domestic happiness, and, it may be presumed, to bring back his wife, the prisoner followed him on the night in question; but before he could overtake him, and, for any thing appearing to the contrary, before his rage had subsided, a fresh and a still greater provocation was caused to him by the deceased's illicit intercourse with his wife so enticed away. That this additional provocation was "grave" is found by the Session Judge and the Assessors, and, the Court thinks very properly.

The next question to consider is whether the provocation was sudden as well as grave. The distance between the prisoner's bed in his field and

†Criminal Review No. 44 of 1877. *Criminal Appeal No. 51 of 1877.

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the place where the adultery took place does not appear to have been accurately ascertained, nor what time it took the prisoner to reach that place; but it is clear, beyond all doubt, that no time whatever elapsed between the act (adultery), which caused the fresh provocation and the consequent blow which proved fatal. When overtaken, the deceased was detected by the prisoner in the act of committing adultery with his wife, and was instantly killed by him in such act. Can it be said that between such acts—the cause of the grave provocation and the fatal blow—there was "time for the blood to cool and for reason to resume its seat?" The Court thinks not; and it does not seem that the provocation in the case was sought or voluntarily invited by the prisoner. The Court is, therefore, disposed to agree with Assessors, and hold that the offence committed by the prisoner was culpable homicide not amounting to murder. It is the state of the prisoner's mind at the time of the assault which determines the character of the offence. The law makes allowance for human frailties. If death had not resulted, but grievous hurt, section 335 and 325 of the Indian Penal Code would have applied.

The Court therefore alters the finding to one of culpable homicide not amounting to murder under section 304 of the Indian Penal Code, and directs that the prisoner Dhira Baji be rigorously imprisoned for a term of five years.

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26 April 1877. KEMBALL & NANABHAI, JJ.

Queen-Empress v. Muggan.*

Railway Act (Act XVIII of 1854)—Return ticket—Transfer—Attempt.

The act of buying an un-used half of return ticket does not in itself amount to an attempt to travel within the meaning of the Indian Railways Act, 1854.

THE accused was convicted under section 3 of Act XVIII of 1854, and sections 107 and 108 of the Indian Penal Code, of abetment of attempting to defraud railway company, in that he abetted one Girdhar Chhagan in the commission of the offence of defrauding the B. B. & C. I. Railway Company by selling him a "return ticket" which was not transferrable.

ORDER.—The accused No. 2 Girdhar Chhagan (who has absconded) neither travelled nor attempted to travel so far as can be seen from the evidence, so that assuming, for the sake of argument, that travelling upon a Railway with the half of a ticket purchased from some one who had obtained it from the company is an offence within the meaning of section 3 of Act XVIII of 1854, it is clear the offence styled "the abetment of attempting to defraud the Railway," was not established. The Court will therefore quash the conviction and sentence and direct the fine to be refunded.

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*Criminal Review No. 54 of 1877

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The act of buying a ticket does not in itself amount to an attempt to travel, setting aside altogether the more important question, which therefore does not arise here, for determination whether it is a fraud in A to travel with a ticket purchased by B—albeit the words "not transferable" are printed thereon.

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29 May 1877. WEST, J.

Kaladgi Magistrates' Quarterly Return.*

Extradition Act (XI of 1872)—Accused—Proceedings in Native States—British territory—Keeping the accused in custody.

A British Magistrate is not warranted in keeping people in custody on a mere allegation that criminal proceedings against them are pending in a foreign State. Unless proper steps be taken against the persons detained under the Extradition Act, they must be released.

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7 June 1877. MELVILL & KEMBALL, JJ.

Queen-Empress v. Bhikaiji.†

Penal Code (Act XLV of 1860), Sec. 182—Information—Criminal Procedure Code (Act X of 1872), Sec. 119—Statement—Magistrate—Evidence—Judgment.

A statement made under section 119 of the Code of Criminal Procedure is included in the word "information" as used in section 182 of the Indian Penal Code.

A Magistrate after having heard all the evidence in a case, cannot postpone it for judgment by his successor in office, on the same materials; but must pass the judgment himself.

THE accused Bhikhaee was charged under section 182 of the Indian Penal Code with having given false information to the Chief Constable, knowing that such false information would be likely to cause him to consider the charge (of theft) he was investigating against the accused (in the theft case of Goolab) proved and cause him to send them up for trial. The woman Bhikhaee stated in her evidence before the Faouzdar that she had not given the articles the accused Goolab was charged with stealing, to him, whereas at the trial before the Sub-Magistrate she allowed that she had given them to him, and that therefore he had stolen them.

The Sub-Magistrate took all the evidence against Bhikhaee and closed the case on the 26th September; writing on the record that he would give his decision on the 30th September. On the 30th September he again postponed giving his decision until the 10th October, knowing that he would before that date have given over charge of his office, and that another Magistrate would have to dispose of the case.

On the 13th October 1876, the new third class Subordinate Magistrate passed final decision in the case. He decided that as the woman Bhikhaee had not given the original information of the theft to the police,

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*Criminal Ruling. †Criminal Reference No. 171 of 1877.

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but only give her information as evidence in support of the complaint, her evidence could not be looked upon as information within the meaning of the term as used in section 182 and on that ground acquitted her.

The District Magistrate of Surat, thereupon, made this reference to the High Court observing—"There appear to be two grounds of objection to the soundness of these proceedings. 1st. The Sub-Magistrate who passed this sentence of acquittal did so on proceedings recorded by another Magistrate, not being empowered by law to do so (section 34 (1), Criminal Procedure Code). 2nd. That evidence given before the police in support of any complaint made by another person is information within the meaning of the term used in section 182 of the Penal Code; and that Bhikhaee has, therefore, been illegally acquitted."

ORDER.—The Court is of opinion that section 34, clause 1 of the Criminal Procedure Code has no application to the present case as the District Magistrate will himself see on referring to section 45 of that Code. The order of Rao Saheb Pragji Anandram is however void by reason of his judgment being based on evidence wholly recorded by another Magistrate: his proceedings are therefore quashed and he is directed to try the case *de novo* and pass a fresh decision. It is observed that the District Magistrate speaks of Rao Saheb Pragji Anandram as 3rd class Subordinate Magistrate whereas he has 2nd class Magisterial powers.

2. In referring the case the District Magistrate notices that the Subordinate Magistrate Rao Saheb Vaghjibhai Mithabhai "took all the evidence against Bhikbai and closed the case on the 26th September; writing on the record that he would give his decision on the 30th September; on the 30th he again postponed giving his decision until the 10th October, knowing that he would before that date have given over charge of his office and that another Magistrate would have to dispose of the case." But he makes no mention of the report which it seems from the proceedings sent up, was called for from Rao Saheb Vaghjibhai through the District Magistrate of Broach. He should have done this, and submitted at the same time a translation of the report.

3. On a perusal, however, of this report, it appears to the Court that Rao Saheb Vaghjibhai misses the point he was required to explain. Mr. Pratt is therefore requested to call on him through the District Magistrate of Broach to explain why he on the 30th September postponed giving decision of the case which had been quite concluded to the 10th October, knowing at the time of the postponement that on that day he would not be at Bulsar and could not give any decision.

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4. It is requested that in re-submitting the case translations of both the reports be submitted and that in future translations of such documents should always be forwarded.

Upon the receiving of the report from Rao Saheb Vaghjibhai called for in the foregoing order the High Court recorded the following further

ORDER.—Mr. Waghji Mithabhai should be informed that the Court does not consider his explanation at all satisfactory. Having taken the evidence in the case he was bound to decide it before he left Bulsar and there appears to have been nothing whatever to prevent him from doing so.

The accused person has now been retried and acquitted, the Subordinate Magistrate being of opinion that she had no such intention as is necessary to constitute an offence under section 182 of the Indian Penal Code. This is a finding of fact and therefore this Court cannot question the propriety of the acquittal. This Court, however, agrees with the District Magistrate in thinking that the statement made under section 119 of the Code of Criminal Procedure would be included in the word "information" used in section 182 of the Indian Penal Code.

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7 June 1877 MELVILL & KEMBALL, JJ.

Queen-Empress v. Hari.†

Penal Code (Act XLV of 1860), Secs. 285, 436—Wilful act—Rash and negligent act.

Section 285 of the Indian Penal Code is not applicable where the act of the accused is wilful and not rash or negligent.

THE accused was convicted under section 285, Indian Penal Code, of dealing with fire so as to endanger human life, in that he had a quarrel with his wife Gunga about some rice, got angry, broke the crockery and then went out and set fire to the eaves of his house, thereby causing risk of injury to house-owners in the neighbourhood but doing no actual mischief.

ORDER.—Section 285 of the Indian Penal Code is not applicable as the prisoner's act was wilful and not rash and negligent. If any applied it would appear to be section 436 of the Indian Penal Code. Return Record and Proceedings.

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12 June 1877. RESOLUTION IN CHAMBERS.

Ahmedabad Magistrate's Endorsement No. 768.*

Criminal Procedure Code (Act X of 1872), Secs, 509—Security for keeping peace—Recognizance for personal appearance—Court Fees Act (VII of 1870), Sec. 19.

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†Criminal Review No. 81 of 1877. **Criminal Ruling.*

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Having regard to sections 489, 490, 500 and 504 of the Code of Criminal Procedure, when taken in combination with Forms E and G of Schedule II. of the same Code, bonds given by the person, under section 509 of the Code whose keeping of the peace or whose good conduct is stipulated for, are exempted from any Court Fee by section 19, article XV of Act VII of 1870, which mentions "recognizances for personal appearance *or otherwise*" as not chargeable with any fee. But the bonds given by sureties for the person whose keeping of the peace or good conduct is guaranteed by them, are not either bail bonds or recognizances, and are not so exempted, but are chargeable with an eight-anna fee under Schedule II, Article 6 of the same Act as they fall within the words "Other instrument of obligation not otherwise provided for by this Act when given by the direction of any Court or executive authority."

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20 June 1877. WEST & PINHEY, JJ.

Queen-Empress v. Shivgod.*

Prosecution—Probabilities—Doubt—Benefit of doubt—Accused.

Where the probabilities in favour of the prosecution outweigh those in favour of the defence, but looking to all the circumstances there remains a reasonable doubt in favour of the accused, the accused must get the benefit of that doubt.

PER CURIAM.—We are of opinion that there is considerable force in the observation of the Session Judge that greater weight should be attached to the first statement made by the deceased Punya Natha with reference to the injuries which he suffered, and which led to his death than the statement made by him in the hospital after he may have been subjected to other influences. We cannot help seeing the circumstances which should have rendered it likely that the deceased was tampered with and induced by the machinations of interested people to withdraw the true statement and make a false one instead.

But then the question arises was the first statement true? The solution of it involves us in considerable difficulty for when we examine it and compare the description given by him of the assault committed by the accused Shivgod we are unable to reconcile it with the evidence given by the witnesses for the prosecution. Looking at the matter from any point of view Punya's statement cannot be relied upon. We are consequently left to the evidence of those witnesses who say they saw the occurrences at Varna coupled with Punya's own statement, which, notwithstanding our inability to believe it, cannot altogether be put out of account. Naturally of course Punya is the person who should be able to give the fullest description of the assault. Now we find that at first he names two witnesses and mentions besides that no one else was present. If then we find that a great many persons come forward and give what is substantially the same account of the transaction we feel some misgiving as to whether what some of them say is not said from what others communicated or inspired. These witnesses belong to the same class; and then there can be no doubt

*Criminal appeal No. 116 of 1877.

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that there had been a serious quarrel between them and the accused's brother Nasir. These circumstances might not in every place be sufficient to cast discredit upon their testimony to the extent of inducing the Judge who has to weigh it to upset the conviction based upon it. But experience has taught us that in Guzerat witnesses run like sheep after their leader or combine too frequently under the influence of friendship or enmity to pervert the truth.

The Hospital Assistant's testimony does not add credit to the testimony of these people who say they were eye-witnesses to the assault. He is a foreigner in Guzerat and from an imperfect knowledge of their language may perhaps have been led into some mistakes; but he is quite disinterested and we are bound to attach a certain amount of credence to his evidence which is free from suspicion of bias or favor. The assessors their own countrymen who are in the best position to weigh the testimony of the Bharwad witnesses do not believe it. Notwithstanding therefore that we consider this case to be one of strong suspicion and notwithstanding moreover, that if we had been satisfied of the exercise of a tyrannical act of oppression by a Durbar servant against poor ryots we should have been specially anxious to visit the act with condign punishment, we do not think we are at liberty to depart from general principles and uphold the conviction. This is a case in which the probabilities in favor of the prosecution outweigh those in favor of the defence, but looking to all the circumstances there remains a reasonable doubt in favor of the accused of which we think he must have the benefit.

We arrive at this conclusion not without hesitation and reluctance but adherence to general principles is more important than irregular attempts to secure practical justice or what might seem to be justice in an individual case.

For these reasons we must reverse the conviction and sentence passed upon the accused and order his discharge.

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26 June 1877. West J.

Reg. v. Padmanabha.*

Criminal Procedure Code (Act X of 1872), Secs. 278, 294, 295—Proceedings—Copies—Originals.

No Court is at liberty to part with its judicial record except when called for by an Appellant Court or on the demand of a superior Court under section 294 or section 295 of the Code of Criminal Procedure. They must be retained in order to meet the contingency of such legal requisitions being made. For the purposes of any reference or report to the Executive Government copies of proceedings are sufficient, but for purpose of appeal to, or revision by, superior Courts the originals are indispensable.

**Criminal Ruling.*

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26 July 1877. WEST & PINHEY, JJ.

Reference No. 62 of 1877.*

Criminal Procedure Code (Act X of 1872), Secs. 518, 520, 527—First Class Magistrate—Order under section 516—Judicial proceeding—District Magistrate—Interference—Reference.

An order passed by a First Class Magistrate under section 518 of the Code of Criminal Procedure being, under section 520 of the Code not a judicial proceeding, the District Magistrate cannot refer it to the High Court, but he is at liberty to deal with it in his executive capacity.

ORDER.—The order of the Magistrate Mr. Thakur in this case having been issued under section 518 of the Criminal Procedure Code is not, according to section 520, a judicial proceeding. It is only the "record of any Court subordinate" to his own that a Magistrate of the District can refer to the High Court under section 297. The Court cannot therefore pass any order on the present reference and the papers must be returned.

Proceedings under sections 518, 519 being expressly declared not to be judicial are executive. By section 37 all other Magistrates in a district are made subordinate to the Magistrate of a district. "Subordinate" means "subject to his control" which control is to be exercised in executive administration according to the discretion of the officer invested with it. The mere fact that this discretion is to be exercised carefully and on due enquiry does not make the function in any way judicial as may be seen from the distinction taken by *Blackburn*, J. in *Reg.* v. *Price* (1). The essence of a judicial proceeding is a declaration of the law on the particular case which has to be arrived at as decision of certain legal relations "*est enim judiciam lex ad factum singulare aplata*" (Grotues de pure Praedae, c. 11). The essence of an executive proceeding is an act to be done under such and such circumstances and inquired into when necessary with a view to determine whether in the particular case they call for or justify some particular.

This distinction being borne in mind the cases in which the superior may departmentally over-ride the orders of his subordinate are easily discriminated from those in which a judicial review is necessary. In the present instance the District Magistrate appears to have authority to do what in his opinion is required.

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27 August 1877. MELVILL & PINHEY, JJ.

Queen-Empress v. Genya.†

Penal Code (Act XLV of 1860), Secs. 428, 379—Mischief—Theft—Bullock.

Where a person steals a bullock and then kills it, he can only be convicted of theft under section 379 of the Indian Penal Code and not to mischief also under section 428 of the Code.

**Criminal Ruling.* (1) L. R., 6 Q. B., 418. †Criminal Reference No. 74 of 1877.

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THE accused was convicted 1st of theft in having stolen a bullock, and 2nd of mischief, in having subsequently killed the animal, and was sentenced separately for each offence. The Sessions Judge of Ahmednagar, referred the case to the High Court, remarking "I am of opinion that the second act of killing the bullock after the accused person had acquired possession of it though unlawfully, does not constitute an offence punishable after the offender has been convicted and punished for the theft.

ORDER.—The prisoner ought not to have been convicted of mischief in respect of a bullock which he had been convicted of stealing.

The Court therefore reverses the conviction and sentence under section 428 of the Indian Penal Code but enhances the sentence under section 379 of the Indian Penal Code to six months' rigorous imprisonment.

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30 August 1877. MELVILL & PINHEY, JJ.

Queen-Empress v. Lakshman.*

Criminal Procedure Code (Act X of 1872), Sec. 46—Reference—District Magistrate—New trial.

When the proceedings of a case are submitted, under section 46 of the Code of Criminal Procedure, to the Magistrate of the District, he is bound to pass such judgment, sentence, or order in the case as he deems proper, and as is according to law. He has no power to order a new trial by the Court of Session, or any other Court; unless he considers that an offence has been committed which was not within the jurisdiction of the Magistrate before whom the trial is held.

THE accused Lakshman was found guilty by the Magistrate 2nd class of theft, under section 380, Indian Penal Code, and as he had been previously on four different occasions convicted of theft and house-breaking and sentenced to imprisonment for terms of one year and shorter periods, the Magistrate 2nd class thinking that Lakshman ought to receive a more severe sentence than he was competent to adjudge, after finding Lakshman guilty, referred his proceedings to the Magistrate of the District under section 46, Criminal Procedure Code.

On the case coming up before the Magistrate of the District, that Officer instead of passing such judgment, sentence or order as he deemed to be proper, subject to the provisions of section 20, Criminal Procedure Code, quashed the conviction of the Magistrate 2nd Class by committing Lakshman for trial before the Court of Sessions on a charge under sections 380 and 75, Indian Penal Code.

The Sessions Judge of Belgaum made this reference to the High Court, observing—" On the authority of *Bhikari Malik* (10 W. R. 50), the Court is of opinion that the committal by the Magistrate of the

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**Criminal Ruling.* Criminal Reference No. 80 of 1877.

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District is without jurisdiction. Not only so, but that the prisoner Lakshman would be prejudiced if he was to be tried by the Court of Session, which would be in a position to pass a more severe sentence than the Magistrate of the District could have adjudged."

ORDER.—The District Magistrate had no power to order a new trial by the Session Court or any other Court, as the prisoner had been legally convicted, and that conviction remained in force. The commitment must be quashed, and the District Magistrate must be directed to pass sentence for the offence of which the prisoner has been convicted, or which in the judgment of the District Magistrate he may have committed. It is clear that the District Magistrate does not consider that an offence has been committed which was not within the jurisdiction of the 2nd class Magistrate and he cannot therefore disturb the conviction.

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6 September 1877. WEST & PINHEY, JJ.

Queen-Empress v. Tharekhan.*

Criminal Procedure Code (Act X of 1872), Secs. 278, 279—Penal Code (XLV of 1860,) Sec. 411—Whipping Act (VI of 1864), Sec. 2—District Magistrate—Appeal—Sentence.

A Second Class Magistrate convicted an accused person of an offence punishable under section 411 of the Indian Penal Code, and sentenced him to a fine of Rs. 50 or in default to suffer 45 days' rigorous imprisonment. On appeal, the District Magistrate altered the sentence to one of 50 lashes in lieu of the term of imprisonment which the accused had yet to undergo in default of the payment of the fine :—

Held, that it was competent to the Magistrate of the District to so alter the sentence notwithstanding that the appellant had, as a matter of fact, been some days in confinement; but in making the alteration, the sentence of whipping should have been substituted for that passed by the Second Class Magistrate and not for the remaining term of imprisonment.

ORDER.—The prisoner by appealing subjected himself to the risk, should the District Magistrate admit his appeal under section 278 of the Criminal Procedure Code to an alteration of the sentence under section 279 even though that alteration should involve an enhanced punishment. It being within the competance of the District Magistrate thus to alter the sentence the fact that the prisoner had been some days in confinement in default of payment of the fine, did not deprive the District Magistrate of the authority. The imprisonment was not a substantive sentence awarded itself as a punishment but merely a means of enforcing payment of the fine. But in altering the sentence the District Magistrate was bound to substitute the whipping for the fine the case being one of a first offence. He could not legally award whipping in lieu of the remaining term of imprisonment which itself was to be suffered only in default of

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**Criminal Ruling.* Criminal Review No. 171 of 1877.

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payment of the fine thus leaving the liability of the prisoner to a levy of the fine, which would constitute a double punishment, untouched. His sentence must be altered accordingly.

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29 November 1877. MELVILL & PINHEY, JJ.

Queen-Empress v. Nabi Natha.†

Criminal Procedure Code (Act X of 1872), Secs. 468, 471—Penal Code (Act XLV of 1860), Sec. 193—Prima facie case—Sanction—Preliminary investigation.

If in the course of a criminal trial, the evidence recorded by the trying Magistrate discloses a *prima facie* case of an offence under section 193 of the Indian Penal Code, the sanction for the trial of the accused person may be given by that Magistrate without independent preliminary investigation.

ORDER.—We do not see that any further preliminary inquiry was necessary than was made in the course of the proceedings before Mr. Oomedram. Nabi Natha accused Chandu and Rasool of causing hurt to him. Three persons deposed to having witnessed the attack. The accused persons denied it and the Police Patel deposed that Rasool was not in the village at the time. Mr. Oomedram disbelieved Nabi and his witnesses and believed Chandoo, Rasool and the Police Patel. The nature of the offence which Mr. Oomedram considered to have been committed and the evidence by which it was to be proved was perfectly clear and no further preliminary inquiry could have made it any clearer.

Moreover, even if Mr. Oomedram's order were defective on other grounds, it was at least equivalent to a sanction under section 468 of the Criminal Procedure Code, and such sanction having been given, the Magistrate of the District had power to take up the case under section 142 and to refer it to Mr. Entee under section 44. Mr. Entee's order dismissing the cases must be reversed and he must be ordered to dispose of them according to law.

1878.

9 March 1878. RESOLUTION IN CHAMBERS.

Dharwar District Magistrate Letter No. 682.*

Practice—Procedure—Imprisonment under two warrants—First warrant to be fully executed before effect is given to the second.

When a convict is imprisoned under two warrants, which order consecutive punishments, the first warrant should be completely executed, both in regard to the substantive sentence of imprisonment and the imprisonment in default of payment of fine, before any effect is given to the second warrant.

**Criminal Ruling.* †*Criminal Ruling.* Criminal Reference No. 130 of 1877.

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6 April 1878. MELVILL & KEMBALL, JJ.

In re **Sankalchand.***

Criminal Procedure Code (Act X of 1872), Secs. 296, 118—District Magistrate—Superintendent of Police—Reference.

Section 296 of the Code of Criminal Procedure does not empower the Magistrate of a District to refer to the High Court the proceedings of a Superintendent of Police, the latter not being a "Court subordinate" to the Magistrate.

The Magistrate of a District cannot interfere (except in the way of suggestion and advice) with the exercise of discretion given to a Police Officer by section 118 of the Code to summon witnesses.

THE facts of this case appear from the following extract from the letter of reference. "On the 26th February 1878, the petitioner complained to me that he had given information to the Police of a theft which had occurred in his house at Nariad and that the Superintendent of Police had, thereupon required the attendance of his (petitioner's) wife in the Police camp at Mahudha. Petitioner is a man holding some position in Nadiad...he appeared greatly distressed at the summons, and entreated that he might be allowed to withdraw his complaint, stating that he would willingly suffer the loss of his property rather than that his wife should be compelled to attend the Superintendent's camp. I, thereupon, wrote to the Superintendent suggesting that one of the Native Magistrates at Nariad should be directed to record the woman's evidence. .. I heard nothing more of the matter until the 20th instant when petitioner again appeared before me, and I was surprized to learn from him that the Superintendent had declined to accede to my wishes and had issued fresh summons requiring the attendance of the female at his camp at Mhye...I feel strongly that it would be difficult to devise any more effectual plan for discouraging complaints or of rendering our administration of Justice unpopular in this province, than that of requiring the attendance of woman of a respectable class at the camp of officers of Police."

ORDER.—It appears to the Court that section 296, Criminal Procedure Code, which only empowers the Magistrate of the District to refer to the High Court the proceedings of a subordinate Court, does not enable him to ask for the opinion of the High Court on questions such as that which forms the subject of his letter under reply.

The Court is very doubtful whether the petition of Sankalchand to the Magistrate, and the Magistrate's order thereon, can be regarded as a "judicial proceeding," on which the Court can adjudicate under section 297. But assuming it to be so the Court is of opinion that the District Magistrate cannot interfere (except in the way of suggestion and advice)

**Criminal Ruling.* Reference No. 33 of 1878.

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with the exercise of the discretion given to the Superintendent of Police by section 118, Criminal Procedure Code.

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8 April 1878. MELVILL & KEMBALL, JJ.

Queen-Empress v. Nilkanth. Queen-Empress v. Ganesh.*

District Police Act (Bom. Act VII of 1867), Sec. 31—Penal Code (Act XLV of 1860), Sec. 268—"Nuisance"—Definition.

The term "commits nuisance" in section 31 of the Bombay District Police Act does not mean a nuisance within the definition of the term in section 268 of the Indian Penal Code but a nuisance within the meaning of the common notice to the public to "commit no nuisance."

THE facts were that the First Class Magistrate of Dharwar Mr. Wiltshire, in his inspection of the Municipal town of Dharwar on the 9th March 1878 saw two school-boys aged 8 and 10 respectively making water in the gutter of the public road close to their school, and at once directed their prosecution before the Third Class Magistrate under section 31 of the District Police Act VII of 1867. The Magistrate sentenced them to pay a fine of four annas each.

The District Magistrate of Dharwar made this reference to the High Court observing.—"The reason for this reference is a doubt whether making water in a gutter is a public nuisance as explained in section 268 of the Indian Penal Code. The School Master states, that the boys had no other place for the purpose, and that the gutter in question had been pointed out as available for the purpose, of a urinal to the boys of his school by the late District Magistrate, Mr. Robertson. This is not probable and at any rate he gave no evidence to that effect when the case was before the Third Class Magistrate but at the same time it is clear from his conduct that the boys believed they were in perfect order when using the gutter as a urinal."

ORDER.—The term "commits nuisance" in section 31 by Act VII of 1867 does not mean a nuisance within the definition in section 268, Indian Penal Code, but a nuisance within the meaning of the common notice to the public to "commit no nuisance."

The convictions therefore appear legal, but the District Magistrate should give such orders as will prevent zealous officers from ordering such prosecutions unnecessarily.

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8 April 1878. MELVILL & KEMBALL, JJ.

Queen-Empress v. Krishna.†

Penal Code (Act XLV of 1860), Sec. 285—Danger to human life—Likelihood of injury to property.

**Criminal Ruling.* Criminal Reference No. 35 and 36 of 1878.

†Criminal Reference No. 38 of 1878.

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Section 285 of the Indian Penal Code does not render it necessary to show danger to human life: it is sufficient to prove likelihood of injury to property.

THE accused in this case was convicted of negligent conduct with respect to fire or combustible matter, in that he was found smoking a *bidi* close to half-pressed cotton bales lying close to the press-house in the compound of Messrs. Gaddum and Co. so negligently as likely to have endangered human life.

ORDER.—Section 285 of the Indian Penal Code does not render it necessary to show danger to human life. It is sufficient to prove the likehood of injury to property (5 Bom. H. C. 6). Whether there was such likelihood in the present case and whether the accused acted rashly or negligently were questions of fact, and this Court cannot interfere with the decision thereon. The record and proceedings are returned.

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2 May 1878. MELVILL & KEMBALL, JJ.

Queen-Empress v. Dada.*

Criminal Procedure Code (Act X of 1872), Sec. 454—Abduction—Theft—Double sentence.

The accused, with intent to steal, induced a boy, under twelve years of age, to go with him to a place where he dishonestly removed certain ornaments from off the boy's person. The Lower Court convicted him 1stly of abduction with intent to steal, and 2ndly of theft, and sentenced him, on the first head, to one year's rigorous imprisonment, and, on the second, to seventy-five stripes:—

***Held*, that under section 454 of the Criminal Procedure Code, the double sentence of imprisonment and whipping was illegal.**

IN this case the accused Dada was charged first with kidnapping a child aged 10 years with the intention of taking moveable property, *viz.*, a pair of silver armlets from his person (section 369, Indian Penal Code and 2ndly, with dishonestly stealing the said armlets (section 379, Indian Penal Code. The Sessions Judge convicted the accused, and sentenced him to one year's rigorous imprisonment and to seventy five stripes for the second offence.

ORDER.—The Court annuls the sentence of whipping and enhances the sentence of imprisonment to eighteen months.

It is difficult to reconcile the words of section 454, Criminal Procedure Code, with the illustrations to the section. But having regard to the previous decisions of this Court, and to the judgment of the MADRAS HIGH COURT in *Reg.* v. *Nanjan* (1) the Court thinks that the double sentence of imprisonment and whipping was illegal.

**Criminal Ruling.* *Criminal Appeal No. 67 of 1878. (1) 7 Mad. H. C., 375.

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1 August 1878. WEST & PINHEY, JJ.

Queen-Empress. v. Lakshmya.†

Penal Code (Act XLV of 1860), Secs. 379, 430—Theft—Criminal misappropriation—Cattle going to drink water at a river.

A person who steals cattle which are let loose by the owner with a view to their going to drink water at a river, commits the offence of theft and not of criminal misappropriation.

ORDER.—It appears that the cattle when they were stolen had been let loose by the owner with a view to their going to drink water at a river. The District Magistrate seems to be of opinion that they were consequently not in the possession of the owner; and that the accused should not have been convicted of theft but criminal misappropriation of property. The Court does not concur with this view but is of opinion that possession of domestic animals is not lost until they have strayed away beyond recovery.

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5 August 1878. WEST & PINHEY, JJ.

Queen-Empress v. Mahadhu.*

Criminal Procedure Code (Act X of 1872), Section 310—Officer—Whipping—Breach of duty—Bom. Act II of 1874, Sec. 30—Jailor—Warrant.

Section 310 of the Code of Criminal Procedure makes it a duty of the Officer responsible to inflict the punishment of whipping to inflict it immediately on the expiration of the times set forth in the enactment. But if, through accident, or neglect, or wilful breach of duty, this direction is not obeyed, the prisoner is not thereby in any way freed from the liability, of undergoing the sentence then subsisting.

The Jailor is, under Bombay Act II of 1874, section 30, responsible for the execution of a warrant for punishment, unless it be one not within the competence of the Court. If anything prevents his executing a warrant, he should make a return or report to that effect to the Court whence the warrant issued.

ORDER.—Section 310 of the Code of Criminal Procedure makes it duty of the officer responsible to inflict the punishment of whipping to which a prisoner has been sentenced immediately on the expiration of the times set forth in the enactment. But if through accident or neglect or wilful breach of duty this direction is not obeyed the prisoner is not thereby in any way freed from his liability. The sentence still subsisting must still be executed notwithstanding a particular circumstance not touching its substance has prevented its being executed so promptly as the legislature intended.

The Jailor is under Bombay Act II of 1874, section 30 responsible for the execution of a warrant for punishment unless it be one not within the competence of the Court. If anything prevents his executing a warrant he should forthwith make a return or report to that effect to the Court whence the warrant issued.

**Criminal Ruling.* Criminal References Nos. 95 and 96 of 1878.

†Criminal Reference No. 102 of 1878.

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It does not seem necessary to make any order in this case there being no apparent illegality in the Magistrate's proceedings.

It is desirable that as a former conviction used for enhancing punishment must form part of a charge it should also be specified as part of the conviction in the warrant for punishment.

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29 August 1878. WEST & PINHEY, JJ.

Queen-Empress v. Tukaram.*

Criminal Procedure Code (Act X of 1872), Sec. 464—Magistrate—Judgment—Alteration—Illegal order—Procedure.

When a judgment has been signed by a Magistrate, it cannot be altered by him according to section 464 of the Code of Criminal Procedure. But on finding that he has passed an illegal sentence, a Magistrate may, if the prisoner is suffering prejudice, direct the Jailor to suspend execution and merely keep the prisoner in detention, which should in no case be allowed to exceed the term of imprisonment awarded, while the case is referred to the High Court.

ORDER.—When a judgment has been signed by a Magistrate it cannot be altered by him according to section 464 of the Criminal Procedure Code. But on finding that he has passed an illegal sentence a Magistrate may, if the prisoner is suffering prejudice, direct the Jailor to suspend execution and merely keep the prisoner in detention while the case is referred to the High Court. Such a reference should be made when necessary as quickly as possible, as vigilance must be exercised as far as may be to prevent any act of a Court from causing wrong—*Syud Tuffuzzool Hoossein Khan* v. *Raghoonath Parshad* (1) and the term of detention should not be allowed to exceed that of the imprisonment awarded.

The sentence should be altered from rigorous to simple imprisonment.

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31 October 1878. MELVILL & KEMBALL, JJ.

Queen-Empress v. Ramchandra.†

Criminal Procedure Code (Act X of 1872), Secs. 205, 470—Complaint—Dismissal—Non-appearance.

The direction contained in Section 205 of the Code of Criminal Procedure to dismiss a complaint on the non-appearance of the complainant is not applicable to cases falling under Chapter XXXV of the Code.

Where, therefore, a sanction had been given by a Court to prosecute a person for resisting the authority of one of it bailiffs, it was held that the non-appearance of the bailiff did not justify a Magistrate in dismissing a complaint.

THE facts of this case were that on the 4th March 1878, Pandu Krishnaji, a bailiff of the Subordinate Judge's Court at Khed was entrusted with the execution of a warrant of attachment of property issued in execution of a decree obtained by Nagar against defendant Ramchandra

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**Criminal Ruling.* Criminal Reference No. 114 of 1878. (1) 14 Moo. I. A., 48.

†*Criminal Ruling.* Criminal Reference No. 176 of 1878.

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the accused. The bailiff and the plaintiff in the case proceeded to the village of Alanki on the 16th March 1878 to attach property belonging to the defendant. On the bailiff entering the defendant's house the defendant Ramchandra turned him out and locked the door. Soon after, the defendant's brother Ganesh came up armed with a stick and ran towards the bailiff. On this being reported, the Subordinate Judge sanctioned the prosecution in the Court of the Second Class Magistrate of Khed, of the defendant Ramchandra and Ganesh under sections 183 and 186, Indian Penal Code. Thereupon the Magistrate issued processes for the appearance of the parties concerned and fixed 9th August 1878 as the date of hearing. On the day so appointed, the bailiff whom the trying Magistrate considered as the complainant having failed to appear as directed, the Magistrate dismissed the complaint under section 205, Criminal Procedure Code.

The District Magistrate of Poona in making the reference to the High Court observed:—" The Magistrate's order of dismissal of the complaint is, in my opinion, improper and contrary to law. The provisions of section 205, Criminal Procedure Code, do not, I think, apply to cases coming under Chapter XXXV of the Criminal Procedure Code. A sanction given under that chapter is sufficient complaint—*vide*, Explanation below section 470, Criminal Procedure Code. The proper procedure would have been to have treated the bailiff not as a complainant but as a witness in the case, his appearance being secured by issue of process."

ORDER.—The explanation to section 470, Criminal Procedure Code, provides that in cases under Chapter XXXV the report or application of the public servant shall be deemed sufficient complaint. From this it is clear that the personal appearance of such public servant or officer presiding over a Court is not, in such cases, essential, and that any provision of the Code which requires the personal attendance of a complainant is not applicable.

The order of the Second Class Magistrate dismissing the complaint under section 205 must accordingly be set aside, and he must be directed to dispose of the case according to law.

1879.

20 February 1879. WEST & PINHEY, JJ.

Queen-Empress v. Adrashapa.*

Salt Act (Bom. Act VII of 1873), Secs. 35, 37—Distance—Measure.

The distance of ten miles mentioned in sections 35 and 37 of the Bombay Salt Act is to be

**Criminal Ruling.* Criminal Appeal No. 252 of 1878; Review No. 215 of 1878.

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measured in a straight line "as the crow flies," *i. e.*, along the horizontal plane and not by the nearest mode of practical access.

THE accused was charged under sections 35 and 37 of the Bombay Salt Act (VII of 1873) of possessing without a permit salt exceeding 40 seers in quantity within ten miles of a land customs station. The Second Class Magistrate convicted him, but the District Magistrate of B lgaum, reversed the conviction, remarking—"as the crow flies the distance from the place where the salt was stored to the nearest land custom station was within ten miles and on this ground the Magistrate, Second Class, convicted the accused, but as it appeared that the nearest possible road by which the distance to be traversed was upwards of ten miles in length, the District Magistrate reverses the conviction considering that for the purposes of this act the distance to be traversed must be calculated." The Government of Bombay, thereupon, preferred an appeal to the High Court.

ORDER.—Referring to the case of *Regina* v. *Bhikoba Vinoba* (1) and to the elaborately argued case of *Monflet* v. *Cole*, (2) we reverse the decision of the District Magistrate and restoring that of the Subordinate Magistrate uphold the conviction and sentence.

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21 April 1879. RESOLUTION IN CHAMBERS.

Khandesh Sessions Judge's Letter No. 420.*

Criminal Procedure Code (Act X of 1872), Sec. 317.

A Magistrate First Class sentenced accused to two years' rigorous imprisonment on the 6th February 18 9 on conviction of theft The Sessions Judge, a month afterwards, sentenced the accused in another case to three years' rigo ous impr.sonment, which he, under Criminal Procedure Code, section 317, directed should begin to take effect on the expiration of the sentence passed by the Magistrate. On appeal the conviction and sentence passed by the Magistrate were reversed :—

Held, that the sentence by the Sessions Judge must be deemed to have commenced from the time it was ordered to commence, *viz.*, from the expiration of the sentence by the Magistrate whether by reversal or completion of the punishment.

This case was followed in application for revision No. 263 of 1889, where the Court recorded the following order :—

ORDER.—The Court following the ruling at page 974 of 15 Q. B. Reports (Adolp. and Ellis) directs that the sentence passed on Maganlal Dolatram in the Jivanpore case be deemed to have commenced from the date on which it was passed.

Again. in the Report from the First Class Magistrate of Thana No. 263 dated 27th September 1890, the Court (*Sargent* C. J., and *Birdwood*, *Parsons*, *Telang* and *Candy*, JJ.) recorded the following resolution on the 30th September 1890.

**Criminal Ruling.* (1) 4 Bom. H. C., 9. (2) L. R., 7 Ex., 70 ; 8 Ex., 32.

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RESOLUTION IN CHAMBERS.—The Criminal Ruling of 21 April 1879 is adhered to after consideration of the case of *Gregory* v. *The Queen* at 15 A. & E. (Q. B.) page 974 and the MADRAS HIGH COURT, Criminal Proceedings, No. 201 of 15th February 1879, quoted at Weir's Criminal Rulings, 3rd Edition, page 993.

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5 March 1879. WEST & PINHEY, JJ.

In re **Pitamber.***

Penal Code (Act XLV of 1860), Sec. 499—Defamation.

The question of the physical and moral as distinguished from the legal character of the act of a person accused of an offence under section 499 of the Indian Penal Code is like those which arise under other sections of the Code one to be determined by considerations and inferences drawn from common experience rather than from rules of legal construction.

JUDGMENT.—The question of the physical and moral as distinguished from the legal character of the act of a person accused of an offence under section 499 of the Indian Penal Code is like those which arise under other sections of the Code one to be determined by considerations and inferences drawn from common experience rather than from rules of legal construction. What the imputation was which a man intended to convey who did not directly express it and whether he believed or had reason to believe that the imputation would produce a particular sentiment or opinion on the part of those to whom the communication was made are matters of fact, or inference from fact, belonging, where the judicial functions are divided, to the province of the Jury. Whether the imputation thus found to have been made, and whether the harm thus found to have been the probable or expected result were such as to satisfy the definition of the offence of defamation would be questions for the Judge. If the words or signs employed could have legally defamatory sense he would in England according to *Cox* v. *Lea* (1) be found to submit them to the jury. The jury instructed as to the law would find whether the language as they understood it constituted a wrong. The question of whether the words satisfy the definition in this case is one so obviously determinable by the popular sense of the language employed that both parties called several witnesses to prove what the natural and proper impression was. Looking to the testimony of those witnesses received without objection by the Magistrate it is impossible for us to say that there was no evidence to support the charge that a very harmful imputation had been made, and the appreciation of that evidence was for the Courts below. As the publication might suggest what would be extremely disgraceful to the subjects of it, and so the Courts dealing with the

*Criminal Application for revision No. 36 of 1879. (1) L. R., 4 Ex., 284

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fact have found that it did suggest it ; and that this was the natural effect of the publication, we, determining only whether the applicant has thus committed an offence, must adopt the view on that point taken by the Session Judge.

It has been pressed on us that the Magistrate and the Session Judge were wrong in receiving evidence at all as to the sense conveyed or properly to be gathered from the publication, or, in having influenced by such evidence. The argument is hardly consistent with the applicant's having called witnesses to support the construction which he now seeks to place on the language he employed; but apart from that we think that it is not illegal for a Judge whose vernacular is English to take the opinion of natives of Guzerat and of persons skilled in Guzerati as to the proper force, and therefore the probable intention of something expressed in the Guzerati language and character. They stand to him with regard to such a matter really in the position of experts. (See Indian Evidence Act, sections 45, 49, 98. Taylor on Evidence, section 1059.) When the parties and the members of the Court are of one race using the same language the sense of what was said in that language is a matter of common knowledge. To take the evidence of witnesses on the point is in some degree to resign to them the proper function of the tribunal and they cannot reduce the language they attempt to explain to any thing simpler than the common tongue. Their explanation might on the same principle be subjected to explanation and the process of proposed elucidation might thus end in contradiction and obscurity. The natural sense of language is best determined by the impression it makes on ordinary persons speaking the tongue in which it is uttered. But in the case of a foreign language still more than in that of a provincial dialect the aid of persons who, as compared with the Court, are specially conversant with the language is indispensable to the attainment of a right understanding of what any particular expressions in that language and the character peculiar to it were fitted to convey; the popular and colloquial sense of the whole passage as it stands in the vernacular character is what is important for the purpose in hand and this is best learned from the testimony of a number of persons as to the impression the words were calculated according to their judgment and knowledge of the language to make. It is so far from wrong for a judge thus to inform himself as to the sense conveyed, which is of course the impression naturally communicated to readers in the vernacular that he could hardly in any other way place his view of the meaning and purpose of any particular passage beyond the reach of very plausible objection. Accepting information, however, the Judge or Magistrate must weigh conflicting statements against

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one another and form the best conclusion in his power. This the Sessions Judge has done in the present case. He was justified we think in doing so and we accordingly reject this application.

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26 March 1879. WEST & PINHEY, JJ.

Queen-Empress v. Ganpat.*

District Police Act (Bom. Act VII of 1867)—Police Inspector—Prosecution—Government—Sanction.

An Inspector of Police being an officer who may be removed from office under section 8 of the Bombay District Police Act without the sanction of Government, the sanction of Government is not necessary in order to give a Magistrate jurisdiction to entertain a complaint against him of an offence committed in his capacity of a police officer.

ORDER —It is now admitted that an Inspector of Police being an officer who may be removed from office under section 8 of the District Police Act (Bombay Act VII of 1867) without the sanction of Government, the sanction of Government was not necessary in order to give a Magistrate jurisdiction to entertain a complaint against him of an offence committed in his capacity of a Police officer. The Magistrate seems to have assumed that such an abuse of authority as was charged against the accused Ganpat Malhar would, if proved, be an offence committed in his capacity as a public servant. It is not necessary for the disposal of the present application to determine whether this view was correct; but we may point out that the analogy of the English statutes, as to actions against justices and constables for abuse of their powers, points rather to the protection of Government officers under section 466 of the Code of Criminal Procedure, only in cases of mistakes or excesses of duty committed in good faith. (See per *Bayley*, J. in *Cook* v. *Leonard* (1) *Haseldine* v. *Grone* (2)). If a Police officer subjects a prisoner or a witness to any form of torture or illegal pressure, it can hardly be said, save in very exceptional cases, that he is really acting in his capacity as a public servant; but the precise point at which the class of acts protected shades off into the class of acts unprotected by the enactment, is really dependent on facts not admitting of exact definition.

The Magistrate seems to have thought that because his proceedings were vitiated as to Ganpat by the absence of a prior sanction of Government to his entertaining the complaint, they were vitiated wholly even as to the co-accused of Ganpat in whose case it was not asserted that a prior sanction was necessary. This was an erroneous view; and as to all the accused it is our duty to set aside the order of the Magistrate for their

*Criminal application for Revision No. 24 of 1879. (1) 6 B. & C., 355 (2) 12 L. J. M. C., 10

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discharge. Mr. Branson had ingeniously contended that as the Magistrate has discussed the evidence and professes to discharge the accused under section 195, he must be taken to have exercised his jurisdiction though he finally denies its existence. But the Magistrate came to no conclusion on the evidence, and could not properly do so when he thought his jurisdiction was barred. We must annul his order discharging the accused and direct him to resume the inquiry into the case at the point immediately preceding that order. As to the sufficiency of the sanction in its present form and the legal possibility or expediency of replacing or supplementing it, we need not at present express any opinion.

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19 June 1879. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Shivbashia.*

Penal Code (Act XLV of 1860), Secs. 379, 403—Theft—Criminal Misappropriation—Taking proof of.

Where there is no proof of 'taking' of the property found in the possession of the accused, he must be convicted not of theft but of criminal misappropriation.

IN this case a bullock belonging to one Rava a resident of Takulki in Kurandwad State disappeared from his house one night and was found at Nidoni in Bijapur Taluka in possession of the accused who were British subjects. The Second Class Magistrate convicted them of theft under section 379, Indian Penal Code. The District Magistrate of Kulladgi in making this reference observed—" He (the Magistrate) should have obtained a certificate from the Political Agent S. M. C. as provided by the Foreign Jurisdiction and Extradition Act XI of 1872 for the trial of the accused."

ORDER.—On a review of the evidence the Court is of opinion that in the absence of any proof of the " taking " the accused should have been charged with and convicted of not theft but criminal misappropriation punishable under section 403 of the Indian Penal Code, and as the Second Class Magistrate had jurisdiction to try this latter offence the Court deems it unnecessary to interfere. The Record and Proceedings to be returned.

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10 July 1879. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Appa.†

Criminal Procedure Code (Act X of 1872), Sec. 315—Habitual offender.

To constitute an "habitual offender" within the meaning of section 315 of the Code of Criminal Procedure, it is necessary that the subsequent offences charged should have been committed by the accused after the previous conviction.

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†Criminal References No 81 to 85 of 1879. *Criminal Reference No. 64 of 1879.

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ORDER.—It appears that all these offences were committed about the same time though the property lay in different persons. The Court therefore sees no reason why the Third Class Magistrate should not have disposed of the cases he did. To constitute an "habitual offender" within the meaning of section 315 of the Criminal Procedure Code it is necessary that the subsequent offences charged should have been committed by the accused after the previous conviction.

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7 August 1879. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Sorabji.*

Abkari Act (Bom. Act V of 1879)—Liquor—Possession—Quantity.

The Bombay Abkari Act, 1879, renders a man punishable for the offence of possessing more than a particular quantity of liquor within a certain local area or place, except under the authority of some license, permit or special order obtained under that Act. It is, therefore, immaterial to consider whether the possession in any case was illegal before the Act came into force.

ORDER.—The Court is unable to concur with the Session Judge. The ofience of possessing more than a particular quantity of liquor within a certain local area or place except under the authority of some license, permit or special order obtained under Bombay Act V of 1878 is rendered punishable by that Act and it is immaterial to consider whether the possession was illegal before the Act came into force.

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1 October 1879. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Balkrishna.†

Criminal Procedure Code (Act X of 1872), Sec. 18—Assistant Judge.

Having regard to section 18 of the Code of Criminal Procedure an Assistant Session Judge has no power to pass a sentence of transportation or to commute a sentence of imprisonment to one of transportation.

ORDER.—The Court confirms the conviction and sentence of seven years' imprisonment and fine, but having regard to section 18 of the Criminal Procedure Code it is of opinion that an Assistant Sessions Judge has no power to pass a sentence of transportation or to commute a sentence of imprisonment to one of transportation. The Court therefore annuls the order of the Assistant Sessions Judge commuting the sentence of seven years' rigorous imprisonment to transportation for the same term, but sentences the convict, under section 59 of the Indian Penal Code, to seven years' transportation.

**Criminal Ruling.* Criminal Reference No. 123 of 1879.
†*Criminal Ruling.* Criminal Review No. 170 of 1879.

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1880.

26 February 1880. PINHEY & F. D. MELVILL, JJ.

Queen-Empress v. Janardhan.

District Municipal Act (Bom. Act VI of 1873), Sec. 331—Building—Reed fence.

A *Karavi* or reed fencing is not a building within the meaning of section 33 (1) of the Bombay District Municipal Act, 1873.

ORDER—A "Karvi" or reed fencing is not a building within the meaning of clause 1 of section 33 of Bombay Act VI of 1873. The conviction and sentence are therefore reversed. The fine to be refunded.

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18 March 1880. WEST & PINHEY, JJ.

Queen-Empress v. Nana.

Penal Code (Act XLV of 1860), Sec. 415—Cheating—Milk—Water.

The selling of milk and water in about equal proportion as pure milk will support a finding of cheating under section 415, Indian Penal Code.

ORDER—The Court sees no reason to interfere. The selling of milk and water in about equal proportion as pure milk will support a finding of cheating. See *Rasum Gheesa*, 4 December 1865, in a note to section 415 of West's Edition of Act XLV of 1860.

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22 April 1880. M. MELVILL & F. D. MELVILL, JJ.

Queen-Empress v. Budhya.*

Criminal Procedure Code (Act X of 1872), Sec. 215—Discharge—Further evidence—Prosecution, revival of.

A discharge under section 215, Criminal Procedure Code, does not bar the revival of a prosecution for the same offence when further evidence is available.

ORDER—The case referred to by the Sessions Judge is not in point. The present case is apparently one of a fresh complaint where new evidence was forthcoming. A discharge under section 215, Criminal Procedure Code, does not bar the revival of a prosecution for the same offence when further evidence is available. (See *Empress* v. *Donelly*, I. L. R. 2 Calcutta 405). The Court is not prepared to say that the committal was illegal.

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20 May 1880. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Murlidhar.†

Penal Code (Act XLV of 1860), Sec. 262—Postal stamp—Used stamp.

The mere affixing to a letter a postal stamp which has been previously used does not itself prove fraud or an intent to cause loss to Government within the meaning of section 262 of the Indian Penal Code.

*Criminal Reference No. 72 of 1880. †Criminal Reference No. 8 of 1880.

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In this case Moorlidhar was convicted under section 262, Indian Penal Code, in that he made use of on a private letter a service postal stamp which had already been used and defaced.

Per Curiam.—It seems to the Court that the mere fact of a person affixing to a letter a postal stamp which has been previously used does not itself prove fraud or an intent to cause loss to Government. In the present case evidence on this point is entirely wanting, the Court therefore reverses the conviction and sentence and directs the fine if paid to be restored.

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10 June 1880. Kemball & F. D. Melvill, JJ.

Queen-Empress, v. Nana Patlu.*

Criminal Procedure Code (Act X of 1872), Sec. 308—Penal Code (Act XLV of 1860) Sec. 62—Forfeiture—Compensation.

Where a person was, under section 62 of the Indian Penal Code, sentenced to undergo a term of transportation and adjudged to forfeit to the Government the rents and profits of his property during that term :—

Held, that it was not competent to the Court before which he was tried and convicted to award any portion of the said rents and profits as compensation to the complainant, section 308, Criminal Procedure Code, having no application to the orders for forfeiture of property.

The accused having been convicted of mischief by fire with intent to destroy a dwelling house, was transported for seven years and the Judge further ordered that "the rents and profits of all the movable and immovable property of the accused be forfeited to Government (Indian Penal Code, section 62) for the above period of his transpotation, subject to such provision of his family as Government may see fit to allow, further that a sum of Rs. 450 be paid out of the said rents and profits of the said Nana's property to the prosecutor Dada (Criminal Procedure Code, section 308) as compensation for his loss." The Government of Bombay, thereupon, preferred an appeal on the ground that the direction about compensation was not authorized by law, as section 308 of the Criminal Procedure Code applied only to cases where a fine was impesed, and as under section 53 of the Indian Penal Code forfeiture of property was mentioned as a distinct and separate punishment from fine.

Order.—The Court cancels so much of the order of the Sessions Judge dated 7th February 1879 as directs "that a sum of Rs. 450 four hundred and fifty be paid out of the said rents and profits of the said Nana *bin* Patlu's property to the prosecutor Dada *bin* Bapu (Criminal Procedure Code, section 308) as compensation for his loss,"—the Court being of opinion that the Sessions Judge was not competent to make such a direction in this case.

**Criminal Ruling.* Criminal Application for Revision No. 62 of 1880.

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17 June 1880. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Virbusapa.*

Criminal Procedure Code (Act X of 1872), Sec. 466—Public servants—Sanction—Police Patel—Village Police Act (Bom. Act III of 1874), Sec. 85.

Section 466 of the Code of Criminal Procedure contemplates sanction in the case of those public servants only who are not removable from their office without the sanction of Government.

A Police Patel, hereditary or otherwise, is not such a public servant under section 9 of the Bombay Village Police Act, as he is liable to dismissal on proof of misconduct by a Magistrate First Class subject to the sanction of the Police Commissioner.

IN this case the accused, a Police Patel was committed for trial under section 193 of the Indian Penal Code for giving intentionally false evidence in a stage of a judicial proceeding; and under section 221 of the Code with intentionally allowing certain accused persons to escape. Before the Sessions Judge it was contended that the Court had no jurisdiction to try the accused in absence of the necessary sanction, as required by section 426 of the Code of Criminal Procedure. The Sessions Judge being of opinion that the necessary sanction was not put in, acquitted and discharged the accused.

PER CURIAM.—The Sessions Judge would appear to be wrong on both the points.

Bombay Act III of 1874 does not apply to a Police Patel (*vide*, section 85 of the Act). Section 466 of the Code of Criminal Procedure contemplates sanction in the case of those public servants only who are not removable from their office without the sanction of the Government. A Police Patel, hereditary or otherwise, is not such a public servant, for under section 9 of the Bombay Village Police Act, as amended by section 2 of Bombay Act I of 1876, he is liable to dismissal on proof of misconduct by a Magistrate of the First Class subject to the sanction of the Police Commissioner. Section 466 of the Code of Criminal Procedure has, therefore, no application as held by this Court in *Imperatrix* v. *Bhagwan Devraj* on the 27th February 1879. Without expressing any opinion on the ruling *Baloji Sitaram* (11 Bom. H. C. R., 34), the Court will only remark that that case and the present are distinguishable, for here the Magistrate in clear terms stated the occasion on which the false evidence was given, and the accused could not have been misled. But if the Sessions Judge thought that a more distinct sanction was necessary for the ends of justice he might have allowed an amended sanction to be put in.

The Sessions Judge's remark about the misjoinder of charges is clearly wrong. He could have held a separate trial on each charge; and even if

*Criminal Ruling. Criminal Review No 84 of 1880; Appeal No. 101 of 1880.

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it had been otherwise, the Sessions Judge's objection on this point ceased to have any foundation as soon as the first charge was dismissed on a preliminary ground.

The Sessions Judge's order acquitting the accused is therefore set aside and he is directed to proceed with the trial of Virbusappa *bin* Basappa.

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19 June 1880. RESOLUTION IN CHAMBERS.

Karwar Sub-Judge's Letter No. 646.*

Criminal Procedure Code (Act X of 1872), Sec. 407—Sessions Judge—Sub-Judge in charge—Precept.

The duty of issuing a precept, which is imposed on the Court of Sessions by section 407 of the Code of Criminal Procedure, cannot legally be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Sessions.

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15 July 1880. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v. Bhagya.†

Penal Code (Act XLV of 1860), Sec. 297—Place of religious worship—Trespass.

The provisions of section 297 of the Indian Penal Code become applicable where there is a trespass in a place of religious worship with the knowledge that the feelings of persons would be wounded thereby.

THE accused was charged with an offence under section 295, Indian Penal Code, of defiling a Hindu temple by the act of defiling it. The District Magistrate of Khandesh in making this reference observed, "Accused was originally charged with having in company with a Mahar woman committed an indecent act in the temple but this part of the case completely broke down and his offence, as proved, was simply as a low caste man being in the temple. Accused admits that he knew he had no business in the temple but this admission even from a Mahar is scarcely, I think, sufficient to support a conviction of wilful defilement. Section 295 would seem to require some defiling act and not merely constructive desecration. A prosecution under section 447 or 448 for criminal trespass would apparently better have met the requirements of the case."

ORDER.—The Court is of opinion that the conviction should have been under section 297 of the Indian Penal Code as there was a trespass in a place of religious worship with the knowledge that the feelings of persons would be wounded thereby, and the trying Magistrate should be so informed. No further interference seems necessary.

**Criminal Ruling.* †Criminal Reference No. 116 of 1880.

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22 July 1880. KEMBALL & F. D. MELVILL, JJ.

Queen-Empress v Baslingapa.*

Abkari Act (Bom. Act V. of 1878), Sec. 55—Magistrate—Confiscation—Collector.

A Magistrate is not competent to order confiscation under the Bombay Abkari Act, the Collector alone being invested with such power by section 55 of the Act.

ORDER.—The Court agrees with the District Magistrate that under section 55 of Bombay Act V of 1878 it was only competent to the Collector to make orders regarding confiscations and that no order of confiscation could be made until the expiration of one month from the date of seizing the things intended to be confiscated. The Court therefore annuls so much of the First Class Magistrate's order as directs confiscation and so much of the Session Judge's order as allows the accused to take the Ganja to Mudhol on payment of Rs. 10.

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13 September 1880. KEMBALL & F. D. MELVILL, JJ.

Savanta v. Bhimaji.†

Criminal Procedure Code (Act X of 1872), Sec. 468—Mamalatdar's Court Act (Bom. Act III of 1876),—Mamlatdar—Sanction.

The Mamlatdars' Court constituted by the Bombay Mamlatdar's Courts Act is a civil Court within the meaning of section 468 of the Code of Criminal Procedure : hence, a complaint of an offence mentioned in that section when such offence has been committed before or against a Mamlatdar's Court shall not be entertained in the criminal Courts, except with the sanction of the Mamlatdar's Court before or against whom the offence was committed or with the sanction of the High Court.

ORDER.—We have now heard this matter fully argued and are of opinion that the First Class Magistrate was right in holding that he had no jurisdiction to entertain the complaint without the sanction of the Court of the Mamlatdar in which the alleged offence was committed. It is contended for the applicant that the Mamlatdar's Court is not a civil Court within the meaning of the Criminal Procedure Code, and in such part of this contention we have been referred to sections 435 and 438 of the same Code in which a Revenue Court is spoken of as distinct from a civil Court and also to section 18 Bombay Act III of 1876 where a distinction is drawn between a Mamlatdar's Court and a civil Court. To what class of Court the term "Revenue Court" in the Criminal Procedure Code relates, we have no means of knowing ; nor, indeed, do we understand why, any distinction should have been drawn in the sections above quoted between it and a civil Court; but that Code applies to the whole of British India, and it has been held in this Presidency, *vide*, *Mahadaji* v. *Sonu* (1) and *Bai Jamna* v. *Bai Jadaw* (2), that a Mamlatdar's Court

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**Criminal Ruling.* Criminal Reference No. 123 of 1880.

†*Criminal Ruling.* Criminal Application for Revision No. 122 of 1880.

(1) 9 Bom. H. C., 251. (2) I. L. R., 4 Bom., 168.

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is *a civil Court* so that the only question we have to consider is whether it is so in the sense of section 468 of the Criminal Procedure Code. No doubt a distinction is taken in Bombay Act III of 1876 between a Mamlatdar's Court and an ordinary civil Court, but we are unable to discover any intelligible reason why the term civil Court should be taken in the restricted sense of an ordinary civil Court, as distinguished from a Mamlatdar's Court, or why sanction for prosecution should not be as necessary and desirable in the case of an offence committed before or against the Mamlatdar's Court as in one committed against the ordinary civil Courts. See sections 468 and 469 respectively. The terms "a civil Court" and "any civil Court" seems to us necessarily to include a Mamlatdar's Court; and we cannot suppose that the Legislature intended to give to suitors in such Court unlimited powers of prosecution. We understand that the Mamlaldar who disposed of the particular case, out of which this question has arisen, is dead; but he appears to have been prepared to give the requisite sanction. We are not aware whether any application has been made to his successor; but, if not, it will rest with him on application being made to consider whether or no to grant it now.

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28 October 1880. MELVILL & WEST, JJ.

Queen-Empress v. Emaji.*

Penal Code (Act XLV of 1860), Secs. 497, 498—Adultery—Conviction—Subsequent adultery—Fresh offence.

If a man, who has been convicted of adultery with another man's wife, continues his adulterous intercourse, he will be liable to a second conviction and punishment for the fresh act notwithstanding that the woman had not returned to her husband's protection after the conviction of her paramour.

THE accused was previously tried in November 1879 for committing adultery with a woman during a period of one and a half a year down to October 1879 and was convicted. He was again charged in August 1880, with committing adultery with the same woman during a period subsequent to his conviction in November 1879.

The Acting Sessions Judge of Khandesh was of opinion that the act of the accused in subsequent acts of adultery was a distinct offence for which he would be convicted and sentenced. His grounds were :—"It is clear that there is no legal objection to the present trial. There is no dispute that the woman Shiv is still the wife of Emaji, nor is it alleged that her husband has consented to or connived at the sexual intercourse which is said to have existed between accused and Shiv. Such sexual intercourse, if proved, amounts to an offence under the Penal Code, and the offender is liable

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**Criminal Ruling.* Criminal Appeal No. 175 of 1880.

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to punishment provided he has not been already punished for such offence. The sexual intercourse with which the accused is at present charged is perfectly distinct from the sexual intercourse with which he was charged in November last. Adultery is an infringement of the rights of a husband towards his wife, and the law in this country regards adultery as an offence. When the offender has been once punished for such an offence, it is obvious that he is not at liberty to infringe the rights of the husband again any number of times at his pleasure, otherwise, there would be little object in punishing at all. The woman is as much the wife of her husband after adultery as before."

ORDER.—The Court confirms the conviction and sentence.

1881.

15 February 1881. MELVILL & NANABHAI, JJ.

Queen-Empress v. Hussein.*

Criminal Procedure Code (Act X of 1872), Sec. 186—Deaf and dumb persons—Practice.

Section 186 of the Code of Criminal Procedure is intended to provide for cases in which the accused person is deaf and dumb, or from ignorance of the language of the country and the want of an interpreter is unable to understand, or make himself understood: and in such cases the High Court would order the prisoner to be detained during Her Majesty's pleasure.

ORDER.—It is impossible to understand the Magistrate's finding that the accused person is an imbecile, and consequently unable to understand the proceedings but that he is not of unsound mind. This is a distinction without a difference.

Section 186 is intended to provide for cases in which the accused person is deaf and dumb, or from ignorance of the language of the country and the want of an interpreter is unable to understand, or make himself understood. In such cases, the High Court would probably order the prisoner to be detained during Her Majesty's pleasure. That was the course adopted by the Queen's Bench Division in *Regina* v. *Berry* (1) in which the prisoner was deaf and dumb and consequently unable to understand the proceedings.

But in the present case it is quite clear that if the prisoner was unable to understand the proceedings, it was from unsoundness of mind, properly so called, and from no other cause. The Magistrate should therefore have found before trial that the prisoner was of unsound mind and should have stayed further proceedings in the case (Criminal Procedure Code, section 423).

Under the provisions of section 297 of the Code of Criminal Procedure this Court now quashes the conviction and declares that the accused

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*Criminal Review No. 171 of 1877. (1) L. R., 1 Q. B. D., 447.

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Hussein *walad* Budehmia is of unsound mind and incapable of making his defence and the Court directs that the said Hussein be released on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person and for his appearance when required; and that in default of such security being given, the case shall be reported by the Magistrate for the orders of Government.

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24 February 1881. MELVILL & BIRDWOOD, JJ.

Queen-Empress v. Lakshmi.*

Penal Code (Act XLV of 1860), Sec. 172—Absconding—Warrant—Service.

A person, absconding to avoid the service of a warrant issued by a Magistrate to the address of a Police officer, directing the latter to arrest that person, does not commit an offence under section 172, Indian Penal Code.

LUKSHAMI *kom* Bhimapa a resident of Badami having been accused of an offence under section 380, Indian Penal Code, by Mr. Luxman Krishna, Third Class Magistrate of Badami, a warrant was issued for her apprehension by that officer. The accused appeared to have left Badami for Kaladgi on some business where she was arrested and brought before the Magistrate Mr. Laxman Krishna. On her appearance the said Magistrate sanctioned her prosecution before Rao Sahib Hanmant Ramchandra under section 172, Indian Penal Code, for absconding in order to avoid being served with a warrant. She was accordingly tried and convicted under section 172 of the Indian Penal Code and sentenced to pay a fine of Rs. 5 or to suffer 7 days' simple imprisonment.

The District Magistrate of Kaladgi in making this reference to the High Court observed.—"A perusal of the record in the case will show the accused did not wilfully abscond or conceal herself to avoid being served with the warrant. It has not been shown whether she had any knowledge of the issue of a warrant for her apprehension. Even supposing as the trying Magistrate does that the accused did wilfully abscond and that she had knowledge of the issue of the warrant her act does not fall within the definition of section 172, Indian Penal Code; because from the wording of section 172, it appears that the summons, notice or order therein referred to should be addressed to the same person whose attendance is required and who absconds to avoid being served with such summons, notice or order. In the present case the order, *i. e.*, the warrant was not addressed to Lukshami *kom* Bhimapa and she cannot therefore be made liable for it under section 172. A warrant is not an order served on an accused: it is

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**Criminal Ruling.* Criminal Reference No. 21 of 1881.

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simply an order to the Police to arrest him. This my view is also supported by a ruling of the CALCUTTA HIGH COURT (*Queen* v. *Woomesh Chunder* (1)) in which it has been ruled that the offence of absconding by an accused person to avoid the service of a warrant does not fall within section 172, Indian Penal Code."

ORDER.—For the reasons stated by the District Magistrate, the Court reverses the conviction and sentence and directs the fine if paid, be refunded to the accused.

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8 March 1881. BIRDWOOD & NANABHAI, JJ.

Queen-Empress v. Bala. Queen-Empress v. Kedari.*

Confession—Admissibility—Co-accused.

The confession of an accused is not admissible against another accused, where it amounts only to a confession of abetting the principal offence charged against him and the other.

ORDER.—The Court is of opinion in this case that the confession of Bala is not admissible against Kedari because it amounts only to a confession of abetting the principal offence charged against him and Kedari—and the abetment admitted was not of a kind to render him liable as a principal offender under section 114 of the Indian Penal Code, *vide, Reg* v. *Amrita Govind* (2). Apart from the confession of Bala the evidence in the case is not sufficient for the conviction of Kedari. The evidence of the witnesses identifying Bala and Kedari cannot be safely acted upon as the witnesses did not give their names to the Police Patel when questioned shortly after the commission of the offence. Though Bala admits only an abetment his confession taken with the other evidence in the case is sufficient for his conviction for the principal offence. And there is nothing but his own confession to show that he took merely a minor part in the commission of the offence. The Court therefore enhances the sentence on Bala to three years' rigorous imprisonment and reverses the conviction and sentence in the case of Kedari and directs that he be discharged.

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9 March 1881. MELVILL & NANABHAI, JJ.

Queen-Empress v. Chintaman.†

Confession—Accused—Inducement—Truth—Recording of confessions.

A confession induced by false allegations is irrelevant even if it be true.

Where an accused makes a confession before one Magistrate, and again confesses before the committing Magistrate, it is not open to the latter to read to the accused his statement before the former Magistrate and to ask him if it was true: in such cases it is very desirable to test the value of statements made on different occasions by taking them fully and in detail and seeing in what respects they agree and in what particulars they differ.

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(1) 5 W. R., 71. **Criminal Ruling.* Criminal appeals Nos. 6 and 26 of 1881.

(2) 10 Bom. H. C., 497. †Confirmation case No. 7 of 1881; Criminal appeal No. 25 of 1881.

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JUDGMENT.—This case presents even more than the ordinary difficulties which this Court always encounters in dealing with cases in which the conviction rests almost entirely on retracted confessions and in which the assessors have differed from the Session Judge.

The case for the prosecution is that the prisoner Chintaman, and the second accused, Dhondo, who has been acquitted, conspired to murder Govind the adoptive father of Chintaman. In pursuance of this conspiracy Chintaman left Revadanda on or about the 22nd September 1880 saying that he was going to Dewas, near Indore. Instead of proceeding direct to Dewas, Chintaman remained in Bombay till the 28th, on the night of which day he returned secretly to Revadanda, and there shortly after midnight, he and Dhondo murdered the old man, as he lay asleep in his veranda. Then before day light Chintaman decamped, and went to Bombay from which place he proceeded to Dewas, where he was arrested on the 10th October. It is also alleged that with the view of establishing an *alibi*, Chintaman caused to be posted at Dewas, on the 30th September, a letter addressed to Dhondo, announcing his arrival at Dewas on the 27th, the day before the murder.

The case for the defence is that Chintaman really arrived at Dewas on the 27th September and remained there until his arrest on the 10th October.

Three witnesses have been called by the prosecution to prove that they met Chintaman in the vicinity of Revadanda before day light on the night of the murder. This kind of evidence is forthcoming in almost every case of murder, and we always regard it with great suspicion. In the present case it is of the smallest possible value. Of the three witnesses, No. 11 can only say that he passed a man in the dark, who in reply to a question said that he was a villager and from his voice he thought that the man was Chintaman. This evidence as the Session Judge says, is very slight. Witness No. 13 was discredited by the Session Judge, and with reason, his evidence being "marred by contradictions so as to render it worthless." The third witness, Ragho Kal Naik, was believed by the Session Judge, but his statements in the Session Court and before the Magistrate, are discrepant on a most material point; and it further appears that this witness is a brother-in-law of the discredited witness No 13. It is certainly strange that these two near relatives should have met Chintaman in different places on the same night: and the discredit which attaches to the witness No. 13 necessarily casts some suspicion on the similar story told by his brother-in-law. Witness No. 12 is said to have mentioned what he saw to Mahadev witness No. 24, from whom the Police are said

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to have derived their information ; but no question was put to Mahadev on this point. It would have been satisfactory to ascertain from the Police diary when the witness Nos. 11, 12 and 13 first made any statements on the subject—but the chief constable (witness No. 44) who was called for the defence did not produce his diary in the Session Court, and could only make rather vague statements from recollection. The cases of such importance as the present, and especially in cases in which imputations of manufacturing evidence have been made against the Police, it is always desirable that the police officer who made the investigation should bring his diary in Court and be able to state accurately the time at which and the circumstances under which the first information was given by the different witnesses.

The Head Constable, witness No. 42, who was called for the defence, stated that on the 29th September the day after the murder, he obtained information that Chintaman had returned to Revadanda during the night and he thought that the information had been given to him by Ragho Kal Naik, witness No. 12. It is however quite clear from the report (Exhibit No. 43) made by the Head Constable on the 29th that he had not then received any such information, and that his suggestion that Chintaman had been engaged in the murder was made upon pure speculation. It was known that there had been bad feeling between Chintaman and the deceased and it was naturally conjectured that he had been concerned in the murder. There are certainly strong *a priori* grounds for supposing that Chintaman had something to do with planning the murder : but the case for the prosecution itself shows that the other two accused persons, Dhondo and Durgabai also had motives for the crime, though perhaps less strong than those of Chintaman ; and it is of course quite possible that the murder was committed by Dhondo, without any actual assistance from Chintaman. Indeed it is not very easy to understand why if such an elaborate plot was devised for averting all suspicion from Chintaman, it should have been necessary for Chintaman to return to Revadanda at all or to take any part in the murder. Dhondo could have required no assistance to murder an old man of 70, as he lay asleep ; and therefore the only reason for requiring Chintaman to return must have been that he should run his share of the risk. But this seems inconsistent with the character of the plot, the object of which appears to have been to divert all suspicion from Chintaman and to leave Dhondo to bear all the risk.

On the 2nd October, Ramabai the wife of Chintaman, a girl of 13, was taken by the Police before Mr. Anandrao Bhaskar, a First Class Magistrate, and she then made a statement to the effect that Chintaman had returned to his house on the night of the murder. To this statement she adhered

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before the Committing Magistrate, Mr. Courtenay, but retracted it in the Sessions Court alleging that it had been extorted from her by the ill-treatment of the police.

On the 15th October Chintaman was brought in custody to Alibagh and the police then obtained from the Magistrate, Mr. Anandrao Bhaskar, permission to keep him in custody for a week with the object of obtaining further evidence. Previously on the 13th October, the police had obtained from Dhondo (not from the Dead Letter Office, as the Session Judge supposes) the letter Exhibit No. 38 which has been already referred to, as having been posted at Dewas on the 30th September; Dhondo was apparently arrested on the same day. On the 19th October, Chintaman was taken before Mr. Anandrao Bhaskar and he then made a confession in which, however, he tried to throw the chief part of the guilt on Dhondo. When taken before Mr. Courtenay the committing Magistrate, Chintaman retracted the confession on the 29th October, alleging ill-treatment by the police, and he made a detailed statement describing all his movements between the 22nd September and the 10th October, in precisely the same way as he has since described them in his defence. On the 30th October, he again volunteered to confess, and on his confession before Mr. Anandrao Bhaskar being read over to him, he declared that it was true. On the 5th November he made some further self-criminating statements. On the 11th December when the case was committed, he again retracted his confession and gave the names of witnesses to establish an *alibi*.

In the Sessions Court he adhered to his denial of his guilt and called his witnesses who gave very strong evidence in his favor.

Under the peculiar circumstances of this case it is almost impossible to believe that the confessions made by Chintaman were altogether voluntary. Here we have a man taking the most elaborate precautions to avoid detection. If the case for the prosecution be true, he had most cleverly contrived to make it appear that he was in Central India on the night of the murder. He had had a letter posted at Dewas, with this object and had prepared evidence of an unusually strong character, to establish an *alibi*. He had witnesses of good position and character ready to come forward from Central India and swear that he was there at the time of the murder. Yet with all these advantages in his favor we are told that he voluntarily abandoned them, and made a full confession of his guilt. Such conduct is so inconsistent as to be almost incredible. When we put the matter thus to the Public Prosecutor and asked him for his exaplanation, he could only suggest that Chintaman had confessed under the influence of remorse: but this is not consistent with the circumstance of his retrac-

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tion of his confession. On the whole we cannot entertain any doubt that some inducement was brought to bear upon Chintaman to make him confess ; and we believe that what he himself on one occasion stated was the truth, *viz.*, that he was induced to confess, not because he was ill-treated but because he was told that his wife had already made a statement to the effect that he had returned to Revadanda on the night of the murder. We have little doubt that what was said to him was something of this kind. "Here is your wife who has sworn that you were at Revadanda on the night of the murder. Here are witnesses who are ready to swear that they saw you on that night. It is useless for you to deny it, and you had better make a clean breast of it." It is not difficult to believe that Chintaman was in this manner induced to make the confession, implicating himself but throwing the greater share of the blame on Dhondo.

If this supposition be correct, as we have little doubt that it is, a confession so induced would be irrelevant, even if it were true. Whether the confessions in this case are true, it is extremely difficult to decide. It is remarkable that, although Chintaman has accused Dhondo of the murder, Dhondo has never retaliated by stating that Chintaman returned to Revadanda on the night of the murder. The confessions themselves are by no means free from improbabilities and contradictions. It is difficult to believe that the murderers would have gone to the scene of the murder, taking a gunny bag with them, but no weapon, and trusting to find a weapon on the spot. We may remark on this point that the Session Judge observes that the crow-bar with which the murder was committed was identified as belonging to the deceased: but there was no evidence on the point, so far as we have been able to discover. Again, the story told by Chintaman of his going to the railway station in Bombay and finding a stranger going to Dewas, who consented to post his letter for him, is exceedingly improbable. His accounts of his movements given in his second confession of the 30th October is not consistent with his previous statement, nor with the probabilities of the case. If he took part in the murder, it is almost certain that he would have gone straight to Indore afterwards and he would not have lingered in Bombay for three or four days. Chintaman's statement that the sound made by the murdered man was like the cry of a goat being slaughtered curiously agrees with the description of the witnesses by whom the sound was heard. It is hardly likely that several persons would hit upon the same simile for describing a sound and the coincidence in the terms of the description rather suggests that the description was derived from the same source.

Some of the points above touched upon are, taken by themselves, of

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little importance: but taken together, they create doubts as to the truth of the confessions of Chintaman, it equally attaches to the retracted statement made by his wife Rama before the Magistrate. But the really strong evidence to invalidate the confessions is the evidence, already alluded to, called to establish an *alibi*. The Session Judge has discredited the evidence because it is irreconcileable with the confessions, and because he believes the confessions. The assessors have reversed the argument, and concluded that the confessions are untrue, because they are irreconcileable with the evidence as to the *alibi* which they believe. The evidence as to the *alibi* is entirely extremely strong, and it is difficult to find any sufficient ground for disbelieving it. We cannot concur with the Session Judge in thinking that there was any improbability in the witnesses recollecting the dates. Keshawrao, witness No. 39, was returning from leave, when he encountered Chintaman: and the date of return from leave would naturally fix itself in the memory. Moreover the Session Judge has omitted to notice that witnesses No. 39 and 40 were examined on the 10th October, when Chintaman was arrested, and therefore only a fortnight after his alleged arrival; so that there could be no difficulty in the witnesses at that time stating the date of his arrival with the fullest confidence. The third witness No. 41. the Dewan of Dewas, is a man of very high position; and we do not feel impelled to the same conclusion as that formed by the Session Judge, *viz.* that he has given false evidence, in order to preserve the life of a Brahmin. No doubt almost all evidence in this country must be received with some suspicion: but weighing the evidence for the *alibi* against the confessions, we feel it impossible to say that the Assessors were wrong in thinking that the balance inclined in favor of the prisoner.

For these reasons we are of opinion that the conviction and sentence cannot with safety be upheld, and we reverse them accordingly.

The preliminary enquiry in this case was very carefully made by Mr. Courtenay and he is deserving of praise for the pains which he took to satisfy himself that the confession of Chintaman was voluntarily made. We would, however, observe that it would have been more satisfactory if he had allowed Chintaman to make an entirely fresh statement on the 30th October instead of merely reading to him his statement before Mr. Anandrao Bhaskar, and asking him if it was true. In such cases it is very desirable to test the value of statements made on different occasions by taking them fully and in detail and seeing in what respects they agree and in what particulars they differ.

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10 March 1881. BIRDWOOD & NANABHAI, JJ.

Letter from Kaira Magistrate.

Regulation 12 of 1827—Pole—Watchman.

It is not competent to a Magistrate to issue a notice under section 19 (6) of Regulation 12 of 1827 calling on the inhabitants of *pols* to employ a watchman if they lock the *pol* gates at night in order to open the gates to the Police when required.

RESUMED consideration of the letter from the Magistrate of Kaira No. 1455. Dated the 11th December 1880 forwarding notice issued by him under section 19 clause 6 of Regulation 12 of 1827 calling on the inhabitants of Pols or semi private streets in Neriad and Mehmadabad to employ a watchman, if they lock the Pol gates at night in order to open the gates to the Police when required; last before the Court on the 20th January 1881.

Resolution on the 20th January 1881 whether any cases have arisen in which the investigation of crime has been interfered with, in consequence of the practice referred to and if so to report the circumstances of those cases.

ORDER.—As the 'pols' referred to are not apparently places of public resort being described by the Magistrate as semi private streets, the Court is of opinion that the Magistrate had no jurisdiction to institute the rule submitted by him under section 19 clause 1 of Regulation 12 of 1827. The Court therefore under clause 6 of the section forbids the injunction issued by the Magistrate.

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10 March 1881. BIRDWOOD & NANABHAI, JJ.

Queen-Empress v. Lallu.*

Criminal Procedure Code (Act X of 1872), Sec. 454—Penal Code (Act XLV of 1860), Sec. 71—Sentence.

A man who rode a horse furiously and knocked down another man and his child, was convicted under sections 279 and 336 of the Indian Penal Code, and sentenced under the former to one month's rigorous imprisonment and under the latter to a fine of Rs. 20:—

***Held*, that though the combined sentence was within the limit fixed by section 71 of the Penal Code, the case fell within section 454 (2) of the Code of Criminal Procedure which contemplated the passing of a single sentence only, and that the order in appeal substituting a single sentence equal in extent to the combined sentence was right.**

THE accused was charged with recklessly and violently riding a horse in a crowded place on the occasion of a Mahomedan festival, and thereby knocking down a man who had a child on his shoulder, causing them hurt and rendering them insensible for about 25 minutes. On these facts, the Second Magistrate convicted the accused under sections 279 and 336 of the Indian Penal Code, and sentenced him to one month's rigorous imprisonment for the first offence and for the second offence to a fine of

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**Criminal Ruling.* Criminal Reference No. 31 of 1881.

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Rs. 20. On appeal Mr. Wiltshire, the Divisional Magistrate confirmed the conviction but said "West's notes to Indian Penal Code, section 71 lead me to the conclusion that accused should have been sentenced under Indian Penal Code, section 279 only," and he passed the same sentence under section 279 of the Indian Penal Code as the Second Class Magistrate had passed under the two sections 279 and 336.

The Sessions Judge of Dharwar in referring the case to the High Court observed:—"I consider that Mr. Wiltshire's order is erroneous in point of law. My grounds of this opinion are as follows. Section 71 of the Indian Penal Code deals with the punishment for offences and limits that punishment under certain circumstances. The combined sentences passed by the Second Class Magistrate in this case did not exceed the limit prescribed in section 71 of the Indian Penal Code. Section 454, Part II of the Code of Criminal Procedure seems to me to deal exactly with a case like the present one, and subject to a limit of punishment, to justify a conviction and sentence under two or more sections of the Indian Penal Code as regards the reasons given by Mr. Wiltshire founded on Mr. Justice West's note, it is sufficient to say that the note, even if it supported Mr. Wiltshire's view was made before the present Code of Criminal Procedure came into operation."

ORDER.—The Court is of opinion that Mr. Wiltshire's order is legal. The case fell under para 2 of Section 454 of Act X of 1872 which seems to contemplate the award of a single sentence only.

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10 March 1881. BIRDWOOD & NANABHAI, JJ.

Queen-Empress v. Bala.*

Penal Code (Act XLV of 1860), Sec. 202, Police—Patel—Information.

A Police Patel failed to report the arrival at his village of dacoits, and supplied them with food and drink :—

Held that he could not be convicted under section 202 of the Indian Penal Code, as there was nothing to show that an offence was committed by persons who visited his village.

THE accused was charged under section 262, Indian Penal Code, with intentional omission to give information respecting an offence by a person legally bound to inform, in that the accused being the officiating Police Patel of the village of Khadkale was legally bound to give information of the commission of any offence in his village. The Police Patel not only failed to report the arrival at his village of the dacoits but supplied them with food and drink.

ORDER.—The conviction under section 202 of the Indian Penal Code cannot be sustained as there is nothing to show that an offence had been

*Criminal Review No. 15 of 1881.

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committed by the persons who visited the accused's village. The accused evidently suspected them of being robbers. It was his duty under section 90 of the Criminal Procedure Code to communicate forthwith to the nearest Magistrate or Chief Constable any information of which he was possessed regarding their visit. But on his examination which is the only evidence recorded in the case it could not safely be held that he intentionally omitted to communicate such information for he says that he gave it to the Foujdar when he came to the village the day after the suspected robbers had visited it. A conviction under section 176 of the Indian Penal Code could not therefore either be sustainable. The Court, therefore, reverses the conviction and sentence and directs that the fine be restored.

There is nothing in the Magistrate's proceedings to show that the procedure prescribed by section 206 of the Criminal Procedure Code was closely followed. The Magistrate's attention should also be directed to section 464 of the Criminal Procedure Code. It should also be noticed to the Magistrate that he omitted to sign the memo of the examination of the accused as required by section 346.

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17 March 1881. BIRDWOOD & NANABHAI, JJ.

Queen-Empress v. Bhika.*

Village Police Act (Bom. Act. VII of 1867), Sec. 31—Call of Nature—Public road.

To ease oneself close to a public road is not an offence under section 31 of the Bombay Village Police Act, 1867, unless the act is committed within sight of a public road so as to cause obstruction, annoyance, risk, danger or damage to residents or passengers.

ORDER.—There is nothing on the Record to show that the accused was called upon to plead to an accusation of the facts necessary to constitute an offence against section 31 of Bombay Act VII of 1867. To ease oneself close to a public road is not an offence unless the act is committed within sight of a public road so as to cause obstruction, annoyance, risk, danger or damage to residents or passengers. There is nothing to show that accused so acted within sight of a road. The conviction and sentence are therefore reversed and the fine should be restored.

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6 April 1881. WEST & NANABHAI, JJ.

In re Mari.†

Criminal Procedure Code (Act X of 1872), Sec. 196—Commitment—Charge—Committing Magistrate.

The drawing up of a charge must always follow the determination of a Magistrate to commit a case to the Court of Session, which determination duly expressed the Magistrate becomes *functus officio* as to that matter.

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*Criminal Review No. 63 of 1881.

†*Criminal Ruling.* Criminal Reference No. 39 of 1881.

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Where, therefore, a Magistrate first drew up a charge, directing the commitment of the accused, and afterwards taking further evidence, discharged them, the High Court held that the order of discharge was illegal and that the case should be committed for trial by the Court of Session.

THE circumstances of this case were that the six accused were sent up for trial to the Magistrate First Class at Tasgaon. After taking the evidence the Magistrate on 27 January 1881, framed a charge against the accused to this effect "that you on or about the 21st November 1880 at Aitanda Taluka Walwa District Satara committed an offence punishable under section 395 of the Indian Penal Code and cognizable by the Court of Session. And I hereby direct that you be tried by the said Court on the said charge." He then proceeded under sections 119 and 200 of the Code of Criminal Procedure. He thought proper to summon before him the persons named by the accused and took their evidence. After hearing their evidence he changed his mind and recorded an order of discharge under section 195 of the Code of Criminal Procedure.

The District Magistrate of Satara in making this reference to the High Court observed:—

"On the above narrative of proceedings it appears to me that the only effect of the Magistrate's proceedings under section 200, was to make his previous commitment recorded on January 27,1881 equivalent to an order of commitment recorded on February 9, 1881, (Note. The date given in the proceedings January 9, 1881 is clearly an error) being the last day on which such further evidence was taken. Section 196 read with the explanation to section 197 seems to me to make it clear that the commitment formally made on January 27, 1881, and legally post-dated under the provisions of section 200 to February 9, 1881 could not be quashed by any other authority than the High Court."

ORDER.—The Court do not think the drawing up of the charge by a Magistrate is necessarily a judicial and final act. In *Cox* v. *Coleridge* (1), it was said indeed that in a preliminary inquiry a Justice of the Peace does not act judicially. Still section 196 says that when a *prima facie* case is made out the Magistrate shall send the accused for trial, and according to the English law he ought not to decide on a conflict of evidence. If the preparation of the charge is judicial, it makes the Magistrate *functus officio*, as it must follow his determination to commit; and the subsequently taken evidence ought not to weigh with the Magistrate. The Magistrate was therefore wrong in making the charge until he had finally resolved to send the case for trial and the Court directs a commitment of the case to the Court of Sessions.

(1) 1 B. & Cr., 37.

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21 April 1881. PINHEY & NANABHAI, JJ.

Queen-Empress v. Natha Reva.*

Penal Code (Act XLV of 1860), Sec. 289—Driver—Leaving carriage unattended.

The accused a house-keeper in the employ of the complainant, harnessed his master's horse, put him into his carriage and then went away, leaving the horse and carriage standing in the road of the compound of the complainant's house without any justification :—

Held, that in so doing, the accused was guilty of knowingly or negligently omitting to take such order with the horse in his possession as was sufficient to guard against the probable danger of grievous hurt from such animal, an offence punishable under section 289, Indian Penal Code. The horse was not the less in the actual possession of the servant, because it was for some purposes in the constructive possession of his master.

ORDER.—The Court refrains from expressing any opinion on the merits of the case (which is in some respects a peculiar one) and confines itself to the legal question which has been referred, *viz.*, whether the act or omission which the trying Magistrate considered proved against the accused constituted the offence of which the accused was convicted under section 289 of the Indian Penal Code.

The Magistrate First Class found that the accused who was a horse-keeper in the employ of Dr. Nolan harnessed his master's horse and put him in his master's carriage and then went away leaving the horse and carriage standing in the road of the compound of Dr. Nolan's house, without any justification for so doing. The Court is undoubtedly of opinion that in so doing the accused knowingly or negligently omitted to take such order with the horse in his possession as was sufficient to guard against probable danger to human life or probable danger of grievous hurt from such animal as stated in section 289 of the Indian Penal Code.

The Court does not agree with the view taken by the Session Judge as to the possession of the horse by the accused at the time the offence was committed. The horse was not the less in the actual possession of the servant because it was for some purposes in the constructive possession of his master.

The Court therefore does not consider it necessary to interfere in this case. The Court rejects the petition and directs the Record and Proceedings to be returned.

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25 March 1881. WEST & PINHEY, JJ.

Queen-Empress v. Vijialakshmi.*

Confession—Admissibility—High Court.

Where a confession was objected to on the ground that it was improperly received into evidence by the Lower Court, the High Court declined to disturb the discretion exercised by the

*Criminal Ruling. Criminal Reference No. 49 of 1881.

*Confirmation Case No. 18 of 1881, Criminal Appeal No. 75 of 1881.

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Lower Court on the grounds that the objections now advanced could well have been advanced before the Lower Court, and that there was nothing improper on the facts of the case in the Lower Court's admitting the confessions.

PER CURIAM.— There appears to be no doubt whatever in the case of the crime having been committed. Some observations had been made by Mr. Shantaram Narain, with proper regard to interests of his client, as to the circumstances under which the first and second confessions of Vijia Lakshmi were obtained ;and if those observations had been made and pressed upon the Sessions Court, no doubt they would have been dealt with by the Sessions Judge in his judgment. If it were desired by the accused, or the pleader acting for her desired that the confessions she had made should be excluded, on the ground that cajolery, or undue pressure, had been brought to bear upon her when she made her first or second confession, that should have been brought before the Court, and if it then appeared to the Court, in the exercise of its judicial discretion, that there had been this pressure under the influence of which she was labouring when she made the confession, they would have rejected the confession. But it did not appear that any thing of the kind was pressed upon the Court: and if the Court in the exercise of its discretion, had received the confessions, under these circumstances it was only on the very plainest and most manifest indication that the Sessions Court had been entirely wrong and mistaken in accepting confessions which ought not to have been accepted, the Court would be justified in interfering. It was a discretion which was left to the Court to which the evidence was tendered, and it was only in the exceptional case when the Court above had reason to believe that the practice had been obviously abused, and that there had been an entire want of discretion in receiving the confession, that they could interfere. Here the main facts of the case tending to criminate the prisoner were not only stated before the Subordinate Magistrate first, and before the committing Magistrate afterwards; but they were actually repeated in the Sessions Court itself, and if the prisoner had been under the influence of undue pressure in making her earlier statement, they could only suppose that before the Sessions Court that influence still remained, and that her confession there was still influenced by the pressure brought to bear upon her. If they were to carry the matter to this length, the necessary consequences would be to exclude confessions altogether; and if they had the prisoner before themselves, and she made a confession before them in that Court, as occurred sometimes in the case of prisoners, for trial in the large Sessions Court adjoining, it might still be said after the trial was over and the sentence passed, that the police, whilst the woman or man thus sentenced, had been in their custody, had put pressure upon them, albeit they looked up to the Court now with a

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great deal of confidence and that they had hoped and expected some good would result. The Legislature in its indulgence to prisoners, who were to come before the Magistrates and Judges for trial, had granted the most lenient rules which could be devised, and said that confessions made to Police officers should not be received at all in evidence, and that confessions made by prisoners in the presence of Police officers should not be received in evidence, and that the Magistrate, in cases where confessions had been made, was to satisfy himself, before accepting them, that no undue pressure had been used, and that a certificate to that effect must be annexed to the confession in order to make it admissible. When the Legislature had provided these safeguards it would amount to self-stultification, if the Courts, which has to discuss the law as the Legislature had framed it, were to say "albeit the law has made these safeguards in favour of accused persons, we do not consider these safeguards enough and will add to the Legislative provisions, and will decline to receive confessions, because some influence was brought to bear on the accused in the Sessions Court." Officers,—especially officers charged with judicial functions—, would as a rule, and invariably, save under very exceptional circumstances, perform their duty as laid down by the Legislature, and as explained to them from time to time by the Court. Therefore, they saw no reason to suppose that the confession in this particular instance, were to be discriminated in favour of the accused from the broad line of cases that generally came before the Court. The Chief Constable acted, in enquiring into what the woman had done, with some degree of rudeness and pressure. Probably, it was the case, that unless police officers did act in a somewhat pressing way when they had criminals to deal with, their investigations would very often prove futile, where they now proved fruitful in the discovery and prevention of crime. Therefore some allowance must be made for an officer in the performance of his duty, so long as he did not transgress the bound laid down for him. There was a matter, however, in this connection, upon which it was desirable the Court should say some thing; and that was that it was certainly—to European ideas at all events—a matter of some degree of hardness—of barbarity almost—to send a woman who had been just before delivered of a child off to the Kutchery; and still more barbarous did it seem to civilized ideas that she would have been sent straight off in a bullock cart, several miles to Surat, when she had only just gone through the pangs of parturition. However, what was somewhat surprising was that when the woman got to Surat, and was examined by the Civil Surgeon, he, finding the condition she was in, should apparently have raised no objection to her being carried home again to Ulpar. Either the Civil Surgeon must have been ignorant that she was

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to be taken back, or that he thought it was a matter of no consequence. It was difficult to believe that he was ignorant of the fact that she would have to return, as he knew she came from Ulpar, and would infer that she would have to be taken back again. The inference from this fact was that the Civil Surgeon, after the examination, thought that the woman was really not in such a serious condition that travelling would be or was likely to be, from the distance she had to go, of any serious consequence to her. The apparent cruelty, therefore—for it did appear cruelty at first sight—to send this woman to and from Surat in the condition she was then in, as a matter of fact and practice, so far as they could gather from the circumstances which appeared on the proceedings before them—did not appear to have really injured the woman very much. The Court thought it was an injudicious and improper thing to do to send a woman, under these circumstances, a journey of nine miles, without first retaining her for a day or two, and then having her examined by some medical person on the spot, to see whether travelling was suitable to her under the circumstances; but that it really affected her mind or body in such a way as to make the confessions, which she subsequently made to the First Class Magistrate, on the 4th April, something for which her mind was not responsible, there was no evidence to show. The Court did not think she was in that physical condition which would probably affect her mind and make her incapable of knowing what she was about or the consequences of her confession, on the 4th April, she having been to Surat on the 31st March. In the interval she was in police custody, and no doubt the police had unfortunately, on some occasions, used their authority with harshness and severity; and the mere fact that the accused had four days between her two confessions, so far from being an interval, during which she could collect her senses and calm her thoughts, would if there was a disposition to abuse their power, only be a time for the police to bring undue pressure upon her and frighten her more and more. But they had no distinct reason for believing that when the police had people in their custody, they abused their charges for the purposes of extorting confessions. It was to be supposed that the police had consciences and that they did not cast off the common feelings of humanity when they put on their police uniform. In the present case there did not appear to have been anything extraordinary in the conduct of the police. The main facts of the case were admitted. The woman said she was delivered of a child, and that child was found. If the child produced was not her own child, the first thing the accused would have said when the body was produced would have been "That is not my child;" or if the body had been taken away by her father or any one else to be disposed of, she would have said, "I did not destroy my

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child, it was born dead, I gave it to so and so." Had not the body of the child produced been the offspring, of the accused, the body of the proper child would, no doubt, have been produced; but there was no real doubt that the child produced belonged to the accused,—in fact when before the Session Court, she admitted that it was the child which had been born to her. This being so they were brought to the established facts of the case, *viz.*, that she was delivered of a child; that she destroyed that child, in what was certainly a most barbarous manner, by using a blunt instrument to cut its throat, and then she was barbarous enough to hand its body over to a low caste woman, and have it flung on a dung-heap. It was difficult to conceive anything more barbarous than that. If she pitched on any casual passer-by to dispose of the body of her child, it showed a want of feeling; and it certainly showed a certain calmness of thought that she pitched upon a low caste woman, who, probably would not think much of the job. It might also be supposed—and rationally supposed—that she had arranged with this woman—that was a far more probable supposition than that she called out casually "come in here, I have a job for you to do." It was to be supposed that she arranged with this woman the part she was to take in the business, and that in pursuance of that arrangement she destroyed the child and handed it over to this woman. If she had an arrangement, it was to dispose of the corpse, and not to take care of a living child, which was to be preserved, because the woman belonged to a low caste. Hence they had these facts under which it was said that the case was one which called for the exercise of merciful discretion on the part of the Court, and for a strong recommendation from the Court that the mercy of Government should be extended to the accused, and that the sentence of transportation for life to which they were asked to commute the sentence, should be further mitigated. The case appeared to the Court to be one of a very common type and if the case of the woman and the rules of the caste were to be taken into account in her favour, these rules must also be taken into account on the other side, because if the case was to be considered on the strict rules, it must be evident that the accused must have known when she indulged her lust, or yielded to the indulgence of the lust of some one else, that these dire consequences might follow; and what was the value, either morally, or from any point of view of a sensibility, which was sufficient to make a woman destroy her own offspring, but which was not sufficient to guard her against the indulgence of her lust. This fine sensibility ought to come in at a much earlier stage; and it was not for a moment to be conceded from the Bench of Justice that a woman might think more of her own selfish gratification, and the guarding of her own

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honor, and the protection of herself from shame,—shame which she had properly earned—than the protection of the life of her own offspring. Human life was not the less sacred, in a moral or political sense, in the case of a young child, than in the case of adult. If human life indeed was more worthless at any particular stage of existence than another, it was, one would think, when men grew older, and not when they were very young and when there was a possibility that they had a part to perform in the world and were likely to become useful members of Society; whereas when their part was performed and their days were drawing to a close, some excuse might possibly be urged for destruction of life under these circumstances. Indeed there were tribes now existing and some mentioned by classical authors, who thought it their duty to destroy old people to save them from further trouble. Infanticide too was still practised by some savages and by some peoples of a type above savagery, outside India as well as within it There has been such things known ; but it would be a disgraceful inconsistency if, while the British Government was bringing great pressure to bear and using great exertions to check female infanticide—which had been, indeed, so great misfortune—the Courts were in any way to encourage the infanticide, which follows on the indulgence of sexual passion against the rules of caste and against the rules of morality. In this case the excuse which was commonly urged could not be urged with the common force. The woman had had her instinct of maternity gratified ; she had been married ; she had had a child ; the craving to be a mother had found its natural gratification in her case, and if any difference was to be made on behalf of some women on the ground that their instincts are a great temptation to them, and that they are brought into the world with the functions of mother to be performed, such an excuse here was not available. It was not indeed for a moment to be listened to that, because a woman could not get a husband, and because no man proposed to her, and she had no opportunity of getting married, she should first indulge in libidinousness, and then conceal the consequences of her sin by destroying her offspring. If mere avoidance of shame to the individual was to be a ground for the commission of a crime, what were they to say to the case of a merchant or banker, on the eve of bankruptcy, who had the sense of shame and ruin staring him in the face? Did they make that a ground of excuse for his committing forgery? But to carry the point further. A merchant or banker on the eve of ruin was visited by some one, who said to him "I am afraid on looking at this signature on the bill you have passed to me, that you have committed forgery, and it will be my duty however painful to denounce you." The merchant or banker feels sure that in five minutes he will be ruined. He,

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therefore, murders the man who has the bills or securities in his hands; destroys the documents and makes away with the body of the murdered man. Here was a murder to save a man from exposure and shame. Was he to be excused? Certainly not. Yet if the sense of shame was to be an excuse for murder, was then the claim of a child upon its parents less than the claim of a creditor upon his debtor under such circumstances? Certainly not. If there was any sacredness attached to the human life at all, that sacredness was trebled in the case of a child appealing to its mother; and the more helpless the child was, the more strong that appeal would be, so long as the mother retained the natural affections of her kind, and so long as she was open to those impulses, which were necessary for the proper protection of society. If she was not open to those impulses, the Courts, which were established to guard against such dangers, must endeavour to instil a wholesome fear under such circumstances; and if they did not instil a wholesome fear, it was manifest that those crimes would increase in number. Mr. Shantaram Narayan had drawn the Court's attention to the circumstance that in several instances the Court had recommended that the sentence of death passed on prisoners found guilty of infanticide should be commuted. The Court had been influenced by very proper motives on all these occasions; but it was to be regretted that these recommendations were followed by the state of things that on that very day they had four cases of child murder—in the work of a single week they had four child murders brought before them. Three were distinctly cases of child murder; the fourth was a case of exposing a child by throwing it from a verandah to the ground and there leaving it to die. It would appear, therefore, that the leniency that had been exercised was bearing fruit in an increased number of crimes of this kind; and it was time that this mercy should be stopped. The fact was that in cases of that kind the ordinary associations, which clustered around the ideal of a woman, were entirely perverted. They thought of a woman as an object, helpless, tender, feeble, with every kind and gentle feeling most strongly developed in her; and then by sudden perversion they were asked to carry on these beautiful attributes and associations to the case of a woman who had acted in entire opposition to these feelings. They were asked to carry on these beautiful associations to a woman who had shown herself void of affection towards her offspring. What claim had a woman who had thus become a disgrace to her sex, to those feelings of mercy and compassion and kindness with which we ordinarily regarded those who were an honor and ornament to the sex? Our feelings so far as they might be indulged at all ought to be exactly the reverse. The woman who herself disregarded the proper functions and

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virtues of sex was in an especial degree disqualified from claiming the kindness and consideration which we ordinarily accord to the sex, because of their having feelings which this woman had thrown aside. In cases of child murder, in ninety-nine cases out of hundred, the crime was committed under purely selfish impulses. In the present case, if the circumstances, under which the murder was committed were examined, it would be found that the woman said she was afraid that she should be brought to shame—that she would lose her honor—therefore to avoid the semblance of dishonor, she incurred the reality of crime. The caste must have moved her out; but if she had preserved her child alive, and faced the dishonor which the caste would have thrown upon her in consequence, she would have been doing that which would have reflected real honor upon her in all judicious minds. Instead of that, she incurred the deepest guilt by the murder of her own offspring, in order to avoid this dishonour, which she had earned by her lewdness. She had dishonored herself already. She could not escape that by any artifice. She could, she thought, escape the consequences which the caste itself would throw upon her; and she committed the very worst crime, and said—or rather her eloquent pleader said for her, with all the force it could be put—that she deserved especial consideration. The Court did not think she was deserving of especial consideration. They thought it was a very vulgar case of selfish crime—a crime committed upon the offspring of her womb—which had especial claims upon her tenderness; and looking at the circumstances which they had that day before them, in the fact that there were four cases of child murder, the Court did not think that they would be right in recommending Government to make any further reduction in the sentence which would be fixed. People, who belonged to castes which visited the offence of libertinism with such extreme severity and did not allow the remarriage of widows, were, of course, labouring under peculiar disadvantages. Society, no doubt, was bound in its own interest to look at the matter calmly and judicially, and bring presure to bear if it could be done with advantage upon castes which had these rules, which were said to be cruel. Whether they were cruel or not, it was not for the Court to say sitting there in an investigation of that kind. If they were cruel, the remedy ought to be brought about by society itself. Infant life must be protected as well as adult life. An infant just brought into the world had as much right to life as a man of twenty or seventy years old; the legislature had made no difference; nor was it for the Court to make any difference. The condition of the accused in the present case appeared to the Court to be one which was not materially different from that of many other woman—from the condition of

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every woman, whose hand was never asked in marriage. Supposing a woman was ugly, supposing she was old, or that she had not the means which in many instances were necessary to obtain a husband, was she first to be previleged to indulge her lust, or the lust of some admirer and then to conceal her shame—for shame was there; albeit she concealed it by the deepest crime of murder? Was a woman who was prevented from marrying a second time here to be distinguished essentially from thousands and millions of women who in civilized Europe, on account of the great preponderance of the female sex were prevented from marrying? These women may at times yield to temptation but they never think it would be an admissible excuse for the indulgence of depraved sensuality still less for committing murder that they cannot get married. They have to say to themselves "Religion which had its consolations and its joys as well as its burden must teach us to accept the lot which has fallen upon us, with such fortitude as we can. God has sent us into the world without everything being smooth for us, and if this is the peculiar cross we have to bear, we must bear it with patient submission, to the Divine will that would not have placed us in this world, unless it were right that we should come here. We must, therefore, perform the duty which God has assigned to us, and submit to our lot in the frame of society in which we have been placed," and so must the Hindu woman or the Mussalman. She too knows good and evil, recognizes a Providence, and is surrounded with social influences which should guard her against gross depravity. We are placed in this world with a duty to perform, and if Providence has not made our path smooth for us, we must bear the cross which is imposed us, with such fortitude and resignation as we can; but we must not, because we have hard lot to bear, commit an offence against the laws of morality; we must not, because we are deprived of the blessings of married life, indulge in licentiousness; and we must not, because we have fallen into one fault, commit another of greater enormity, in order to conceal from the world the evidence of our shame. These appeared to the Court to be the observations which a case of that kind called for. The case was not to be distinguished from the great number of cases which came before them of a similar legal description. Still the Court did not think it was necessary that the extreme penalty of the law should be carried into execution. They did not think the crime of child murder was yet so common that forfeiture of life should follow in every instance where a woman was found guilty of it; but they did think that the case was not one in which they would be justified in making a recommendation to Government. Their determination, therefore, was that the conviction was confirmed; and that the sentence of death was not confirmed, but was commuted to transportation for life.

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28 July 1881. KEMBALL & PINHEY, JJ.

Queen-Empress v. Balu.*

Lunatic—Procedure—Burden of Proof.

The law presumes every person at age of discretion to be sane unless the contrary is proved; and even if a lunatic has lucid intervals the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed during derangement.

ORDER.—The Court is of opinion that there has been a wrong finding here; but it thinks this is in some measure due to the mistake of the Judge in summing up to the Jury.

The sole question for their consideration was whether at the time of killing his child the accused had or had not the use of his understanding so as to know that he was doing a wrong act.

The law presumes every person at age of discretion to be sane unless the contrary is proved; and even if a lunatic has lucid intervals the law presumes the offence of such person to have been committed in a lucid interval unless it appears to have been committed during derangement. The Sessions Judge rightly explained to the Jury that it was for the accused, who sought to excuse himself on the plea of insanity, to make it clear that at the time of committing the offence he was incapable of knowing right from wrong, but he ought to have gone on to tell them that the onus being on the accused, it was their duty if they had any doubt in the matter to convict him, instead of directing them that if they had any doubt in coming to a conclusion they were to give the benefit of it to the prisoner.

The Court is unable on the facts to find any foundation for the finding of the Jury. The first allegation that the accused had been idiotic for a long time is not worthy of serious consideration and as to the derangement after violent attacks of epilepsy the evidence that accused suffered from epilepsy is hardly of a reliable character, and there is really no evidence that he was suffering from dementia at the time of killing his child. Accused gave a reason for the killing but assuming the absence of motive that is no ground for inferring an irresistable and insane impulse.

The Court convicts the accused of murder and sentences him to transportation for life.

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*Criminal Reference No. 73 of 1881.

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18 August 1881. MELVILL & KEMBALL, JJ.

Queen-Empress v. Rampuri.*

Practice—Police—Evidence.

In all important cases, and especially in cases of murder and dacoity, the police officer making the investigation should be examined as a witness regarding the circumstances of the investigation. It is generally important to the trying authority to know why, where and when the accused persons were arrested. It is often important to ascertain what the witnesses said, when they were first questioned by the police, and whether such statements agree with those subsequently made by the witnesses in Court.

ORDER.—The following observations should be communicated to the Sessions Judge, and through him, to the committing Magistrate, and the Superintendent of Police.

In several recent cases the High Court has had occasion to remark on the omission to examine the police officer or officers by whom the investigation was made into the offence under consideration. The High Court is of opinion that in all important cases, and especially in cases of murder and dacoity, the police officer making the investigation should be examined as a witness regarding the circumstances of the investigation. It is generally important to the trying authority to know why, where and when the accused persons were arrested. It is often important to ascertain what the witnesses said, when they were first questioned by the police, and whether such statements agree with those subsequently made by the witnesses in Court. In the present case, it appears that ten persons were arrested for complicity in the murder, but it would have been satisfactory to know on what grounds these persons were suspected, and when and where they were taken up. It is stated by one of the witnesses that, when the confessions of the accused persons were taken, the Foujdar was sitting by the side of the Third Class Magistrate, and suggesting to him the questions to be put. Being satisfied that the confessions are true, this Court has not thought it necessary to order an inquiry into this point; but it is a matter on which the Foujdar might well have been questioned.

The evidence as to some of the most important points in this case is very weak, and it seems to have been the fault of the Police and of the committing Magistrate that more satisfactory evidence was not produced. The witness Bulwant is the only member of the "Punch" who has been examined. He alleges that the earth in the neighbourhood of the scene of the murder was stained with blood, and that there were also stains of blood on certain sticks and stones there found, and upon some blankets belonging to the Prisoners. Bulvant is described by the Sessions Judge as a "stupid man who should never have been selected for a *punch* at

*Confirmation case No. 30 of 1881.

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all." It was evidently desirable that some better evidence as to the existence of blood stains should have been forthcoming. The Police do not seem to have sent up any other evidence, but the committing Magistrate appears to have felt the necessity for it. In his reasons for committal, he speaks of the blood stains, as if their existence were established, but at the end of his observations he says "the sticks and stones and blankets are sent to the Civil Surgeon for examination as to whether they bear stains of human blood or not." It seems doubtful whether the committing Magistrate's order on this point was ever carried out: for in the vernacular *roznama* it is stated that the articles in question were forwarded direct to the Sessions Court on the same day on which the Magistrate's order was recorded. At all events, the record contains no report by the Civil Surgeon, nor is there any skilled witness who deposes on the subject. It is impossible, on the evidence of such a man as Bulvant, to hold it established that any blood stains were apparent. Another most important piece of evidence, if it can be relied upon, is that of the finding of a broken stick in the house of Khetri Prisoner No. 5, and of another piece of stick exactly fitting into the former stick, at the scene of murder. Now it is manifest that such an important, and almost conclusive, circumstance as this should have been established by the very strongest testimony available. Some doubts as to the genuineness of such a piece of evidence must necessarily suggest themselves to the mind. It is a curious coincidence that it should be forthcoming against the only one of the prisoners who has not confessed, and whose conviction therefore was more doubtful than that of the others. It is strange that a man who had committed a murder with such a weapon and broken it in the act, should be careful to preserve the broken piece in his house. The search of the house was not made, as it ought to have been made in the presence of the prisoner, Khetri. Yet under all these circumstances, both the Police and the committing Magistrate were content to send up no other witness than the man Bulvant, already referred to, and who was actually not the person who found either of the pieces of stick. It is true that he says that he saw one piece found at the scene of the murder by a police man named Mohomed: but as to the other, he does not seem to have entered Khetri's house, and all that he can say is that he saw the stick brought out of the house by one Ramji Patel. Why neither Mahomed nor Ramji was sent up as a witness it is very difficult to understand. In this defective state of the evidence it is impossible for this Court to attach much weight to the circumstance of the production of the two sticks, and if the other evidence in the case had been insufficient for the conviction of Khetri, it would have been necessary to order further inquiry.

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JUDGMENT:—On Monday last after we had given judgment in this case, Mr. Rivett-Carnac made an application requesting us to refer to the Full Bench the question whether the confessions of seven out of the eight accused persons were inadmissible, because every question put to them had not been recorded. Had this been an ordinary case we should have at once told the learned counsel that the Court was *functus officio*, and that it could not entertain his application after judgment passed; but this case is a most serious one, more serious perhaps than any which has yet come before the Court, inasmuch as it involves a sentence of death on five persons and of transportation for life on three others. We were, therefore, unwilling to dispose of the application without the fullest consideration; and we should have been only too glad to share, if we could, with our brother Judges the heavy responsibility which lies upon us in this matter. We, therefore, took time and have now fully considered, the point. We regret that the conclusion we have come to is that the application must be refused. Section 25 of the Amended Letters Patent after providing that there shall be no appeal to the High Court from any sentence or order passed in a criminal trial before the Court lays down :—" But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of said High Court." It should, however, be noted that the provision refers to the sentence of the High Court in its *original* criminal jurisdiction. Likewise the power given in section 26 to the High Court to review a case upon certificate of the Advocate General, and which power was exercised in the well known case of Pestonjee Dinshaw on a certificate signed by Mr. Scoble after judgment had been pronounced by Mr. Justice *Bayley*, refers also to the original jurisdiction of this Court. We are here sitting as a Court of reference and appeal, and we have to be guided solely by the Code of Criminal Procedure,and this does not make any provision as to reserving a point of law or referring it to the Full Bench. Mr. Rivett-Carnac relied upon the leading case of *Bai Rutan* (1). At an early stage of the hearing of that case it occurred to Mr. Justice *Nanabhai Haridas* and myself that the confession in that case being neither signed by the accused nor attested by her mark was inadmissible. The report says we " referred " four questions for the decision of the Full Bench. That is not strictly accurate. What we did was to lay those questions before the Chief Justice, and express a desire that other judges should sit with us and hear the case. Five Judges accordingly set and heard the case from begining to end. In the case before us now the counsel raised the point last Wednesday and

(1) 10 Bom. H. C., 166.

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asked us to decide it before going into merits. We passed an interlocutory judgment. Then was the time to make this application; but none was made, and the case was on Monday resumed and decided. This case, therefore, differs materially from that of Bai Ratan. The application, even if it were otherwise admissible, is made too late. We do not for a moment imply that by omitting to make the application at an earlier period the learned counsel failed in his duty to his clients. The counsel has, we think, performed his duty with very great care and ability. We simply mean to say that the only clause of re-opening the question lay in the making of the application after we passed our interlocutory decision. But even if the application had been made at the right time the result would have been the same. We entertained no doubt on the point. Even if it were the case that every question put to the accused had not been recorded by the Magistrate the omission had not prejudiced the accused. It was contended that whether or no the accused were in fact prejudiced the omission rendered the confessions inadmissible; but we held otherwise, as in Bai Ratan's case, in which at page 178 the following passage occurs in the judgment: "The error of the Second Class Magistrate in omitting to ask her to sign was, having regard to the probable intention of the Legislature in requiring the signature of the accused, of such a nature as may have seriously prejudiced her, and, *therefore*, as we think, rendered the thus imperfect record of the confession inadmissible in evidence against her." And again at page 181 of the report we stated that section 283 of the Code of Criminal Procedure could not be held applicable, because it was impossible that the accused had not been prejudiced. This shows that the irregularity to render the confession inadmissible must be such as may have prejudiced the accused. Otherwise section 283 of the Code of Criminal Procedure which was held inapplicable in Bai Ratan's case, would apply. As there enacted, a sentence is not to be reversed on the ground of any error or defect in the proceedings unless it has occasioned a failure of justice by prejudicing the accused in his defence. In conclusion, we will notice another point which has not been alluded to before. Section 80 of the Indian Evidence Act provides: "whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused person, the Court *shall presume* that the document is genuine, that the statement as to the circumstances under which it was taken purporting to be made by the person signing it are true, and that such evidence, statement, or confession was duly taken." If, as is now argued, all the questions put to the accused have not been recorded, evidence ought to have been produced to prove it. Some questions appear on the face of the confessions,

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which, therefore, purport to be duly taken according to law; and this Court is bound to presume that they were so taken unless and until it is proved to the contrary. The order formerly made will now be signed.

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31 August 1881. MELVILL & KEMBALL, JJ.

Queen-Empress v. Jamshedji.*

Criminal Procedure Code (Act X of 1872), Secs. 297, 283—Question of fact—High Court.

The High Court in the exercise of its revisional powers, under section 297, Criminal Procedure Code, does possess the power of upsetting a finding of fact by the Lower Court on the ground of misappreciation of evidence but it has been the uniform practice of the Court not to exercise that power, except for some very extraordinary reason. The circumstance that the Court itself might or would have come to a different conclusion is not such a reason.

An officer, appointed a Magistrate of the First Class for a whole District, but put in charge by the District Magistrate of particular Talukas only, is not without jurisdiction, if he inquires into or tries a case in another Taluka of the same District. An order of the District Magistrate directing the First Class Magistrate to take up a case is unnecessary.

An irregularity in the conduct of an inquiry, eventhough sufficiently serious to induce the High Court to annul a commitment, is not sufficient to justify the annulment of the trial after the commitment had been made and a trial had upon it, unless the irregularity has caused a failure of justice by prejudicing the accused in his defence.

MELVILL, J.—This is a case in which we have been asked to interfere with a conviction recorded by the Assistant Sessions Judge and confirmed by the Session Judge of Ahmedabad on appeal. It must be borne in mind that we are sitting here not as a Court of Appeal, but as a Court of Revision, although the argument addressed to us has been such as could only have been properly laid before an appellate Court. Our action must be regulated by section 297 of the Criminal Procedure Code. It says, "if in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there had been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit." No doubt the words used are very wide. A material error in any judicial proceeding of a subordinate Court can be made the basis of a proper judgment on the case by us. It is impossible to say that the words of the section do not give us the power of interfering on findings of facts. But during the twelve years that I have been a Judge of the Court I can almost say with certainty, and I can almost say with equal certainty, that since the constitution of the High Court in 1862, it has never as a Court of Revision interfered with the finding in criminal cases or in those in civil cases, in which the words which

*Criminal application for Revision No. 182, of 1881.

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confer the power are indeed wider, on the ground that the evidence has been misappreciated. Such has been the uniform practice of this High Court; and such also appears to have been the practice of the CALCUTTA HIGH COURT. (See *Debichurn Biswas*,) (1). We should not be justified in departing from this practice unless some very extraordinary reason existed. Mr. Pherozeshaw Mehta rested his argument on the misappreciation of the evidence ; and Mr. Branson in addition, relied upon the number and serious character of the discrepancies in the evidence of the same and different witnesses. If these discrepancies had been lost sight of in the Courts below, there might have been some ground for our interference; but Mr. Unwin, the Assistant Judge has carefully weighed them. "It must be admitted," he says, "that not only in Bheema's but in the witnesses Chagan and Ranchordas's depositions before the Magistrate and this Court, there are self-contradictions, considerable variety, and some falsities ; but the duty of the Court to ascertain whether there is substantial truth in the statement to which Bheema has adhered throughout, that the accused beat him, pinioned his arms behind him from a beam in the *utara* and applied or caused the application of lighted matter to his hands and feet." In thus laying down his duty the Assistant Judge was right. His conclusions may be wrong ; and it may be that if we had been trying the case or the appeal we might have come to a different conclusion. But the legislature has made the Sessions Court at Ahmedabad the Court of Appeal in this case. If we were to admit a second appeal in this case it would be our duty to admit a second appeal in nearly every case, for some discrepancies in evidence can almost always be shown. But *falsus in uno falsus in omnibus* is not a maxim which can be adopted here. It was contended that Mr. Beaman had no jurisdiction to inquire into the case on the day he took it up. We cannot accept the contention. Mr. Beaman's appointment as First Class Magistrate is for the whole district of Ahmedabad, and his jurisdiction is not confined to any particular taluka or talukas. It is argued that the District Magistrate specially made an order empowering Mr. Beaman to make the inquiry. If such an order was made it was unnecessary. Mr. Branson also argued that Mr. Beaman would not allow the accused to cross-examine witnesses, or to allow him to appear by a pleader who was present and had to be sent away. On these points there would appear to be some inconsistency in the two petitions made to this Court. But, however that may be, if the accused was not allowed to cross-examine or to be defended by pleader, that was no doubt a serious irregularity, and the High Court, if a timely motion had been made to it, would have probably quashed the commitment. But

(1) 20 W. R., 40.

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the commitment has been made, and a trial had upon it; and according to section 283 of the Code of Criminal Procedure cannot be set aside unless any error or defect has occasioned a failure of justice by prejudicing the prisoner in his defence. No such error or defect, however, has been shown to have occurred during the trial of this case. For these reasons we cannot send for the record and proceedings and must refuse the application.

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15 December 1881. MELVILL, KEMBALL, & PINHEY, JJ.

Queen-Empress v. Natha.*

Practice—Appeal—Enhancement of sentence—Notice.

When the proceedings are called for on appeal solely with a view to enhance the sentence notice to that effect should be given to the appellant and to the District Magistrate.

THIS was a criminal appeal. The appellants were convicted of theft in a dwelling house and sentenced to rigorous imprisonment for three years. Justices *Kemball* and *Pinhey* on a perusal of the petition of appeal and Judgment made the following order.

"Record and Proceedings in original to be sent for to consider the sentence only."

When making this order their Lordship's intention was to enhance the sentences, if, on a perusal of the record and proceedings, the convictions could be sustained.

The question for determination in Chambers is whether in cases like the present a notice should go to the accused telling them that the Court intended to enhance their sentences.

It will be remembered that in cases other than appeals such notices are issued and that by section 280 of the Criminal Procedure Code an accused by appealing takes the risk of an enhancement of his sentence.

It will be also noted that the Government Pleader was instructed in this case to appear for the Crown. Had a notice been issued, the Government would probably have been saved the expense of instructing their Pleader.

ORDER.—The Court enhances the sentence upon Natha *walad* Murree and Daji *walad* Haree to transportation for seven years.

RESOLUTION IN CHAMBERS.—When the proceedings are called for on appeal solely with a view to enhance the sentence, notice to that effect should be given to the appellant and to the District Magistrate.

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*Criminal Appeals No. 165 of 1881.

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1882.

10 January 1882. KEMBALL & PINHEY, JJ.

Queen-Empress v. Ravji.*

Criminal Procedure Code (Act X of 1872), Sec. 318—Act V of 1876, Sec. 1—Notification—Local Government.

Pending the publication by the Local Government of the notification contemplated in section 1 of Act V of 1876, section 318 of the Criminal Procedure Code, 1872, contains the provisions of the law for the confinement of youthful offenders in reformatories, but it is only when such an offender is sentenced to imprisonment that the latter section empowers a Magistrate to direct that he shall, instead of being imprisoned in a criminal jail, be confined in a Reformatory; and neither the said section nor the corresponding section 7 of Act V of 1876 gives jurisdiction to a Magistrate to pass a sentence of imprisonment in excess of the powers conferred by section 20 of the Code of Criminal Procedure.

ORDER.—Pending the publication by the Local Government of the notification contemplated in section 1 of Act V of 1876, section 318 of the Criminal Procedure Code contains the provision of the law for the confinement of youthful offenders in Reformatories: but it is only when such an offender is sentenced to imprisonment that the latter section empowers a Magistrate to direct that he shall, instead of being imprisoned in a criminal jail, be confined in a Reformatory; and neither the said section nor the corresponding section (7 of Act V of 1876) gives jurisdiction to a Magistrate to pass a sentence of imprisonment in excess of the powers conferred by section 20 of the Code of Criminal Procedure. See *Reg.* v. *Gunpaya* (1). The Court annuls the sentence passed in this case, and passes under the provisions of section 297, para 7 of the Criminal Procedure Code, a sentence of five years' rigorous imprisonment, and directs that the convict shall, for such period be confined in a Reformatory, the sentence to begin from the 28th October 1881.

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2 March 1882. MELVILL & PINHEY, JJ.

Queen-Empress v. Trikam.†

Criminal Procedure Code (Act X of 1872), Sec. 186—High Court—Reference—Committal—Conviction.

Under section 186 of the Code of Criminal Procedure, 1872, it is necessary that there should have been a committal or conviction before a reference is made to the High Court.

ORDER.—Under section 186 of the Criminal Procedure Code it is necessary that there should have been a committal or conviction before a reference is made to the High Court. In this case there has been neither and therefore the High Court can make no order on the reference.

**Criminal Ruling.* Criminal Reference No. 175 of 1881. (1) Vide, *ante*, p. 109.
†Criminal Reference No. 8 of 1882.

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It may, however, be observed that the Magistrate seems to have satisfied himself that the accused did understand the proceedings and intended to plead guilty. Section 186, therefore, would have no application, and there would appear no reason why the Magistrate should not, after recording a conviction, pass a proper sentence.

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16 March 1882. KEMBALL & NANABHAI, JJ.

Queen-Empress v. Ismal.*

Criminal Procedure Code (Act X of 1872), Sec. 67—Mischief during a voyage—Jurisdiction—Magistrate.

The complainant and the accused sailed from Bombay at Honawar in a boat. The latter threw over board a box belonging to the former during the voyage within 9 miles of the Janjira State. On arrival at Honawar, the complainant charged the accused with having committed mischief before the Magistrate at that place :—

Held, that under section 67, ill. (*a*) of the Criminal Procedure Code, 1872, the Magistrate at Honawar, through whose jurisdiction the accused passed on the voyage, had jurisdiction to try the offence.

IN this case one Sheikh Ismal made a complaint against one Sheikh Hussain before the Second Class Magistrate of Honawar accusing Sheikh Hussain of committing mischief and thereby causing damage to an amount of Rs. 63. The complainant stated that he was in the employment of the accused and sailed from Bombay in the month of November 1881, along with accused on board a vessel. One night the accused for some grudge threw overboard into the sea a box of his containing clothes and other property without his knowledge.

The District Magistrate of Kanara in making the reference to the High Court observed :—"The Magistrate took up the case under a misapprehension but at a later stage of the proceedings discovering that the offence was not triable by him stopped his proceedings and made a reference.

"This offence appears to have taken place on the high seas between Bombay and Ratnagiri about nine miles from the State of Jangira. As it is doubtful whether the case is triable by the Court of Admiralty Jurisdiction or the Courts of Jangira I beg to submit these proceedings for such orders as the High Court may deem fit to pass."

ORDER.—The Court is of opinion that the Court of the 2nd Class Magistrate at Honawar had jurisdiction to try the case having regard to the illustration (*a*) to section 67 of the Code of Criminal Procedure. If the vessel put into Honawar it is obvious that part of the voyage on which the offence alleged was committed must have been performed with-

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**Criminal Ruling.* Criminal Reference No. 26 of 1872.

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in the local limits of the jurisdiction of the Honawar Court, in other words, that the person who is said to have committed the offence passed through its jurisdiction.

The Court will, therefore, inform the District Magistrate that having regard to the facts and illustration (*a*) section 67 of the Criminal Procedure Code the Second Class Magistrate of Honawar had jurisdiction to try the charge.

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30 March 1882. MELVILL & NANABHAI, JJ.

Queen-Empress v. Mulharji.*

Penal Code (Act XLV of 1860), Sec. 197,—False certificate—False information to a public servant.

A person signed a notice of transfer of survey nos. in the character of his father who was dead; and the declaration to this notice was signed by the accused, who confirmed the assumed character:—

Held, the accused could not be convicted under section 197 of the Indian Penal Code, but could be convicted of giving false information to a public servant.

THE facts of this case were that before the Mamlatdar of Wai a notice transfer of Survey Nos. 125 and 127 of the village of Bholi standing in the name of one Bahirji Apaji was signed by one Krishna *bin* Bahirji who represented himself in the character of his father Bahirjee. The declaration required by law to be appended to his notice was signed by Mulharjee and Ragho the accused in the case declaring that the person who signed the notice of transfer was Bahirji but in fact Bahirji was dead and the person who signed in his name was his son Krishna. For making this false declaration the accused Malharji and Ragho were tried under section 197 of the Indian Penal Code and sentenced to pay each a fine of Rs. 51.

The District Magistrate of Satara in making the reference to the High Court observed:—"I am of opinion that the sentence passed by the Magistrate is both illegal and inadequate because section 197 provides that if a person issues or signs a false certificate required by law he shall be punished as if he gave false evidence and the punishment for giving false evidence under section 193, Indian Penal Code, is imprisonment as well as fine and therefore proper punishment should be passed upon the accused."

ORDER.—It appears to this Court doubtful whether the accused persons were properly convicted under section 197 of the Indian Penal Code. The certificate required by Rule 31 of the Rules under section 28 of the Survey Act was in this case signed not by the accused but by two other

*Criminal Reference No. 19 of 1882.

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persons. The accused signed another certificate but it does not appear that such a certificate is required by law to be given or signed. No doubt the accused might have been properly convicted for giving false information to a public servant and the sentence passed would have been a legal sentence for that offence. Under these circumstances this Court is not prepared to interfere with the sentence as illegal nor does it think it necessary to enhance it.

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20 July 1882. RESOLUTION IN CHAMBERS.

Reg. v. Gowlia.*

Salt Act (Bom. Act VII of 1873)—Evidence Act (I of 1872), Sec. 125—Officer of Salt Department—Police officer—Information—Evidence.

Having regard to the distinction drawn throughout Bombay Act VII of 1873 between a Police Officer and an Officer of the Salt Department, the latter cannot be considered a Police Officer within the meaning of section 125 of the Indian Evidence Act I of 1872, and may, therefore, be compelled to say whence he obtained information as to the commission of an offence.

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22 August 1882. SARGENT, C. J., KEMBALL & PINHEY, JJ.

Queen-Empress v. Francis.†

Bom. Act VII of 1867, Sec. 31—Cruelty—Animal.

A man who after firing at a dog refrains from again firing at it to put it out of pain, does not commit an offence under section 31 of Bom. Act VII of 1867.

THE accused was convicted under section 31 of Bombay Act VII of 1867, of torturing an animal in that the accused shot a dog and wounded him but did not take any step to relieve him from suffering, the dog being 24 hours alive after he was shot.

KEMBALL, J.—I would not interfere; any humane person would have put the animal out of pain; and I consider that as the defendant wounded the animal it was his bounden duty to see that it did not linger in suffering. I think it was not very creditable to Mr. Hardwike not to wait and see that the dog was put out of pain. I would return the record and proceedings.

PINHEY, J.—The facts proved do not constitute the offence of which accused has been convicted. He was ordered by his master to shoot the dog for very good reasons and was prevented by the Police from firing again and killing it. A man may be very willing to shoot a dog under such circumstances, and yet decline to beat it to death, afterwards, with sticks or stones. Reverse conviction and sentence and refund fine.

SARGENT, C. J.—I think that the fact of the prisoner having left the wounded dog in the ditch under the circumstance disclosed by the evidence

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*Criminal Ruling. †Criminal Review No 145 of 1882.

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did not establish the charge of cruelty which is an essential part of the offence; and that the conviction and sentence should, therefore, be reversed and the fine refunded.

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5 October 1882. KEMBALL & PINHEY, JJ.

Queen-Empress v. Bapu Punja.*

Abkari Act (Bom. Act V. of 1878),—Magistrate—Jurisdiction.

A Third Class Magistrate has no jurisdiction to try cases under the Abkari Act, 1878.

THE District Magistrate of Kaira in referring the case to the High Court, remarked:—"The whole proceedings in the case appear to be illegal, inasmuch as the trying Magistrate had only third class powers and the offences under the Abkari Act are triable by a Magistrate of the first or second class."

ORDER.—The Court annuls the conviction and sentence and directs a retrial of the accused by a competent Magistrate.

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11 October 1882. MELVILL & PINHEY, JJ.

Queen-Empress v. Mulhari. Queen-Empress v. Shiva.†

Penal Code (Act XLV of 1860), Secs. 411, 412—Stolen property—Presumption.

In the trial by jury of a person charged with dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession of the stolen property is clearly traced to the accused, and that it could not have been placed in the accused's house, where it was found by any other member of his family.

The fact of stolen property being found concealed in a man's house would ordinarily be sufficient to raise a presumption that he knew the property to be stolen property, but not to prove that he knew that it had been acquired by dacoity.

ORDER.—It is admitted that there is no evidence against the appellant Mulhari except the circumstance that stolen property was found concealed in a loft in his house. This would be sufficient to raise a presumption that he knew the property to be stolen property but not to support the finding of the Jury that he knew that it had been acquired by dacoity. But apart from this defect in the verdict, it is to be observed that the attention of the Jury was not directed to the necessity of their being satisfied that the possession of the stolen property was clearly traced to the accused, and that it could not have been placed where it was found by any other member of the accused's household. The following observations by Mr. Best in his work on Evidence, section 212, page 294, fifth edition, are worthy of consideration. "But in order to raise this presumption legitimately, the possession of the stolen property should be exclusive as

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**Criminal Ruling.* Criminal Reference No. 115 of 1882.

†*Criminal Ruling.* Criminal Appeals Nos. 145, 148 of 1882.

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well as recent. The finding it on the person of the accused, for instance, or in a locked-up house or room or in a box of which he kept the key, would be a fair ground for calling on him for his defence; but if the articles stolen were only found lying in a house or room, in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access no definite presumption of his guilt could be made. An exception has been said to exist where the accused is the occupier of the house in which the stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent any thing coming in or being taken out without his sanction. As a foundation for *civil* responsibility this reasoning may be correct; but to conclude the master of house guilty of *felony*, on the double presumption, first that stolen goods found in the house were placed there by him or with his connivance; and secondly, supposing they even were, that he was the thief who stole them, there being no corroborating circumstances is certainly treading on the very verge of artificial conviction." In the present case the appellant appears to have had a grown up brother living in his house during his absence, besides several other relatives: and the presumption that the appellant, and not one of these relatives, placed the stolen property where it was found is under the circumstances so weak that the attention of the jury might well have been directed to the point. We do not think that the conviction, as it stands, nor even a minor conviction under the Indian Penal Code, section 411, is under the circumstances sustainable in law, and we therefore reverse the conviction, and order Mulhari to be discharged.

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2 November 1882. WEST & PINHEY, JJ.

Queen-Empress v. Narsu.*

Penal Code (Act XLV of 1860), Sec. 426—Mischief—Cattle—Straying.

The act of the accused in negligently allowing his cattle to stray into one's garden does not amount to mischief within the meaning of section 426, Indian Penal Code.

THE accused in this case was convicted under section 426, Indian Penal Code, of mischief in that he negligently let his bullock stray into the soldier's garden and caused damage worth eight annas to the vegetables and plants.

ORDER.—The act or omission of the accused not constituting more than negligence does not satisfy the definition of the offence under section 426 of the Indian Penal Code. Conviction and sentence reversed and fine to be refunded.

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*Criminal Review No. 189 of 1882.

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2 November 1882. WEST & PINHEY, JJ.

Queen-Empress v Fakirappa.*

Penal Code (Act XLV of 1860), Sec. 503—Criminal intimidation.

A mere threatening to bring a matter before the caste in order to get one expelled does not amount to criminal intimidation.

THE Sessions Judge of Belgaum in making this reference to the High Court, reported as follows:—"It seems that eight days before the last Holi, the accused No. 1 and 2 who by the surname "Gowda" Patel are influential persons went with accused No. 3 to the complainant who by his name appears to be brother of accused No. 1 and asked him to cause a deed of divorce to be given to the wife of complainant's son, who had left her husband and had a child by a Badger Shetyappa. Bhimangowda refused to interfere and the accused said unless he acquiesced they would put him out of caste. Complainant still declined to move and the three accused accordingly by beat of drum proclaimed Bhimangowda to be out-caste. Dyamawa is called 'son's wife' in another part Bhimawa her husband is called '*son-in-law*' of complainant and this is explained in a measure that after Dyamawa left Bhimawa, he married Basawa a daughter of complainant.

"Complainant alleges 'he believes the object of insisting on the divorce of Dyamawa is that complainant may obtain money upon her remarriage at Mudhol.' But there is no evidence in support; in fact it is admitted later, that as Bhimawa would not divorce Dyamawa complainant's interference was asked. Now as complainants and accused Nos. 1 and 2 are related, the accused apparently had a right to complain both as head-caste men and members of the family and even if disputes arising out of the Patelship influenced the conduct of accused Nos. 1 and 2, it is not shown accused No. 3 was actuated by private malice, and this Court does not think, a Magistrate First Class should have interfered in a purely caste dispute, saving to keep the peace and if he thought the peace was likely to be disturbed which is not shown to have been probable, complainant equally with accused should have been called upon to furnish security."

ORDER.—In this case there was not merely a threat but a proclamation that Bhimangowda was put out of caste. That, if false, was defamation. But threatening to bring the matter before the caste in order to get Bhimangowda expelled was not criminal intimidation. The caste might receive a complaint and expel Bhimangowda if satisfied he had committed a caste offence. A false complaint would be defamation and a malicious

*Criminal Reference No. 125 of 1882.

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expulsion would perhaps afford ground for a civil suit but the charge as here framed is not sustained and the convictions and sentences must be reversed.

The Court reverses the convictions and sentences and directs the fines if paid to be refunded.

1883.

11 January 1883. MELVILL & PINHEY, JJ.

Queen-Empress v. Bai Baya.*

Penal Code (Act XLV of 1860), Sec. 426—Mischief—Goats—Straying.

In order to convict of mischief under section 426 of the Indian Penal Code, the owner of an animal which has done damage to crops, it is not sufficient to show that he was guilty of carelessness in allowing it to stray: the prosecution is bound to show an intention on his part to cause wrongful loss or damage.

IN this case the accused was convicted under section 426 of mischief in that she intentionally let loose her she-goat which caused damage to the extent of Rs. 2 by destroying a young eatric tree in the Police Lines, the accused knowing full well that the she-goat would likely cause mischief.

ORDER.—The conduct of the accused does not constitute the offence of which she has been convicted. In order to constitute the offence of mischief it is not sufficient to show that the accused was guilty of carelessness in allowing her goat to stray. The prosecution was bound also to show that there was an intention to cause wrongful loss or damage. The same view has been taken by the CALCUTTA and MADRAS HIGH COURTS in the case reported 6 Bengal Law Reports, Appendices III; 6 Madras High Court rulings XXXVII. Conviction and sentence are reversed.

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11 January 1883. MELVILL & PINHEY, JJ.

Queen-Empress v. Ragho Nanasing.†

Bombay Village Police Act (Bom. Act VIII of 1867), Sec. 14—Police Patel—Powers.

Under section 14 of the Bombay Village Police Act, 1867, the Police Patel on convicting a person of abuse has authority to punish him with confinement in the village chowri for a period not exceeding twenty-four hours: but has no authority to inflict a fine.

THE accused was convicted of abusing the complainant and sentenced under sections 14 and 15 (2) of the Village Police Act to pay a fine of Rs. 3, and in default to undergo confinement in the village chowri for 32 hours.

The District Magistrate of Khandesh in referring the case to the High Court observed: "The sentence awarded by the Police Patel is

*Criminal Ruling. Criminal Review No. 284 of 1882.
†Criminal Ruling. Criminal Reference No. 183 of 1882.

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illegal. The act of the accused falls under section 14 of the Act and the punishment provided for the offence is 'confinement in the village chowri for 24 hours only.' In awarding the sentence the Police Patel has quoted section 15 (2) but he is wrong."

ORDER.—The Court reverses the sentence and directs refund of fine to Ragho Nanasing.

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11 January 1883. MELVILL & PINHEY, JJ.

Queen-Empress v. Narshi.*

Penal Code (Act XLV of 1860), Sec. 442—House-trespass—Attempt.

The removal of a trap-door with the intention of committing house-trespass amounts to an attempt to commit the offence.

THE Joint Sessions Judge of Broach in making the reference to the High Court observed:—"The complainant occupied the ground floor of a house and the convicted men the upper story: in the ceiling of the lower room there was a trap-door which was kept closed by the complainant. The only act which has been proved against the convicted men is that they forced open and removed this trap-door. The Magistrate has stated in his judgment that they attempted to enter the complainant's room, but there is no evidence that they actually made this attempt or that having made the attempt their intention was defeated. In fact all that is proved is that the accused men removed the trap-door. This does not amount to a house-trespass, to constitute which ofience the introduction of same part of the criminal trespasser's body is necessary; *cf.* section 442, Indian Penal Code."

ORDER.—The First Class Magistrate has found that the removal of the trap-door was effected with the intention of committing house trespass. Such an act does, in the opinion of the Court, constitute an attempt. The conviction of the accused was therefore correct and there is no sufficient reason to interfere.

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19 March 1883. KEMBALL & PINHEY, JJ.

Queen-Empress v. Tayee.†

Penal Code (Act XLV of 1860), Sec. 309—Murder—Attempt.

The pounding of oleander roots with an intention to poison oneself with the same does not constitute an attempt to commit suicide.

THE accused in this case was charged under section 309, Indian Penal Code, of attempting to commit suicide in that she brought home roots of *Kaneri* shrub pounded them in order that she may cut them and thereby commit suicide.

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*Criminal Reference No. 182 of 1882. †Criminal Review No. 53 of 1883.

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ORDER.—The Court is of opinion that the accused may have intended to poison herself by means of the oleander roots which she was pounding but her act did not constitute an attempt to commit suicide. The Court reverses the conviction and sentence passed on Tayee *kom* Sakharam and directs that the fine if paid by her be refunded to her.

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20 March 1883. KEMBALL & PINHEY, JJ.

In re **Shiddu Vithoji.***

Criminal Procedure Code (Act X of 1872), Sec. 538—Maintenance—Advance.

A Magistrate's order directing the payment of maintenance allowance in advance from the date of the Magistrate's order is legal.

THE District Magistrate of Satara in making the reference to the High Court stated "it seems to me that the orders of the Magistrate passed under Chapter XLI of the Criminal Procedure Code making the maintenance payable in advance is illegal."

ORDER.—According to the order of Mr. Muir Mackenzie the maintenance was payable from the date of the order. Section 538 of Act X of 1872 requires that the allowance "shall be payable from the date of the order." It seems to follow from this provision that it was intended to be in advance and it would be only reasonable to supply the woman with the means to sustain herself for the time to come and not for the time past. There is then nothing illegal in the order of the Magistrate ordering the payment of the allowance in advance from the date of the Magistrate's order.

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19 April 1883. KEMBALL & PINHEY, JJ.

Queen-Empress v. Rangu.†

Penal Code (Act XLV of 1860), Sec. 426—Buffaloes—Mischief.

Where the accused's buffaloes by straying into the complainant's wheat field commits mischief the complainant is not at liberty to set the criminal law in motion: his proper remedy being to impound the cattle.

THE accused was convicted under section 426, Indian Penal Code, of mischief, in that his three buffaloes went into the complainant's wheat field and committed mischief and the accused took no trouble to drive them out.

ORDER.—The facts stated in column 7 of the return do not, in the opinion of the Court, constitute the offence of which he has been convicted. The case was clearly not one within the Criminal Law, and the complainant's remedy was to impound the cattle. Reverse conviction and sentence, and direct fine to be returned.

**Criminal Ruling.* Criminal Reference No. 27 of 1883. †Criminal Review No. 87 of 1883.

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26 April 1883. PINHEY & NANABHAI, JJ.

Queen-Empress v. Narayan.*

Abkari Act (Bom. Act V of 1878), Sec. 43—Ganja growing—Permit.

To grow *ganja* without a permit is not an offence within the meaning of section 43 of the Bombay Abkari Act, 1878.

THE accused grew *ganja* in his field without a permit, for which he was tried under section 43 of the Bombay Abkari Act and was sentenced by the Magistrate to pay a fine of Rs. 20.

The District Magistrate of Khandesh in making this reference stated:—"To grow *ganja* without permit is not an offence under the Abkari Law or the rules framed under it."

ORDER.—The facts found proved do not constitute the offence under section 43 of (Bombay) Act V of 1878. The Court reverses the conviction and sentence, and directs refund of fine.

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20 August 1883. BAYLEY, AG. C. J. & PINHEY, J.

Queen-Empress v. Daya Kashiram.†

Whipping Act (VI of 1864), Sec. 5—Penal Code—Special Acts.

The Whipping Act, 1864, section 5, applies only to cases of offences under the Indian Penal Code and not to cases under any special law and sentence of whipping in these cases is illegal.

IN this case the accused Daya Kashiram, a juvenile of 14 years of age was tried by the Cantonement Magistrate of Ahmedabad on a charge of importing one seer of *ganja* from the Gaekwar territory under section 43 of the Bombay Abkari Act. He was sentenced on conviction of the offence to 20 stripes with a light ratan under section 5 of Act VI of 1864.

The District Magistrate of Ahmedabad in making this reference to the High Court observed:—"I am respectfully of opinion that section 5 of Act VI of 1864 applies only to cases of offences under the Indian Penal Code and not to cases under any special Act such as the Abkari Act."

ORDER.—The District Magistrate should be told to communicate his remarks to the First Class Magistrate.

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26 November 1883. PINHEY & SCOTT, JJ.

Queen-Empress v. Shivana.‡

Penal Code (Act XLV of 1860), Sec. 494—Bigamy—Evidence.

To substantiate a charge of bigamy the first marriage of the complainant and his alleged wife must be strictly proved.

**Criminal Ruling.* Criminal Reference No. 41 of 1883.

†*Criminal Ruling.* Criminal Reference No. 115 of 1883.

‡Criminal Appeal No. 146 of 1883.

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ORDER.—The first point argued before us is that the original marriage of Prosecutor Gadgyapa to Shivi is not sufficiently proved. The evidence on this point is that of Gadgyapa and Shivi and the admission of accused No. 1 Shivana that he knew they were married.* But it was ruled by the Full Bench in the *Empress* v. *Pitambar Sing* (1) that in a case of this kind the first marriage of the complainant and his alleged wife must be strictly proved, and that the evidence of the complainant and of his alleged wife alone was insufficient to prove such marriage. Following this Full Bench Ruling, *Knight*, J. in the *Empress of India* v. *Kula* (2) ruled further that the admission of the accused in no way strengthened the position, because if, as a matter of fact, there had been no marriage, no conviction could stand against him. Tested by authoritative decisions then it would appear that the evidence on the record of this case is insufficient legally to establish the marriage of the complainant and Shivi. But when we consider the evidence of these two persons and take notice of their ages, the present case appears to be a stronger one than either of those cited. The complainant Gadgyapa gave his age as 16. The Session Judge describes him as apparently over 20. Shivi's age is entered on the record as 16. If Gadgyapa be now 20 and Shivi 16, then 9 years ago the former was 11 and Shivi 7. Manifestly it would be unsafe to consider it proved by their evidence of what took place when they were such mere infants that a marriage ceremony was truly and legally performed between them especially as they have never yet lived together as man and wife. Therefore we cannot hold that the first point which it is necessary to prove in this case, *viz.*, the original marriage between Gadgyappa and Shivi is proved.

Ordinarily when a criminal charge is insufficiently proved it would be the duty of the appellate Court simply to reverse the conviction and sentence recorded in the Court below: but in the present case we feel bound to put into operation the provisions of section 428 of the Code of Criminal Procedure and to direct that further evidence be taken by the Court of Session and certified to this Court as to whether Gadgyapa and Shivi were truly and legally married: for this point was not only not contested in the Court below, but it seems to have been accepted as common ground by both the prosecution and the defence that such a marriage, whether it had actually been performed or not, was subsisting.

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*MARGINAL NOTE. Baslingaya mentions it but the Sessions Judge did not rely on his statement when dealing with this point and moreover he described him generally as an untruthful witness.

(1) I. L. R., 5 Cal., 566. (2) I. L. R., 5 All., 233.

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As some time must elapse before this case can be disposed of finally, pending the further hearing of this appeal we order under section 426 of the Code of Criminal Procedure that the sentences recorded against the appellants by the Court of Sessions be suspended, and that the said appellants be released on such bail as may appear sufficient to the said Court of Sessions.

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28 November 1883. WEST & NANABHAI, JJ.

Queen-Empress v. Sadanand.*

Bombay Municipal Act (Bom. Act III of 1872), Sec. 220—Municipal Commissioner—House—Ventilation.

Section 220 of the Bombay Municipal Act, 1872, as amended by Bombay Act IV of 1878, does not empower the Municipal Commissioner to direct structural alterations. Hence, where he requires the owner of a chawl to put it in a proper state by providing ridge ventilation within a given time, the notice is illegal and the owner, by refusing to comply with it commits no offence.

ON the 16th of May 1888, the Municipality of Bombay served on the complainant, a house-owner, a notice calling upon him to put his chawl in a proper state by providing ridge ventilation within seven days. The owner having failed to comply with the notice, the Municipality proceeded against him.

JUDGMENT.—We think that section 220 of the Bombay Municipal Act III of 1872 would be unduly extended if it were so construed as to enforce structural alterations. As amended by Bombay Act IV of 1878 it runs thus: "Whoever being the owner or occupier of any house, building or land, whether tenantable or otherwise, suffers the same to be in a filthy or unwholesome state, or, in the opinion of the Commissioner, a nuisance to those in the neighbourhood, or over-grown with rank and noisome vegetation, and who shall not, within twenty-four hours after notice in writing by the Commissioner to cleanse, clear, or otherwise put the same in a proper state, have complied with the requisition contained in such notice, shall be liable ect." It is obvious that most occupiers of the less wholesome houses in Bombay would be quite incapable of effecting structural alterations. Supposing tenants for instance paying two rupees per month were asked by the Commissioner to make such alterations they could not of course comply with the demand especially within 24 hours contemplated by the section. We must therefore suppose that something less exacting and more practicable was meant for the tenants and therefore also for the land-lords (there being no difference made by the section in their positions) by the use of

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**Criminal Ruling.* Criminal Application for Review No. 244 of 1883.

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the expression 'filthy or unwholesome state.' When a person is asked to cleanse, clear or otherwise put a building which is in a filthy or unwholesome state, what is meant is that he is to remove the objectionable accidents, such as filth and nuisance, leaving the essence of the building the same as before. Without proper safe-guards unlimited license is not to be given to a Commissioner to command or effect any alterations in a structure and we can well understand that the Legislature refrained from giving this power when conferring the power of causing nuisances to be removed. We are therefore of opinion that the Legislature in enacting section 220 could not have intended and did not intend to invest the Municipal Commissioner with the power of directing structural alterations.

As regards the question of notice we think that when a notice is required by law it cannot prescribe something which the law itself does not contemplate or involve. Mr. Jardine on behalf of the Commissioner argues that the notice errs only by excessive indication, but the section appears to leave it to the owner or occupier to adopt such measures as he pleases to carry out the demand of the Commissioner. It is not open to the Commissioner to prescribe his own measures and deprive the owner or occupier of his option. If this were not so the Commissioner might order expensive painting or papering or other costly alterations beyond the means of the person concerned and beyond the intentions of the Legislature. We hold, therefore, that it was not competent to the Commisssioner to require ridge ventilation in the notice and as the notice was thus framed no offence was committed by failing to do what it did not call on the owner to do.

We accordingly reverse the order of the Presidency Magistrate and direct the fine paid by the accused to be refunded to him.

1884.

13 February 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Joomabhai.*

Criminal Procedure Code (Act X of 1882), Sec. 19—Presidency Magistrate—Jurisdiction—Bombay Harbour.

The Presidency Magistrate of Bombay has jurisdiction over the port of Bombay upto high-water mark.

THE petitioners were the owners of a steam launch called "Alexandria." On the 21st and 22nd April 1883, they carried to Pirwadi some passengers, whereupon they were charged by Messrs. Shephard & Co. before

*Criminal Revision No. 213 of 1883.

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the First Class Magistrate of Thana under section 13, Bombay Act II of 1868, for having plied for hire without a license from Carnac Bunder across the Bombay Harbour to Pirwadi. The petitioners contended that Pirwadi shore was within the limits of the Bombay Harbour and consequently the said act was not applicable. The Magistrate sentenced them to pay fines. The petitioners thereupon applied to the High Court contending that Act II of 1868 was not applicable, that the Magistrate had no jurisdiction to entertain the complaint and that the case was really governed by Bombay Act VI of 1863.

JUDGMENT.—With regard to the argument as to the limits of the port of Bombay, it must be observed that there is a difference of expression in the existing Indian Ports' Act No. XII of 1875 and No. XXII of 1885 which it repeals. Section 4 of the latter enacted that "every declaration by which any port, navigable river or channel shall be made subject to this Act, shall define the limits of such ports, navigable river, or channel; and such limits *shall extend always* up to high water mark, and may include any piers, jetties, landing places, wharfs, quays, docks and other works made for any of the purposes mentioned in the preamble of this Act, whether within or without the line of high water mark, and (subject to any right of private property therein) any portion of the shore or bank within fifty yards of high water mark." Section 5 of the existing Act is not imperative but merely permissive. In the section it is provided that the Local Government may by notification in the Official Gazette define the limits of the port, river or channel to which it refers and such limits *may* extend to high water mark. It is thus open to the Local Government to define the limits by reference to high water mark or not. The notification issued by the Local Government on the 7th of June 1866 by which Peerwadi shore was declared to be within the limits of the Bombay Harbour, to have effect was a notification under Act XXII of 1855 and as it does not seem to have been superseded it must be taken to have fixed the limit of the port of Bombay with reference to high water mark.

Turning to the Code of Criminal Procedure we find that section 19 provides that "every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency town for which he is appointed and within the limits of the ports of such town and of any navigable river or channel leading thereto and as such limits are defined under the law for the time being in force for the regulations of ports and port-dues." The Presidency Magistrate has, therefore, jurisdiction over the port of Bombay up to high water mark. His jurisdiction and the jurisdiction upon which it borders are mutually exclusive. Section 7 of the Code of

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Criminal Procedure indicates that distinctly. It provides that every Province excluding the Presidency towns shall be divided into Session's Divisions and constitutes every Session's Division, a district or a group of districts and the Presidency town itself, a separate district. Section 177 of the Code of Criminal Procedure enacts that every offence shall ordinarily be inquired into and tried by a Court within the limits of whose jurisdiction it was committed. Where then the jurisdiction of the Presidency Magistrate exists it excludes the neighbouring jurisdiction of the Magistrate of Thana who would be competent to enquire into and try it if committed on his side of the border line.

The question for determination, therefore, is, where was this offence committed? The accused Hajee Ismael in co-operation as has been found with accused Jumabhai Lalji, issued tickets to certain passengers for their conveyance from the Carnac Bunder to Peerwadi. In one of the affidavits filed in this Court it is stated that the steam launch employed to convey them cast anchor and the passengers disembarked three quarters of a mile further from the shore of the island of Karanja, on which Peerwadi is situated than the low water mark, and in the other affidavit it is stated that the place was in the Bombay harbour about a mile distant from the Peerwadi shore. It is further stated in this affidavit that there were a number of boats plying then for hire, that the passengers got into those boats and went ashore and that the said boats did not belong to the owner or charterer of the steam launch or any one connected with them. The fact that the tickets issued were for from Carnac Bunder to Peerwadi shows *prima facie* that the accused entered into an engagement with the passengers to take them on board at Carnac Bunder and land them at Peerwadi. The Magistrate's finding of what was done is consistent with this and it is not necessarily inconsistent with the statements in the affidavits which are silent as to who paid for the boats; we think that the conveyance of the passengers by boats from the steam launch to the dry land at Peervadi may well have been a part of the original engagement. If the plea to the jurisdiction was raised before the trying Magistrate, as we will suppose it was, on the ground now taken, still his finding on the facts that the accused conveyed passengers from Bombay to Peervadi overcomes that plea supported by a statement identical with that in the affidavit. The finding is conclusive under the circumstances and as he conveyed to Peerwadi in Karanja the applicant committed a continuing offence punishable by the Magistrate of Thana. We therefore cannot interfere with the decision as passed without jurisdiction. Had we considered that the conveyance of passengers from the steam launch where it anchored, was a distinct transaction to which the accused were no parties, we should have held that the

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offence was completed within the Port of Bombay cognizable by the Presidency Magistrate and not regularly cognizable by a Magistrate of Thana. We should then have had to consider the application to the case of section 531 of the Criminal Procedure Code but under the circumstances no question on that section arises for our disposal.

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6 March 1884. KEMBALL & NANABHAI, JJ.

Queen-Empress v. Hanmanta.*

Village Police Act (Bom. Act VIII of 1867), Secs. 15, 16—Criminal Procedure Code (Act X of 1882), Sec. 29—Police Patels—Superiors—Jurisdiction.

The jurisdiction to punish an offender for nuisance or disorderly acts under section 16 of the Bombay Village Police Act, 1867, is expressly confined to the Police Patels duly empowered under section 15 (1) of the Act and does not extend to their official superiors (the Magistrates in charge of the Talukas within which they are Patels).

THE District Magistrate of Kalladghi in making this reference observed: "Section 16 of Bombay Act VIII of 1867 gives police patels duly empowered certain authority, but there is nothing to show that a Magistrate, as the Patel's superior, may exercise authority under the section, which Mr. Mac Callum assumes to be the case, and a Magistrate can take action, when necessary, in other ways. There is no reason to doubt that substantial justice was done, but the procedure seems irregular and calculated to create a bad precedent."

ORDER.—The Court concurs with the District Magistrate in thinking that the jurisdiction to punish under section 16 of the Village Police Act (Bombay Act VIII of 1867) is expressly confined to Police Patels duly empowered under section 15 clause 1 and does not extend to their official superiors, the Magistrates in charge of the Talukas—section 29 of the Criminal Procedure Code.

There is, moreover, in this case the further objection, *nemo debet esse judex in propria sua causa*, the Court appears to have been complainant, witness and judge.

The Court reverses the conviction and sentence and directs the refund of the fine.

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13 March 1884. KEMBALL & BIRDWOOD, JJ.

Queen-Empress v. Dhanji.†

Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Fine.

Under section 545 of the Code of Criminal Procedure, an award of compensation cannot be made in addition to the fine imposed, but must be made payable out of the fine itself.

**Criminal Ruling.* Criminal Reference No. 25 of 1884. †Criminal Reference No. 26 of 1884.

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In this case the accused Dhanji was convicted and sentenced under section 379, Indian Penal Code, in that he had dishonestly taken away Babul tree wood belonging to Government valued at eleven annas. He was sentenced for this offence, by the Third Class Magistrate of Thasra to pay a fine of Rs. 15 and also to pay annas eleven as compensation to Government for the wood in question.

The District Magistrate of Kaira in referring the case to the High Court observed:—"The compensation should have been ordered to be paid out of the fine of Rs. 15 and not in addition to it."

Order.—Under section 545 of the Criminal Procedure Code an award of compensation cannot be made in addition to the fine. The proper order should have run thus. "If the fine be recovered the sum of annas 11 being the value of the trees cut down and appropriated by Dhanji to be paid out of it to the Gevernment." The Court accordingly directs that annas 11 be refunded to the accused.

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20 March 1884. Kemball & Birdwood, JJ.

Queen-Empress v. Pandu.*

Penal Code (Act XLV of 1860), Sec. 289—Animal—Mischief.

Where the accused's buffalo attacks the complainant's buffalo and injures the latter by breaking its leg, he cannot be convicted of an offence under section 289, Indian Penal Code.

The complaint in this case was that the accused by driving his buffalo on to attack the complainant's did injury to the latter's animal by breaking his leg.

The District Magistrate, in his letter of reference, went on to say:—"I do not myself think there is sufficient ground for a prosecution under section 429. The prosecutor on examination stated he could not say that the injury had been knowingly inflicted, but inferred it from the fact that the animal which caused the mischief had injured two buffaloes the previous year and the proprietor had paid for the damage. The proprietor, therefore, he suggested must know his animal was likely to cause mischief. The offence having been from the Magistrate's own point of view illegally compounded I do not like to pass it over, but I do not think anything further need be done in the interests of justice. The offence if one was committed would seem to come under section 289, Indian Penal Code."

Order.—Return record and proceedings with the remark that under the circumstances there is no sufficient reason for the interference of the High Court. And that section 289 of the Indian Penal Code is upon the

*Criminal Reference No. 31 of 1884.

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District Magistrate's statement of the case hardly applicable, there being nothing to show that the buffalo is of a savage disposition as against human being.

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27 March 1884. KEMBALL & BIRDWOOD, JJ.

Government of Bombay v. Malkaji.*

Penal Code (Act XLV of 1860), Secs. 279, 337, 338—Driving along a road—Running over.

Where a person by allowing his cart to proceed unattended along a road runs over a boy who is sleeping on the road, he cannot be convicted under section 297 but must be convicted under sections 337 or 338 of the Indian Penal Code.

THE facts were that the complainant Bhima was sleeping on the road-way a little to one side. The accused Malkaranjuni, who was driving his cart loaded with cotton stalks, remained behind to make water, and the cart came upon the boy sleeping, who cried, and accused ran and removed him. The boy was found hurt on his left foot and on his back, caused probably by the friction of the wheel against his body.

The accused was brought up before the First Class Magistrate of Dharwar, for an offence under section 279, Indian Penal Code: but the learned Magistrate acquitted him, remarking—"The only point for decision is whether the act of the accused amount to an indictable offence. It would seem there was some negligence on his part in leaving the cart unattended, and had he stopped the cart or had he not left it, the result would not have come to, as he would have observed the boy sleeping on the way and would not have allowed it to pass over his person. But the rule seems to be that had the accused acted in a different way or more carefully, the injury would not have taken place—is no evidence of negligence; but that the act of the accused was one, the natural or necessary result whereof would be of an injurious character. Now was the act of the accused such as to have naturally or necessarily caused hurt to Bhima? The boy being a cooly worked on the road till noon and took his meals and slept on the road-way. This was not in a crowded street, the road being the one passing from Navalgund to Nargund, and the spot where he was sleeping, being within the boundary of the village of Belvatigi among the fields. It was as it appears, at 1 P.M. that the cart hurt the boy. The bullocks of the cart seem to be old and well accustomed to harness and of a very mild nature and in no way fierce. Accused could not expect that any body would be sleeping on the road; and had not the boy been asleep, no injury would have taken place, as he would naturally have got out of the way of the vehicle. Accused could not,

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Criminal Appeal No. 12 of 1884.

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in leaving his cart for a few minutes, expect that it would hurt any body in the plain or *maidan*. The complainant perhaps was more wrong in sleeping on the road or on the inner slope of a side embankment as he says. Under these circumstances, I cannot consider the act of the accused—though in some degree negligent—is such as to render him criminally responsible for its result, though the very act would have been quite different, had the same occurred in a town or on a crowded street.

"I hereby find that the accused is guilty of no offence, and I hereby acquit him of the charge, section 345 of Criminal Procedure Code.

"As hurt is caused, the Police should have, if at all, charged the accused under section 337 or 338 of Indian Penal Code."

Against this order of acquittal the Government of Bombay appealed to the High Court.

ORDER.—The First Class Magistrate is no doubt right in saying that upon the facts the defendant should have been charged under either section 337 or 338 of the Indian Penal Code though the duty of applying the correct provision belongs to the trying Magistrate and not to the Police. That the act of the defendant in allowing his cart and bullocks to proceed on the road albeit there may not have been much traffic upon it was negligent is undisputed but we are unable to concur in the Magistrate's view of the law as to contributory negligence. The boy may have contributed to his own injury by going to sleep on the side of the road but it is obvious that the defendant by his negligence caused such injury. The case is not one calling for the exemplary punishment, indeed it is not pressed for and the defendant must already have suffered considerable anxiety and expense. In therefore convicting the defendant under section 338 of the Indian Penal Code we direct that he pay a fine of Rupee one or in default suffer one day's simple imprisonment.

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24 April 1884. KEMBALL & BIRDWOOD, JJ.

Queen-Empress v. Hyderally.*

Penal Code (Act XLV of 1860), Sec. 426—Mischief—Animal—Straying.

The allowing of goats to enter a garden whereby they do damage cannot be made punishable under section 426, Indian Penal Code.

THE accused was convicted of mischief in that he wilfully allowed his goats to enter the garden of Mr. Kennedy whereby they ate and destroyed flowers to the value of one rupee and was sentenced under section 426, Indian Penal Code to pay a fine of Rs 1-9-0.

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*Criminal Review No. 65 of 1884.

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ORDER.—In case No 14 the facts stated do not constitute the offence of which the accused was convicted. There is nothing to show that any act was done causing the cattle to enter with knowledge the damage would ensue. The Court, therefore, reverses the conviction and sentence and directs that the fine paid be refunded.

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8 May 1884. KEMBALL & BIRDWOOD, JJ.

Queen-Empress v. Sheshibhat.†

Land Revenue Code (Bom. Act V of 1879),—Rule III (2) (d)—Excavation—Old foundations—Permission.

Excavating, without permission, a foundation on the site of a village and building a wall upon it is not an offence under Rule No. III (2) (*d*) of the Rules under the Land Revenue Code, 1879.

THE accused excavated foundation and built a wall in the village site of Guledgud without permission by the proper authority. He was thereupon convicted by the Second Class Magistrate of Badami and sentenced to pay a fine of Rs. 20 under section III, cl. 2 (*d*) of the rules framed under the Land Revenue Code, 1879.

The District Magistrate of Kaladgi, in making the reference observed:—" The conviction under the rule is illegal as it expressly exempts excavation without permission for laying the foundations of buildings, &c. and the act of unauthorized occupation of the site by the accused can be taken notice of by Revenue authorities and not by Magistrates' Courts."

ORDER.—The Court concurring with the District Magistrate reverses the conviction and sentence and directs the fine to be returned.

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29 May 1884. BAYLEY & KEMBALL, JJ.

Queen-Empress v. Mahadshet.*

Penal Code (Act XLV of 1860), Sec. 278—Call of Nature—Public street.

The act of performing the offices of nature in a public street is not an offence under section 278, Indian Penal Code.

THE accused in this case was charged with an offence under section 278, Indian Penal Code, for making atmosphere noxious to health in that he was caught performing the offices of nature in front of his door-step in a public street; and was sentenced to pay a fine of annas eight.

ORDER.—The Court reverses the conviction and sentence and directs that the fine paid by Mahadshet *bin* Appashet Pathare be refunded to him.

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†*Criminal Ruling.* **Criminal Ruling.* Criminal Review No 92 of 1884.

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18 June 1884. WEST & NANABHAI, JJ.

Dhanjibhai v. Pyarji.*

Criminal Procedure Code (Act X of 1882), Secs. 209, 253—Magistrate—Inquiry—Practice.

Section 209 (2) and section 253 (2) of the Code of Criminal Procedure relieve a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has already been deposed to that a criminal charge cannot be sustained.

JUDGMENT.—The second paragraph of section 209 of the Code of Criminal Procedure and para. 2 of section 253 of the same Code relieve a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has already been deposed to that a criminal charge cannot be sustained. The most common case of this kind is when the account given of a transaction by a prosecutor himself is such as to deprive it of a criminal character. In such a case it would generally be a mere waste of time to go on taking collateral evidence which could have no effect in sustaining a charge virtually contradicted by the person most interested in establishing it.

In the case before us however it is clear that the statement of the clerk Dhanjibhai so far from depriving the transaction on which the charge was founded of a criminal character went if believed to prove clearly that it had such a character. The Magistrate does not say that he disbelieves Dhanjibhai nor can his reference to prior transactions be understood as implying that the one now in question would not have been of the character described by Dhanjibhai. At least if that was the Magistrate's intention it should have been explicitly set forth amongst the reasons given for regarding the charge as groundless. As the case stands at present there are really no such reasons recorded. It is quite consistent with a certain looseness of practice on previous occasions that there should on the present one have been a positive imposition such as Dhanjibhai has described. If there was, it is conceded that there was a criminal offence. We must set aside the order of the Magistrate and direct him to proceed anew with the inquiry from the point at which the examination of Dhanjibhai was ended or broken of. Should the Magistrate after reopening the inquiry find it necessary to discharge the accused under the clause to which we have referred he will set forth in detail his reasons for considering the charge to be groundless.

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18 June 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Ramchandra.†

Penal Code (Act XLV of 1860), Sec. 218—Public Document—Falsification.

Section 218 of the Indian Penal Code contemplates the wilful falsification of a public document with the intent thereby to cause loss or injury and this means by the document itself or by some transaction with which it is essentially connected.

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*Criminal Application for Revision No. 77 of 1884. †Criminal Appeal No. 44 of 1884.

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JUDGMENT.—The documents in question in this case appear to have been altered. But they do not seem to have been so altered as to support any false or undue claim on the Government or so as in themselves to cause loss to the public or to imply an intention in falsifying them to cause such loss. Even assuming, therefore, that the prisoner is responsible for the preparation of the documents T and O, still we think that his case is not one falling within section 218 of the Indian Penal Code. That section contemplates the wilful falsification of a public document with the intent thereby to cause loss or injury and this means by the document itself or by some transaction with which it is essentially connected. Here no more is suggested than that the misstatement in the document T might possibly be misused in some way in supporting some future fraud. The only error in it seems to be the transposition of some men's work from certain days to other days and if in some particular contingencies this error might be used along with other circumstances to the detriment of the public, it is not apparent that the prisoner contemplated such a use, still less is such an intent conclusively established. There is thus no case for a conviction under section 218, Indian Penal Code. Similar considerations apply to document O. Still less if possible is there a case for conviction under section 465, Indian Penal Code, on document O. That section cannot apply except where the dishonest or fraudulent intent embraced in the definition given in section 464 is made out and such an intention is not made out merely by establishing however clearly that under conceivable circumstances a particular error might be used to support some false claim. An accused must not be convicted on so remote and speculative a chain of possibilities; otherwise the most innocent acts might by the exercise of a little ingenuity be perverted into the initial steps of great crimes.

We must agree with the Assessors, reverse the conviction and sentence and direct that the prisoner be discharged.

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19 June 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Lakshia.*

Penal Code (Act XLV of 1860), Secs. 71, 240, 243—Convictions—Practice.

A person having four counterfeit coins in his possession, but uttering only one of them, cannot be separately convicted under section 240 of the Indian Penal Code respecting the one rupee, and under section 243 of the Code regarding the other three; because an offence under section 240, implies prior guilty possession.

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*Criminal Review No. 113 of 1884.

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THE accused was firstly charged under section 240, Indian Penal Code with delivery of Queen's coin knowing that it was counterfeit in that he fraudulently delivered a rupee to one Iatimia, a counterfeit of the Queen's coin he knowing at the time of the delivery that it was counterfeit of the Queen's coin; and was secondly charged under section 243, Indian Penal Code, with possessing Queen's coin knowing it to be counterfeit in that he was in fraudulent possession of three rupees, counterfeits of Queen's coin, the accused knowing when he became possessed of them that they were counterfeits. The First Class Magistrate of Sholapur sentenced him to undergo one year's rigorous imprisonment for the first offence and to undergo six months' rigorous imprisonment for the second.

ORDER.—The Court is inclined to think that the second conviction is opposed to section 71, Indian Penal Code, as amended by Act VIII of 1882. The offence under section 240 implies prior guilty possession. Had the prisoner uttered the four rupees together there could not have been a second conviction and sentence and it would be anomalous that uttering one rupee instead of four should expose him to a severer sentence. The possession of all four was as a crime an indivisible act which was the complement of the uttering in constituting the offences under section 240 and a conviction having been obtained under that section the guilty possession should not have been made a distinct crime. If such separations were allowable there might be a conviction for the possession of each rupee. The physical acts though capable of separate existence and perception coalesce when coincident in time and space and purpose (Section 71, Indian Penal Code). The Court maintains the sentence of eighteen months' rigorous imprisonment which is to be attributed to the conviction on the first head of the charge, conviction on the second head being reversed.

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24 July 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Vithoba.*

Penal Code (Act XLV of 1860), Secs. 277, 290—Public Nuisance—Nala—Fouling water.

A person fouling the water of a *nala* by putting into it bundles of stalks of *tur* plants commits an offence not under section 277, but under section 290 of the Indian Penal Code.

IN this case the accused were convicted under section 277 of the Indian Penal Code for fouling the water of a *nala*, by putting into it bundles of stalks of *tur* plants and were each sentenced to pay a fine of four Rupees.

*Criminal Reference No. 65 of 1884.

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The District Magistrate of Khandesh, in making this reference, stated:—"As it has been ruled that the water of a flowing *nala* cannot be included in section 277, which distinctly provides against defiling water of a public spring or reservoir only, I am of opinion that they be reversed."

ORDER.—Return record and proceedings and tell the District Magistrate that though the act of the accused may not be an offence under section 277 yet from the description given it may well be a nuisance under section 290 of the Indian Penal Code. The Court is not therefore called on to interfere.

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24 July 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Amirkhan*

Workman's Breach of Contract Act (XIII of 1859)—Artificer, labourer, workman.

A person who in the ordinary course would himself take part in the work he contracted for is an artificer, labourer or workman within the scope of the Workman's Breach of Contract Act, 1859.

THE accused Amirkhan entered into a contract with the complainant to build a *ghat* leading down to Godawari. The contract stated that the petitioner should provide the materials and labour: and the sum was fixed at Rs. 269. Out of this sum Rs. 100 were already paid and Rs. 50 were to be paid when pavement was begun. The work was to be completed within a month ; and if it would be washed away in the monsoon, the petitioner was to rebuild it. That if failure was made petitioner would not claim damages and would not be liable for damages if the money was not paid ; and that if complainant had to finish the work, the petitioner would pay her.

The complainant alleged that she had at various times, advanced money to petitioner for the work and that about two months previous to her complaint, he had obtained Rs. 20 from her on the pretence that he was going to finish the work, but he had failed to finish it. She, therefore, proceeded against him under Act XIII of 1859.

The Magistrate ordered the petitioner to repay Rs. 144 and sentenced him in default to two months' rigorous imprisonment. The Sessions Judge of Nasik was however of opinion that the petitioner was wrongly convicted. His reasons were:—"The question is whether the petitioner is an artificer, labourer or workman within the meaning of Act XIII of 1859? I think he is not. The note in West's Code under Act XIII of 1859 as to what is meant by an 'artificer' will I think apply to the present case. The money to be paid to petitioner, can hardly be regarded as wages, and it is doubtful

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†*Criminal Ruling.* Criminal Reference No. 95 of 1884.

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whether complainant could under the circumstances be regarded as an 'employer.' The contract provides that if the work should be washed away petitioner would rebuild it, and that if complainant had to finish the work herself, petitioner would pay her. It seems unjust that when complainant had such a remedy she should be allowed to set the criminal law in motion, and this is not, I consider, a case in which the remedy by suit in the civil Court for the recovery of damages is wholly insufficient. If petitioner be held liable to punishment for breach of this contract it would be difficult to say what contracts are excluded from the operation of the Act."

ORDER.—Record and proceedings to be returned. The accused is a workman who in the ordinary course would himself take part in the work contracted for. This seems to have been contemplated. He comes within the scope of the Act.

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7 August 1884 WEST & NANABHAI, JJ.

Queen-Empress v. Vithi.*

District Municipal Act (Bom. Act VI of 1873), Sec. 48—Criminal Procedure Code (Act X of 1882), Secs. 4, 205—Accused—Mother-in-law—Absence—Representation.

A woman was charged with causing obstruction, under section 48 of the Bombay District Municipal Act. She having gone to a village her mother-in-law appeared in Court on her behalf and the Magistrate proceeded with the case and convicted her:—

Held, that the conviction must be set aside as the accused was neither present nor duly represented in the case.

IN this case the accused was convicted of the offence of "causing obstruction to passers-by by depositing two baskets full of mangoes in a market street, under section 48 of the Bombay Act VI of 1873, and sentenced under section 74 of the Act to pay a fine of annas eight. In the proceedings, however, the Magistrate recorded that "the accused having gone to a village her personal attendance was dispensed with under section 205 of the Criminal Procedure Code and her mother in-law Bhagubai having put in an appearance the case was proceeded with her consent."

The Sessions Judge of Ahmednagar, in making this reference, observed—"But section 205 of the Criminal Procedure Code provides that 'whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.' Hence, the Magistrate was wrong in proceeding against the mother-in-law of the accused contrary to the provisions of the law."

**Criminal Ruling.* Criminal Reference No. 104 of 1884.

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ORDER.—The accused was neither present nor duly represented in the case and hence the Court sets aside the conviction and sentence and directs the fine to be refunded.

August 1884. WEST & NANABHAI, JJ.

In re Chhatrasangji.*

Magistrate—Complaint—Cognizance—Civil dispute.

A Magistrate is bound to hear a complaint on its being duly presented to him. It is not competent to him either to refuse to take cognizance or to postpone its investigation *sine die* on the ground of non-existent civil proceedings.

IN this case the petitioner lodged a written complaint in the Court of First Class Magistrate of Broach charging one Jitba widow of Thakore Himatsingji with having concealed the death of her son Chandrasingji and with having substituted another boy named Jiku for her said deceased son Chandrasangji. The Magistrate, however, without issuing any process against any of the accused postponed the consideration of the matter until the civil Court should decide (1) whether petitioner was the next heir to the estate of the late Himatsingji and (2) whether the child was the true heir.

The petitioner, thereupon, applied to the High Court contending, *inter alia*, that a sworn complaint having been lodged before the Magistrate showing in detail how the offence was committed, the Magistrate was bound to proceed to investigate the matter; and that the fact that there was a civil remedy open to the complainant did not prevent him, or the Magistrate from proceeding with the criminal charge.

ORDER.—We think that the Magistrate's proceedings must be set aside in order that he may proceed anew in more strict accordance with the Code of Criminal Procedure. Should he find that the complaint discloses no offence he may decline cognizance under section 191. If it does disclose an offence he should examine the complainant under section 202. According to the result of that examination as showing or not a reasonable basis for a criminal investigation he should proceed with the inquiry or dismiss the complaint under section 203. Non-existent civil proceedings cannot be a good ground for refusing to take cognizance of a case of a really criminal nature nor for postponing the investigation of it *sine die*.

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26 August 1884. WEST & NANABHAI, JJ

Queen-Empress v. Chandrabhaga†

District Municipal Act (Bom. Act VI of 1884), Sec. 61—Criminal Procedure Code (Act X of 1882), Secs. 4,205—Accused—Personal appearance—Father-in-law.—Absence—Representation.

*Criminal Review No. 142 of 1884. †*Criminal Ruling.* Criminal Reference No. 118 of 1884.

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A woman was charged with the offence of "fouling water," under section 61 of the Bombay District Municipal Act: she being unwell her father-in-law appeared in Court on her behalf and the trying Magistrate proceeded with the case and convicted her :—

Held, that the father-in-law of the accused might probably have been received by the trying Magistrate as a person appointed by her to act in the proceedings before him consistently with section 4 of the Code of Criminal Procedure.

IN this case the accused was convicted of the offence of "fouling water" under section 61 of Bombay Act VI of 1873 and sentenced the accused to pay a fine of eight annas. The Magistrate, however, recorded that "the accused being ill, her personal attendance is dispensed with under section 205 of the Criminal Procedure Code and her father-in-law having put in an appearance on her behalf the case is proceeded with against him with his consent." In referring the case to the High Court, the Sessions Judge of Ahmednagar, went on to say: "But the accused was not 'duly represented' in the case, and hence the Magistrate was wrong in proceeding against the father-in-law of the accused contrary to the provisions of the law."

ORDER.—In this case the father-in-law of the accused may probably have been received by the Magistrate (trying) as a person appointed by her to act in the proceedings before him consistently to section 4 of the Criminal Procedure Code. The Court therefore does not consider it necessary in so trivial a case to make any order.

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8 October 1884. SARGENT, C. J. & PINHEY, J.

Queen-Empress v. Ganu Sakharam.*

Penal Code (Act XLV of 1860), Sec. 70—Imprisonment—Fine—Default—Bar of six years.

Imprisonment in default of payment of fine is not a satisfaction of the fine, but is a punishment for contempt; and the fine may be recovered by distress, within six years, even though the full term of imprisonment in default has been undergone. The bar of six years, provided in section 70 of the Indian Penal Code, may save the property of the accused but not his personal arrest. The liability for any sentence of imprisonment awarded in default of payment of fine continues after the expiration of the six years.

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27 November 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Sadu.†

Penal Code (Act XLV of 1860), Secs. 109, 111—Murder—Abetment—Different act.

The accused accompanied his brother who was taking a child to murder it: after accompanying him for a while he refused further to go along with his brother, but at the same time, though knowing full well that the child was being taken to be murdered he made no attempt to take the child back with him:—and the child was subsequently murdered:—

*Criminal Ruling. Criminal Reference No. 51 of 1878. †Criminal appeal No. 132 of 1884

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Held, that under sections 109 and 111 of the Indian Penal Code, the accused was guilty of murder.

JUDGMENT.—In this case Sadu Ramji, against whose acquittal the Government of Bombay have appealed, was tried with his brother Pandu Ramji on the charges of murder and abetment of murder and sentenced to death. Sadu was also charged in the course of the trial with having omitted to give information of the commission of the offence of murder by their elder brother Shambhu of his wife Harni and his child Narsu and being convicted was sentenced to rigorous imprisonment for six months but acquitted of the graver charge.

The circumstances of the case are as follows. Shambhu had a quarrel with his wife in the course of which he killed her. Sadu came to know of the murder and questioned his brother about it who admitted the act and asked him to assist him in disposing of the corpse. Shambhu took the corpse and asked Sadu to accompany him with his child Narsu. Sadu asked Shambhu what he intended to do with the child and Shambhu replied that he would either abandon it in the jungle or kill it also. Sadu did not at that time decline and went with the child in company of Sambhu (who carried his wife's corpse) to a place called Kala Khadak, where Sadu declined to proceed further. Leaving the child with Shambhu he went to call his brother Pandu who was in the neighbouring field. Sadu then sent Pandu to Shambhu and himself returned home. He must have known that his brother Sambhu was going to kill the child and he had opportunity of saving the child's life by taking it away with him. He could not have been pursued by Shambhu encumbered as the latter was with the corpse of his wife and therefore there was an intention on his part to assist his brother Shambhu in the murder of his child. It is impossible to say that he was not aware of his brother's murderous intention or that he could not have saved the life of the child. He might have refused to leave their house with the child and he might have taken it away afterwards.

As to what offence Sadu committed section 111 of the Indian Penal Code says: "When an act is abetted and a different act is done, the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it; provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment." It cannot be said that the murder of his child by Shambhu was not a probable consequence of Sadu's conveying the child and accompanying Shamhbu and handing the child

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over to him near the *nala* Sadu therefore in law abetted Shambhu in his child's murder. By section 109 of the Indian Penal Code "whoever abets any offence shall, if the act abetted is committed in consequence of abetment, be punished with the punishment provided for the offence." The punishment provided for the abetment of murder is death or transportation for life. There does not seem to be any necessity for passing the capital sentence in this case. We convict Sadu of abetment of murder, agreeing with the Assessors rather than with the Sessions Judge, and sentence him to transportation for life.

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3 December 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Krishna.*

Criminal Procedure Code (Act X of 1882), Sec. 437—Discharge—Magistrate—Prima facie case—Conclusions of fact—High Court—Revision—Fresh complaint.

Where a trying Magistrate has arrived at the conclusion that no *prima facie* case had been made out against an accused person, the High Court cannot command him to arrive at a different conclusion on the facts. If the complainant has a good case, according to law, against the accused, he may make a complaint to another Magistrate who will not be prevented from inquiring and adjudging by a mere discharge of the accused in a warrant case.

ORDER.—We do not think we ought to interfere. The Magistrate has arrived at the conclusion that no *prima facie* case has been made out against the accused and we cannot command him to arrive at a different conclusion on the facts. If the complainant has a good case according to law against the accused he may make a complaint to another Magistrate who will not be prevented from inquiring and adjudging by a mere discharge of the accused in a warrant case.

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11 December 1884. WEST & NANABHAI, JJ.

Queen-Empress v. Rajya.†

Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 66—Market—Selling meat at one's house—Platform.

The selling of meat in one's own house would not, but the selling of meat on another person's platform abutting on a public road would be, an offence under section 67 of the Bombay District Municipal Act, 1873.

ORDER.—Referring to L. R. Ch. D. Vol. 25 pages 548, 555 and the cases there referred to we think that the act of Rajya selling in his own house may perhaps have been not a selling there as if it were a market but that the act of Ganu who for his traffic occupied an area on another person's platform abutting on the public road was such a selling. The notice under section 66 of Municipal Act it may be, was to the latter but

*Criminal Ruling. Criminal application for Revision No. 171 of 1884.

†Criminal application for Review No. 214 of 1884.

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not to the former, a prohibition which made his subsequent selling unlawful and subjected him to penalty. In Ganu's case there seems no reason to call for the proceedings. In Rajya's case they are to be called for with a view to considering the legality of the notice and order therein.

1885.

12 February 1885. NANABHAI & WEDDERBURN, JJ.

Surat Sessions Judge's Letter No. 187.*

Criminal Procedure Code (Act X of 1882), Chap. XXXII, Sec. 193 (2)—Sessions Judge—Revisional Jurisdiction—Joint Sessions Judge.

Applications under Chapter XXXII, Criminal Procedure Code, for the exercise of the Sessions Judge's revisional jurisdiction cannot be made over by the Sessions Judge to a Joint Sessions Judge for disposal. Section 193 (2) of the Code of Criminal Procedure refers only to cases which are to be made over to the Joint Sessions Judge for trial.

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19 February 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Parmaya.†

Penal Code (Act XLV of 1860), Sec. 177—Stamp Act (I of 1879)—Stamp vendor—Purchaser giving a false name.

The purchaser of a stamped paper, not being bound by any law, or rule having the force of law, to furnish information to the stamp-vendor, is not punishable, under section 177 of the Indian Penal Code, if he gives a false name.

THE facts of this case were that on the 9th September 1884, the accused Parmaya went to the stamp vendor at Sirsi, to purchase a general stamped paper of the value of rupee one for his brother Narayan. The stamp-vendor asked his name, in reply to which the accused mentioned the name of his brother as his own and an entry was made accordingly, in the vendor's day-book of sales. On being further questioned, the accused gave his own name, and said, that he had stated the name of his brother, because, the paper was wanted by him. Thereupon, the vendor lodged a complaint before the Second Class Magistrate, who after a regular trial, convicted and sentenced the accused to a fine of Rs. 5, under section 177 of the Indian Penal Code, under the authority of *Reg.* v. *Raghoji* (1).

The District Magistrate of Kanara, in making the reference to the High Court, observed:—" The facts of the case would appear to be somewhat similar to those of the case reviewed by the High Court and relied on by the Second Class Magistrate of Sirsi, but still there are grave doubts as to whether any conviction like the one under notice is legally sustainable, under the present state of the law. Section 177, Indian

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*Criminal Ruling. †Criminal Ruling. Criminal Reference No. 19 of 1885. (1) 3 Bom. H. C., 42.

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Penal Code, requires that the person giving the false information should be bound by some law to give the information. There is no such law which compels the purchasers of stamps to state their true names, although a compulsion is placed on the vendors of stamps to make a true endorsement on the stamp by Rule 12 of the Rules framed under section 55 of the Stamp Act I of 1879. The vendors are by this rule only required to ascertain the real names of the purchasers who require the stamps for use, whoever may actually come before them to take the stamp either for themselves or for others. The accused in this case stated the name of the purchaser, and the stamp-vendor, in endorsing the same, certainly was not led to commit any breach of the rules but on the contrary did what was strictly legal. The information, therefore, given by the accused to the vendor cannot be said to be false. Hence, the second ingredient of the offence, *viz.*, of giving false information is also wanting in this case to support a conviction under the section above referred to, and the conviction and sentence passed by the Second Class Magistrate appear to be illegal."

ORDER.—For the reasons stated by the District Magistrate the Court reverses the conviction and sentence and orders the fine to be refunded.

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26 February 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Dala Tala*.

Criminal Procedure Code (Act X of 1882), Sec. 238—Penal Code (Act XLV of 1860), Secs 380, 397, 456—Judge—Jury—Charge of one offence—Verdict for another.

The accused were charged with and tried by the Sessions Court, under Section 397, Indian Penal Code, for committing robbery and using a deadly weapon (a sword) at the time of committing it and the jury returned a verdict of not guilty of the offence charged, but found accused No. 1 guilty of the offence of house breaking by night and theft in a dwelling-house, and accused No. 2 guilty of abetting those offences:—

Held, that all the particulars constituting the minor offence of house-breaking by night and theft in a dwelling house and abetment of those offences were not included in the definition of robbery, the only offence with which the accused were charged. Therefore, under section 238, Criminal Procedure Code, the accused could not be convicted of those offences without a charge being framed. The verdict of the jury finding them guilty of those offences in the absence of such a charge was accordingly bad and should be reversed.

IN this case the two accused were charged with using a sword at the time of committing robbery. The evidence adduced went to show that one night they removed the door of the complainant's house from its sockets, took some copper pots from the house and ran away with the things on the complainant awakening. They were pursued for about 150 paces, and the accused No 1 who had a sword, attempted to cause hurt with it and that they

*Criminal Ruling. Criminal Reference No. 4 of 1885.

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were then arrested and a copper pot was taken from accused No. 1 and a bundle from accused No. 2 containing the other two pots and cloths. On this evidence the unanimous verdict of the jury was that the accused were not guilty of the offence charged; but that the accused No. 1 was guilty of the offences of the house breaking by night and theft in a dwelling house and that accused No. 2 abetted those offences.

The Sessions Judge of Ahmedabad referred this case to the High Court.

ORDER.—All the particulars constituting the minor offences of house breaking by night and theft in a dwelling house abetment of those offences are not included in the definition of robbery, the only offence with which the accused were charged. Therefore under section 238 of the Criminal Procedure Code the accused could not be convicted of those offences without a charge being framed. The verdict of the Jury finding them guilty of those offences in the absence of a charge was therefore bad. The Court accordingly acquits the accused and orders them to be discharged.

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26 February 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. J. I. Almeida.*

Criminal Procedure Code (Act X of 1882), Sec. 234—Four offences.

Where the accused was tried, in contravention of section 234, Criminal Procedure Code, for four offences instead of three and convicted of all of them, the conviction and sentence for the fourth offence were reversed as illegal.

ORDER.—Under section 234 the accused could not be tried at one trial for more than three offences under section 45 (*c*) of Bombay Act V of 1878 the conviction and sentence for the fourth offence is therefore reversed and the fine of Rs. 10 to be refunded to the accused.

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9 March 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Bapu.†

Criminal Procedure Code (Act X of 1882), Sec. 438—Sessions Judge—Acquittal—District Magistrate—Reference—High Court.

A District Magistrate is not warranted by section 438 of the Code of Criminal Procedure in referring, for the orders of the High Court, a case in which the Sessions Judge, on appeal, acquitted and discharged the accused. That section, having regard to section 435 of the Code, empowers the District Magistrate only to refer to the High Court proceedings before an inferior criminal Court, which the Sessions Court is not. If the District Magistrate thinks a failure of justice has occurred in such a case his proper course is to have steps taken for an appeal to be preferred against the order of acquittal by the Sessions Judge.

THE District Magistrate of Kolaba in referring the case to the High Court, said "The Magistrate discharged two of the accused and

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**Criminal Ruling.* Criminal Review No. 36 of 1885.

†*Criminal Ruling.* Criminal Reference No. 27 of 1885.

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convicted the police patel and the constables under sections 202 and 217, Indian Penal Code. The Sessions Judge reversed the sentences, and while I think the Magistrate seems to have scarcely tried the case with due care, it is the finding of the appellate Court which I would respectfully call their Lordships' attention."

ORDER.—This reference is not warranted by section 438 of the Criminal Procedure Code. That section having regard to section 435 of the same Code empowers the District Magistrate to refer to the High Court only proceedings before an inferior criminal Court which the Sessions Court is not. If the District Magistrate thinks a failure of justice has occurred in this case he should take steps to have an appeal preferred against the order of acquittal by the Session Judge.

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10 March 1885. RESOLUTION IN CHAMBERS.

Queen-Empress v. Ravji.†

Criminal Procedure Code (Act X of 1882), Sec. 547—Accused—Fine—Compensation—Complainant—Repayment of compensation.

The accused were tried by the First Class Magistrate and fined Rs. 25 each and it was ordered that half the fine, if recovered, was to be given to the complainant. The conviction and sentence were quashed by the High Court who ordered a retrial. The Second Class Magistrate, on retrial, fined each of the accused Rs. 10 and said that "as they had already paid a fine of Rs. 25 each, the result of the sentence will be that Rs. 15 will have to be returned to each of them." The complainant who had previously been given half the fine, on being called upon by the District Magistrate, stated that he had spent the money and was unable to repay. A reference was, therefore, made by the District Magistrate as to how the compensation could legally be recovered:—

Held that the decision of the Second Class Magistrate amounted to an order to the complainant to refund the sum of Rs. 15 and was, therefore, enforceable under section 547 of the Criminal Procedure Code.

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19 March 1885 NANABHAI & WEDDERBURN, JJ.

In re Raola Vishta.*

Criminal Procedure Code (Act X of 1882), Sec. 437—Magistrate—Discharge—District Magistrate.

When a District Magistrate considers that a Magistrate subordinate to him has improperly discharged an accused person, under section 253 of the Code of Criminal Procedure, he need not refer the case to the High Court but may deal with it under section 437, Criminal Procedure Code.

THE District Magistrate of Ahmedabad referred this case for the orders of the High Court, being of opinion in that the Magistrate had improperly discharged the accused under section 253, Criminal Procedure Code.

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†*Criminal Ruling.* **Criminal Ruling.* Criminal Reference No. 31 of 1885.

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ORDER.—No reference is necessary. The District Magistrate can himself deal with the matter under Section 437, Criminal Procedure Code, as held in several cases.

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6 August 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Gaffur.*

Abkari Act (Bom. Act V of 1878), Sec. 45 (c)—Licensee—Servant.

Section 45 (c) of the Bombay Abkari Act applies only to the "holder of a license" and not to a mere servant of the licensee.

ORDER.—Section 45, clause (c) of the Abkari Act Bombay Act V of 1878 under which the accused No. 2 Jallal *walad* Pirsaheb was convicted applies only to the "holder of a license" which the accused is not. He is a mere servant of the licensee to whom the above section does not apply.

The Court reverses the conviction and sentence and directs that the fine paid by the accused be refunded to him.

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14 September 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Bapuji.†

Judge—Reference—Pending trial.

There is no provision in the Criminal Procedure Code which enables a Judge to stop a trial already commenced and to refer to the High Court any question or questions of law arising on the merits in that case.

ORDER.—We do not find in the Criminal Procedure Code any section which enables the Joint Sessions Judge to stop a trial already commenced and to refer to the High Court any question or questions of law arising on the merits in that case. We direct the Joint Sessions Judge to proceed with the trial disposing of any questions arising according to his own view of the law. There is nothing to show that the commitment was invalid.

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1 October 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Mohan.††

Abkari Act (Bom. Act V of 1878), Sec. 43 (g)—Transfer—Ganja—One shop to another.

A transfer of *ganja* from one shop to another, both shops belonging to the same licensee, does not constitute an offence under section 43 (g) of the Bombay Abkari Act.

THE accused Mohan was a servant of the licensee of a shop for the sale of Ganja at Karmalla, and one Daud was the servant at the shop at Kem, both shops belonging to the same licensee. Accused Mohan made over to Daud three seers of Ganja for use in the shop at Kem, there was no

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**Criminal Ruling.* Criminal Reference No. 81 of 1885.

Criminal Reference No. 114 of 1885. ††*Criminal Ruling.* Criminal Reference No. 133 of 1885.

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cash payment and the Ganja was shown in the books of the Karmala shop in the column headed sent to villages.

Clause 8 of the license for the sale of intoxicating drugs ran as follows:—"That he will not sell to one and the same person any one day any intoxicating drugs exceeding in the aggregrate half an India seer or 40 tolas unless under the authority and in accordance with the terms of a special order duly made in this behalf under section 17 of the Bombay Abkari Act."

The First Class Magistrate was of opinion that in the transaction with Daud, Mohan broke this rule and convicted him for selling in contravention of the provisions of a license.

The District Magistrate of Sholapur, in making this reference to the High Court observed:—"I am of opinion that the decision is wrong, as there is no evidence of any sale of Ganja; a transfer of Ganja from one shop to another, both shops belonging to the same licensee, cannot constitute a sale. It is true that the Ganja could not be transported from one shop to another without a permit, but that is a different point."

ORDER.—For the reasons stated by the Magistrate of the District, the Court reverses the conviction and sentence and directs the fine, if paid to be refunded.

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1 October 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v Hari.*

Penal Code (Act XLV of 1860), Sec. 277—Public spring—Rivulet.

The water of a rivulet, even though standing in pools, does not constitute a "public spring" within the meaning of section 277, Indian Penal Code.

THE facts in this case were that the accused Hari after obeying calls of nature on the bank of a river at Manmar washed his private parts in the river and thus fouled the water of the river, the water of which was used by the inhabitants of Manmar for drinking purposes. The First Class Magistrate convicted the accused under section 277 of the Indian Penal Code and sentenced him to pay a fine of Rs. 2.

The District Magistrate of Nasik in referring the case to the High Court observed:—"It has been held by the HIGH COURT OF CALCUTTA and MADRAS that section 277, Indian Penal Code, does not apply to rivers. *Vide Empress* v. *Halodhar* (1) and *Empress* v. *Vithi* (2). In submitting papers and proceedings called for the Magistrate First Class writes 'I have the honor to state with regard to the remark upon the latter case that the

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* *Criminal Ruling.* Criminal Reference No. 139 of 1885. (1) I. L. R., 2 Cal., 333. (2) I. L. R., 4 Mad., 229.

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cases cited by you are quite proper. The stream of the rivulet, however, was not running there where the offence was committed but the water of it in that spot was just like a spring. It having been personally inspected by me, the accused was convicted under section 277 of the Indian Penal Code.'

"I do not however think that even under the circumstances explained by the First Class Magistrate, section 277, Indian Penal Code, applies to the acts complained of."

ORDER.—It does not appear that the water of a rivulet, even though standing in pools constitutes a "public spring" within the meaning of section 277 of the Indian Penal Code. The conviction and sentence are therefore reversed and the fine, if paid, be refunded.

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8 October 1885. NANABHAI & WEDDERBURN, JJ.

Queen-Empress v. Gangaram.*

Gambling Act (Bom. Act III of 1866), Sec. 6—Gaming house—House in which instruments of gaming are found—Presumption.

A house, suspected to be used as a common gaming house, in which any instruments of gaming are found and which is entered in warrant issued under the provisions of the Bombay Gambling Act, 1866, is presumed to be a common gaming house until the contrary is proved.

THE Sessions Judge of Khandesh in making the reference stated: "The facts of the case were that the accused were found playing for money with cards in the house of accused Gangaram. There was no evidence that the house is a common gaming house within the meaning of section 14 of the Act and therefore I hold the conviction to be bad. The Magistrate appears to have quite overlooked the fact that to constitute the offence of gambling under section 4 of the said Act it is essential that the gambling should take place in a common gaming house."

ORDER.—Return record and proceedings and direct the attention of the Sessions Judge to section 6 of Bombay Act III of 1866 with regards to a house suspected to be used as a common gaming house and entered under a warrant issued under this Act.

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30 October 1885. BIRDWOOD & WEDDERBURN, JJ.

Queen-Empress v. Jagannath.†

Penal Code (Act XLV of 1860), Sec. 430—Mischief—Water-course—Diminution of water.

Where it is clear, upon the evidence, that the complainant is the exclusive owner of a water-course and that the accused has no sort of right to assert any claim to it, the causing of a

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* *Criminal Ruling.* Criminal Reference No. 129 of 1885.

† *Criminal Ruling.* Criminal Reference No. 146 of 1885.

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diminution of the supply of water by the accused, even under the colour of right, is only an additional wrong and constitutes mischief within the meaning of section 430, Indian Penal Code.

THE District Magistrate of Ratnagiri in making this reference to the High Court observed.—" A brook flows down the valley from the hills and near its head the complainant has diverted its course into a channel by means of which he waters a garden of trees. This channel passes on into the land of the accused and after emerging from his boundary enters the house-garden of complainant. There is no evidence in the case to show what were the conditions on which accused allowed complainant to carry this water channel through his grounds. Accused pleads that he and complainant constructed it in conjunction one with the other; and that he annually uses the water. Complainant claims exclusive possession. Many witnesses have been examined on either side. The offence is said to have taken place in the hot weather. The stream which then trickles along the channel must be very fine, and a few stones might dam it up. Whatever accused did he seems to have done within the boundaries of his own land. Until complainant produces the decree of a civil Court or some grant or arrangement from or with the accused giving him the exclusive right of using the water which passes along this channel I do not see how accused can be held guilty under section 430 of the Indian Penal Code for using the water in his own land under what he considers his rights.

"Holding this view I have the honor to request that the High Court may be pleased to quash the conviction and to direct that the fine may be refunded to the accused or to pass such orders in the case as may to them seem right and proper."

ORDER.—The trying Magistrate seems to have been distinctly of opinion, on his appreciation of the evidence, that the complainant was the exclusive owner of the water-course stopped by the accused, and that the latter had no sort of right to assert any claim to it. If the Magistrate's view of the case is correct, and for the purposes of the present reference, we must, we think, accept it, then any claim set up by the accused could not have been *bona fide*. The assertion of a claim in such a case would be "only an additional wrong," (cf. I. L. R., 1 Mad. 262). The conviction and sentence must, we think, be sustained.

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30 October 1885. BIRDWOOD & WEDDERBURN, JJ.

Government of Bombay v. Kalaya.*

Penal Code (Act XLV of 1860), Sec. 430—Mischief—Water-course—Diminution of water—Damage to crops.

Where the accused closed a water-course by which water had been supplied to the complainant's land, he was held not to have committed mischief, under section 430 of the Indian

*Criminal Ruling. Criminal Appeal No. 154 of 1885.

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Penal Code, by the diminution of the supply of water, as no damage was alleged to have been caused by the stoppage of water to any crop on the land.

ORDER.—The accused were charged with committing mischief by doing an act which they knew to be likely to cause a diminution of the supply of water to the complainant's land for agricultural purposes. They were convicted by the Second Class Magistrate under section 430 of the Indian Penal Code. The conviction was reversed on appeal by the Magistrate First Class who held that the act of the accused did not amount to a criminal offence, and should have been dealt with under Bombay Act III of 1876. He relied on the ruling of the MADRAS HIGH COURT reported at page XXXIX of the appendix to Vol. II of the Madras High Court Reports.

The accused closed a water-course by which water had been supplied to the complainant's land. But no damage is alleged to have been caused by the stoppage of water to any crop in the land. So that it cannot be held that mischief has been committed by the diminution of the supply of water. This case does not therefore fall under section 430 of the Indian Penal Code. Evidence was, however, adduced to show that the utility of the water-course itself in which the complainant has an interest was destroyed. If mischief was thus done to the water-course then the case might fall under section 426 of the Indian Penal Code. The accused were not however, tried for an offence against that section and had no opportunity of meeting any case under it.

The appeal is dismissed ; but this order is not to be understood as a bar to any prosecution under section 426 of the Indian Penal Code, if the complainant wishes to proceed under that Section.

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24 November 1885. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Abdul Latif.*

Penal Code (Act XLV of 1860), Sec. 410—Accused inhabitant of Janjira—Theft at Rajkote—Trial at Thana—Statute 21 and 22 Vic., c. 106.

The accused, an inhabitant of the Janjira State was charged with the offence of theft by a servant of property in the possession of his master, committed at Rajkote, and convicted by the Sessions Judge of Thana:—

Held, (1) That the Rajkote civil station is not part of British India within the meaning of the Statute 21 and 22, Victoria, Chapter 106, and that the accused being a subject of the Janjira State, the Sessions Court at Thana had no jurisdiction to try him for the theft;

(2) That as under section 410, Indian Penal Code, the definition of stolen property, includes property stolen outside of British India, the accused might have been charged with the offence punishable under section 411, Indian Penal Code.

**Criminal Ruling.* Criminal Review No. 322 of 1885.

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IN this case it was held that Rajkote civil station is not part of British India although the Courts and jurisdictions in that station are created by the Government of India, and are recognised by the Foreign Jurisdiction Act. The accused was charged before Mr. H. J. Parsons, Sessions Judge of Tanna, with theft as a servant, and was sentenced to five years' rigorous imprisonment.

JARDINE, J.—In this case the learned Sessions Judge has held that he had jurisdiction to try the accused, who is an inhabitant of the Native State of Jinjeera, for the offence of theft, under section 381 of the Indian Penal Code "inasmuch as the theft took place within British territory at Rajkote, and the things stolen were possessed by the thief in a place within the limits of this (the Tanna Sessions Judge's) Court's jurisdiction." On the prisoner pleading guilty to the charge, under section 381, he was convicted and sentenced. The proceedings of the Magistrate show that by Rajkote is meant the British station in Kattyawar near the town of that name. We are not aware of any legislative recognition of the British station of Rajkote as a part of British India, nor of any judicial ruling to that effect by this Court. On the contrary, the Courts of the Political Agency in Kattyawar were, by Notification 1499, dated the 17th December, 1868, Foreign Department, published at page 1288, recognised by the Governor General in Council for the purpose of section 284 of the Code of Civil Procedure, Act VIII of 1859, which refers to civil Courts established by the Governor General of India in Council in the territories of any foreign Prince or State. Another Notification of the Government of India, No. 1783 of the 23rd September, 1874, (printed in Mr. Prinsep's note to section 458 of his Code of Criminal Procedure, seventh edition) in exercise of powers conferred under the 28th Victoria, chapter 15, section 3 (which empowers the Government of India to authorise the High Courts to exercise jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of Princes and States of India in alliance with Her Majesty) mentions the States of Kattyawar as among the native states, territories, and chiefships about which the order is passed. The land on which the British station of Rajkote is established is the subject of an agreement between the Thakor of Rajkote and the Political Agent, dated 25th September, 1863, printed as No. LXX in Aitchison's Treaties, Vol. 4, page 165, edition of 1876. This land is thereby assigned in perpetuity to the officers of the Government of Bombay for the purpose of assisting Government in establishing a civil station on its own ground in Rajkote, the Government allowing an annual deduction of Rs. 1,500 from the tribute payable by the native state. Article 13 further stipulates that, if Government ever abandon the station the land must be returned to the Rajkote

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State, and the deduction be thenceforward discontinued. There are other conditions about the levy of taxes, the jurisdictions, and other matters. On consideration of all the articles of this agreement, we are of opinion that it does not relate to the sovereignty of the land, although in different respects it deals with its use and confers certain powers and jurisdictions on the officers of the British Government. This power and jurisdiction exercised by the Political Agency Officers are, in our opinion, such as Act XXI of 1879, the Foreign Jurisdiction and Extradition Act, applies to. For these reasons we are of opinion that Rajkote civil Station is not part of British India within the meaning of the Statute 21 and 22 Victoria, chapter 106; and that as the accused is a subject of the Jinjeera State, the Sessions Court of Thana had no jurisdiction to try him for the theft. On this ground, we reverse the conviction and sentence. Under section 410 of the Indian Penal Code, as amended by Act VIII of 1882, the definition of stolen property includes property stolen outside of British India. The accused might therefore have been charged with the offence punishable under section 411. We now order that he be retried by the Court of Session on an amended charge for the dishonest retention, the previous convictions being also set forth in the charge.

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26 November 1885. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Ramchandra.*

District Police Act (Bom. Act VII of 1867) Sec. 42—Criminal Procedure Code (Act X of 1882), Sec. 54—Penal Code (Act XLV of 1860), Sec. 342—Police Officer—Wrongful confinement.

The provisions of section 42 of the Bombay District Police Act must be held to apply to criminal prosecutions as well as to civil actions, notwithstanding the use of the word "decree" in section 43 in connection with prosecutions.

The prosecution of a Police Officer for an alleged offence of wrongful confinement, punishable under section 342 of the Indian Penal Code, the Police Officer having, without a warrant, arrested and detained in custody a person in whose possession he found property which he suspected to be stolen, is a prosecution for a thing done or intended to be done under the Bombay District Municipal Act, inasmuch as section 21 of the Act authorizes the arrest, by a Police Officer, without warrant, of any person in whose possession anything is found, which may reasonably be suspected to be stolen property, if the person may "reasonably be suspected of having committed an offence with reference to such thing," and authority given to arrest in such cases implies authority to detain.

ORDER.—The provisions of section 42 of Bombay Act VII of 1867 must be held to apply to criminal prosecutions as well as to civil actions, notwithstanding the use of the word "decree" in section 43 in connection with prosecutions.

The prosecution of a Police Officer for an alleged offence of wrongful confinement punishable under section 342 of the Indian Penal Code the

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*Criminal Ruling. Criminal application for Revision No. 284 of 1885.

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Police Officer having without a warrant arrested and detained in custody a person in whose possession he found property which he suspected to be stolen, is a prosecution for a thing done or intended to be done under Bombay Act VII of 1867, inasmuch as section 21 of the Act authorizes even Police Officer to apprehend all persons whom he is legally authorized to apprehend, and section 54 of the Criminal Procedure Code authorizes the arrest by a Police Officer without warrant of any person in whose possession anything is found which may reasonably be suspected to be stolen property "if the person may reasonably be suspected of having committed an offence with reference to such thing," and authority given to arrest in such a case implies authority to detain. Section 42 of Bombay Act VII of 1867 was therefore applicable to the present case and as the complaint was barred by time we refuse the application now made to us.

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3 December 1885. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Biram.*

Cantonement Act (Bom. Act III of 1867), Secs. 13, 14—Penal Code (Act XLV of 1860), Secs. 40, 64—Imprisonment—Default of payment of fine.

Notwithstanding the amendment by section 1 of Act VIII of 1882, of section 40 of the Indian Penal Code, and the amendment of section 64 of the Code, by section 2 of the Act, the provisions of sections 13 and 14 of Bombay Act III of 1867, which is a special and local Law, still (under section 5 of the Indian Penal Code) remain unaffected.

The ruling in *Reg.* v. *Lallu* (1) that in cases coming under the Cantonement Act 1867 simultaneous sentences of fine and imprisonment in default of payment of the fine, are illegal, held to be still in force.

ORDER.—Notwithstanding the amendment of section 40 of the Indian Penal Code, by section 1 of Act VIII of 1882, (by the insertion of the figure '64' before the figure '109' in the second clause of section 40) and the amendment of section 64 of the Code by section 2 of the Act the provisions of sections 13 and 14 of Bombay Act III of 1867 which is a special and Local Law still (under section 5 of the Indian Penal Code) remain unaffected. It has already been ruled by this Court in *Regina* v. *Lallu*, decided on the 8th August 1870, that in cases coming under Bombay Act III of 1867 simultaneous sentences of fine and imprisonment in default of payment of the fine are illegal. That ruling must be held to be still in force. So much of the Magistrate's sentence as awards imprisonment in default of payment of the fine is therefore reversed. As the fine has already been paid no further order is made.

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* *Criminal Ruling.* Criminal Review No. 334 of 1885. (1) 8th August 1870.

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7 December 1885. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Havia.*

Criminal Procedure Code (Act X of 1882), Sec. 349—Magistrate—Practice.

A Sub-Divisional Magistrate, to whom a case is sent, under section 349 of the Code of Criminal Procedure for severer punishment, by a Second Class Magistrate, cannot return it to the latter for committal to the Court of Session, and the Second Class Magistrate's committal is also illegal. The Sub-Divisional Magistrate must deal with the case according to law.

IN this case the Second Class Magistrate in the first instance sent the case up, for severer punishment than he could inflict, to the Divisional Magistrate under section 349 of the Criminal Procedure Code. That Officer instead of disposing of it himself returned it to the Second Class Magistrate for committal. Thereupon the latter committed the case to the Court of Sessions.

The Sessions Judge of Belgaum in making the reference to High Court, stated:—"The action of the Divisional Magistrate in returning the case to the Second Class Magistrate appears illegal inasmuch as he was bound to pass a final judgment, sentence or order (*Imperatrix* v. *Abdulla*) (1), and the order of the Second Class Magistrate committing the case seems also illegal as he having once referred the case under section 349 had no further jurisdiction to deal with it. If these views are correct I think the case should be sent back to the Divisional Magistrate with instructions to dispose of it according to law. He cán then either pass judgment himself or if he think proper commit the accused to this Court for trial."

ORDER.—For the reasons stated by the Sessions Judge the Court annuls the Sub-Divisional Magistrate's order of the 12th October and directs him to deal with the case according to law.

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10 December 1885. BIRDWOOD, & JARDINE, JJ.

Queen-Empress v. Amarsang.†

Penal Code (Act XLV of 1860), Sec. 220—Conviction—Essentials.

To justify a conviction under section 220 of the Indian Penal Code, there must be a guilty knowledge superadded to an illegal act.

BIRDWOOD, J.—In this case Meherbai, widow of Hormusjee Dosabhoy, obtained a rule from *Nanabhai Haridas* and Sir *William Wedderburn*, JJ., requiring the accused, Amirsing Jetha, Hoosen Gulam Mahomed, and Bhimrao Keshavrao, to show cause why they should not be committed for trial on charges under sections 220 and 342 of the Indian Penal Code. It has been urged before us by Mr. *Manekshah*, for Meherbai, that

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**Criminal Ruling.* Criminal Reference No. 168 of 1885.

†Criminal Application for Revision No. 263 of 1885. (1) I. L. R., 4 Bom., 240.

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Mr. Lely, the Magistrate, who discharged the accused, was wrong in his findings on the issues recorded by him as to the legality of the arrest of Hormusjee and the corrupt or malicious *animus* of the accused. We have been asked to infer the existence of this *animus* from the unnecessary harshness with which the arrest was conducted, a subject with which Mr. Lely has dealt in his third finding. On these grounds we are asked to direct the committal of the accused to the Court of Session. On a consideration of the very careful judgment recorded by Mr. Lely, and his full discussion of the evidence as to the alleged reasons for the arrest, we do not think that, as a Court of Revision, we should interfere with his decision either on the ground that there was no reasonable suspicion or complaint to justify the arrest, or on the ground that the accused acted from corrupt or malicious motives. We have been referred to the opinion expressed by the CALCUTTA HIGH COURT in *Queen* v. *Behary Singh* (1). In that case, which was decided when the powers of police officers to arrest without a warrant were regulated by section 100 of Act XXV of 1861, *Markby*, J., observed—"What is a reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information." These words are a comment on clause 2 of section 100 of the Code of 1861, which authorised the arrest, without a warrant, of a person against whom a reasonable complaint had been made, or a reasonable suspicion existed, of his having been concerned in any offence of the class described in the Codes of 1872 and 1882 as "cognisable offences." The law has now been altered by section 54 of the Code of 1882, which authorises the arrest, not only of persons against whom a reasonable complaint has been made, or a reasonable suspicion exists of their having been so concerned, but also of persons against whom "credible information" to that effect has been received. In the present case the prosecution failed to satisfy the Magistrate that the informer Parbhu Jumnadas had given no information to the accused of the kind contemplated in section 54 of the Code; and we cannot say that the Magistrate's finding on the evidence before him was wrong, or that he failed to notice any evidence bearing on the point. We must hold, therefore, that the accused acted within their legal powers of arrest, however harshly they may have behaved in the exercise of those powers. These considerations are really sufficient to enable us to dispose of the application now before us. If the arrest was legal, there could be no guilty knowledge "superadded to an illegal act," such as it would be

(1) 7 W. R. Cr., 3.

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necessary to establish against the accused to justify a conviction under section 220, Indian Penal Code. (See *Reg.* v. *Narayen Babajee* (2)). It is only when there has been an excess by a police officer of his legal powers of arrest that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was "acting contrary to law." Nevertheless, in the present case, we may say that there is no reason for holding that Mr. Lely has wrongly appreciated so much of the evidence as bears on the motives which actuated the accused in arresting the deceased Hormusjee. The arrest was certainly conducted with unnecessary harshness ; but we concur with Mr. Lely in holding that the Legislature has left the protection of individuals from such conduct as the police were guilty of in the present case to the supervision of executive authority, and such supervision is shown to have been exercised as regards the accused. The arrest of the deceased having been strictly legal, it is obvious that the accused could not be successfully proceeded against on a charge under section 342, Indian Penal Code. For these reasons, we decline to interfere with the Magistrate's order.

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10 December 1885. BIRDWOOD & JARDIN, JJ.

Government of Bombay v. Dala Jiva.*

Criminal Procedure Code (Act X of 1882), Secs. 195, 337—Penal Code (Act XLV of 1860) Sec. 193—Contradictory statements—Sanction to prosecute—Tender of pardon.

The accused was charged, under section 193 of the Indian Penal Code, before the Assistant Sessions Judge of Ahmedabad with intentionally giving false evidence in respect of two contradictory statements, one of which was made in 1883 in the case against Bhaga, who were charged with house breaking by night, and the other in 1885, in the course of the trial of Bhopta and Lila for house-breaking by night. The Magistrate acquitted the accused for want of the necessary sanction :—

Held, (1) that if the case was not of the kind contemplated in section 337 of the Code of Criminal Procedure, then it was not competent to the Magistrate who made the preliminary inquiry in 1883, to tender a pardon to the accused in the present case, who was one of the accused in the former case, or to examine him as a witness; and the deposition of the present accused, recorded in that case, could not be used against him in a manner in which it was now sought to be used. He could only, in that event, be charged with giving false evidence in the case of 1885.

(2) that, if, on the other hand, a pardon was legally tendered to the accused in 1883, then proper sanction would be necessary for the present prosecution on each branch of the alternative charges; and in respect of the statement made in 1885, the sanction of the High Court would be necessary under section 339 of the Code of Criminal Procedure.

JUDGMENT.—The accused persons who were under trial in 1883 were charged under section 457 of the Indian Penal Code, that is, of an offence not triable exclusively by the Court of Session. The Government Pleader is unable to inform as whether the complaint against them was one of dacoity that is of an offence triable exclusively by a Court of Session, or not,

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†*Criminal Ruling.* Criminal Reference No. 95 of 1884. (2) 9 Bom., H. C., 346.

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If the case was not of the kind contemplated in section 337 of the Code of Criminal Procedure, then, it was not competent to the Magistrate Mr. Morison who made the preliminary enquiry in 1883 to tender a pardon to the accused in the present case, who was one of the accused in the former case, or to examine him as a witness; and the deposition of the present accused, recorded in that case could not be used against him in the manner in which it is now sought to be used—*cf. Regina* v. *Hanmanta* (1). He could only, in that event, be charged with giving false evidence in the recent case before Mr. Maconochie. And there being nothing to show that his evidence in that case is false, the prosecution would necessarily fail.

If, on the other hand, a pardon was legally tendered to the accused in 1883, then proper sanction would be necessary for the present prosecution on each branch of the alternative charges—*In re Balaji Shitaram* (2). And in respect of the statement made in 1883 the sanction of the High Court would be necessary under section 339, Criminal Procedure Code.

That sanction has never been given and could not now be given (see clause 16 of section 195 of the Code of Criminal Procedure). We do not, under the circumstances, consider the question whether there was sufficient sanction as regards the branch of the charge, having reference to the evidence given before Mr. Maconochie.

The appeal is dismissed.

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10 December 1885. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Pir Mahomad.*

Penal Code (Act XLV of 1860), Secs. 193, 211, 71—Criminal Procedure Code (Act X of 1882), Sec. 35—Concurrent sentences—Consecutive sentences—Practice.

The accused was convicted of making a false charge of an offence with intent to injure, punishable under section 211 of the Indian Penal Code, and of intentionally giving false evidence in a stage of a judicial proceeding punishable under section 193, Indian Penal Code, and was sentenced, for each of the charges, to three months' simple imprisonment, the sentences being concurrent:—

Held, that the Judge could not legally pass concurrent sentences for the offences under sections 211 and 193 of the Indian Penal Code, as the case did not fall under section 71 of the Indian Penal Code; and that under section 35 of the Code of Criminal Procedure consecutive sentences should have been passed, as the second accused was convicted of "two distinct offences" within the meaning of the section.

THIS case came on before their lordships on review of a decision of Mr. E. T. Candy, Sessions Judge of Surat. The accused was charged with

(1) I. L. R., 1 Bom., 610. (2) 9 Bom. H. C., 34.

*Criminal Ruling. Criminal Review No. 188 of 1885.

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making a false charge of an offence with intent to injure, in that he, with intent to cause injury to Merwanjee Hormusjee, *alias* Hope Saheb, lodged a complaint against him of gambling, knowing that there was no just or lawful ground for such complaint; and he was further charged with intentionally giving false evidence in a stage of a judicial proceeding in order to support the above mentioned complaint. He was convicted of both offences, and sentenced to three months' simple imprisonment for each: the sentences to be concurrent.

In passing the sentences, the Sessions Judge observed:—When I am reminded that, after all, the statement was not made in order to gratify some private spite, but was due to the over-zeal of a trusted police officer, I reply that I take these facts into consideration when awarding sentence; and remembering that the accused has, by his foolish act, ruined his career, and looking at his age and long service, I shall inflict a very lenient punishment.

PER CURIAM.—We cannot concur in the opinion that the offences, of which the accused was convicted were "due to the overzeal of a trusted police officer." The Sessions Judge and both the assessors found that the accused had knowingly given false evidence. The statements made by him were deliberate and malicious perversions of the truth. It would be dangerous to regard such conduct as in any sense compatible with an honest discharge of duty. The only grounds on which a lenient sentence was permissible were that the conviction carried with it the professional ruin of the accused, including the loss of his pension, and that he had, till the time of his conviction, borne a good character in the police department for many years. After giving due consideration to those circumstances, we are unable to concur with the Sessions Judge that sentences of simple imprisonment only were adequate. Nor do we think that the Sessions Judge could legally pass concurrent sentences for the offences, under sections 211 and 193 of the Indian Penal Code, of which the accused was convicted. The case does not fall under section 71 of the Indian Penal Code: *see*, *Rej.* v. *Abdill* (1). Under section 35 of the Code of Criminal Procedure, consecutive sentences should have been passed, as the accused was convicted of two "distinct offences" within the meaning of that section. We alter the sentences of simple imprisonment recorded by the Sessions Judge to sentences of rigorous imprisonment, and direct that they commence "the one after the expiration of the other." The result will be that the accused will now undergo a further period of rigorous imprisonment for three months.

(1) 7 W. R., 59.

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8 January 1886. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sakharam.*

Indian Arms Act (XI of 1878), Sec. 19—Khandesh—Saltpetre—License—Government of India Notification No. 518, dated 6-3-1879.

As Khandesh is neither a district on the external land frontier of British India nor a sea-board District of British Burma, clause IV of the Notification of the Government of India No. 578 of 6th March 1879 has no application to it and as the Government of India has not, by any other Notification, extended section 19 of the Act to saltpetre in the Khandesh District, a person cannot be convicted under section 19 of the Arms Act, for keeping salt-petre without a license.

IN this case the accused was charged under the Arms Act, 1878, section 19 of possessing saltpetre in the Khandesh District without a license.

ORDER.—As Khandesh is neither a District on the external land frontier of British India or a Sea-board District of British Burma, clause IV of the Notification of the Government of India No. 518 of 6th March 1879 (*Bombay Government Gazette*, 1879, page 325) has no application to the District, and as the Government of India has not, by any other Notification extended section 19 of Act XI of 1878 to salt-petre in the Khandesh District, the conviction of the accused under that section was illegal.

We therefore reverse the conviction and sentence and direct the fine to be restored.

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8 January 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Bava Chela.†

Penal Code (Act XLV of 1860), Secs 379, 471—Stolen property—Criminal Procedure Code (Act X of 1882) Sec. 342—Accused—Defence—Examination.

In order to sustain a conviction on a charge of theft or dishonest receipt of stolen property it is not sufficient that the property found in the prisoner's possession was *like* that stolen. There must be a finding to the effect that property was the property stolen.

Under section 342 of the Code of Criminal Procedure an accused person, before he is put on his defence, must be examined by the Court.

ORDER.—The prisoner has been convicted on an alternative charge of theft or dishonest receipt of bajri ears. There is no evidence connecting him with the theft; and although some bajri ears were stolen, there is no evidence to shew that the stolen ears were those found in prisoner's possession. The only finding of the Magistrate on this point is that the latter were similar to the crop from which the ears were stolen. Not that they were actually the stolen ears or part thereof: this finding is not a finding that the property found with the prisoner was stolen property but only that it was like the property stolen. Under these circumstances,

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**Criminal Ruling 1 of 1886. Criminal Review No. 336 of 1885.*

†Criminal Ruling 5 of 1886. Criminal Reference No. 176 of 1885.

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the conviction for the dishonest receipt of stolen property cannot be sustained. For these reasons, we reverse the conviction and sentence.

The Magistrate would have been less likely to have fallen into the error committed in the trial of this case, if he had complied more exactly with the law. As pointed out by the learned Sessions Judge, he did not, before putting the prisoner on his defence, examine him as required by section 342 of the Code of Criminal Procedure. Neither does the Judgment contain the points for determination, as section 367 of the same Code requires. These omissions should be avoided in future.

The Sessions Judge should be requested to draw the Magistrate's attention to any other irregularities of the kind referred to by him which he has noticed in any other proceedings, not now specially reported to this Court, which may have come before him on appeal or otherwise.

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11 January 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Kashinath.*

Criminal Procedure Code (Act X of 1886,) Sec, 235 (1)—Penal Code (Act XLV of 1860) Secs. 71, 380, 457—Convictions—Separate sentences.

An accused can, under section 235 (1) of the Code of Criminal Procedure, legally be tried at one trial for the offences of house breaking by night to commit theft and of theft and the separate convictions therefor are legal; inasmuch as though nothing contained in section 235 affects section 71 of the Indian Penal Code, still when the accused commits distinct offences, which, when combined are not punishable under any single section of the Penal Code, section 71 does not apply to the case.

IN this case the accused Kashinath was tried and convicted of house-breaking by night to commit theft and theft in a dwelling house and sentenced to suffer rigorous imprisonment for one year under section 457, Indian Penal Code, and for two years under section 380 of the Code.

The District Magistrate of Poona in referring the case to the High Court, stated "Having regard to the High Court's rulings in the cases of *Govinda Rama* (1) and *Tukaya* (2) the punishment awarded should not have in the aggregate exceeded the powers of the trying Magistrate, *viz.*, two years."

JUDGMENT.—This case must be considered with reference to the provisions of the present Code of Criminal Procedure. It falls under clause 1 of section 235 of the Code. The accused could, therefore, be legally tried at one trial for each of the offences committed by him and the separate convictions were legal. See illustration(*c*) of section 235. But nothing contained in that section affects the Indian Penal Code, section 71; and the

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**Criminal Ruling* 6 *of* 1885. Criminal Reference No. 182 of 1885.

(1) Vide, *ante*, p. 79. (2) Vide *ante*, p. 95.

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question, therefore, is, whether the case falls also under that section. If it does, a single sentence could only be passed for one of the offences committed. As the accused committed distinct offences, which, when combined, are not punishable under any single section of the Indian Penal Code, section 71 does not, in our opinion, apply to the case. The sentences passed by the Magistrate were, therefore, legal under section 235, Criminal Procedure Code, and the papers can be returned.

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18 January 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Nepal.*

Penal Code (Act XLV of 1860), Secs. 84, 99—Murder—Unsoundness of mind.

Partial delusion or the mere existence of mental disease does not necessarily exempt a person from criminal responsibility.

The proved unsoundness of mind of the sort described in section 84 of the Indian Penal Code is a complete defence; and mental weakness caused by disease is an extenuating circumstance affecting the sentence.

When the absence of any motive, preparation or purpose for a criminal act is admmitted, or evidence of some mental derangement such as melancholy or excitement, or of every extraordinary conduct has been given, or other index of disease of the brain appears in the case, the Magistrate or Judge ought to use the means pointed out in the various provisions of law, so as to find out as much as possible about the mental state of the accused.

JUDGMENT.—The prisoner Nepal, a lascar, aged 35 years, was put on his trial before the Sessions Judge of Poona, charged with the murder of two other lascars, named Aba and Jagu, on the 20th November. He then pleaded guilty to the charge, his pleader stating that in the face of his client's full confession he could only plead guilty, although he wished to bring forward certain facts in mitigation of punishment. Upon this the learned Judge allowed evidence to be taken; and at the close, the pleader urged that the prisoner had so brooded over his wife's unchastity and the taunts and jeers of the deceased who were the men who had thus dishonoured him as to lose his sense of right and wrong. The Judge records that it is "apparently true" that the prisoner did so brood for these reasons, and "also apparently the prisoner is of a sensitive, melancholy disposition and of what some persons might term a weak intellect. On the other hand the prisoner was and is quite rational, that is, quite able to understand the difference between right and wrong. He certainly was not deprived of the power of self-control. He did not even cause the death of the deceased when excited by hearing them talk of his wife's infidelity. There is nothing to shew that he heard them so talk or that they jeered at him for sometime before the murder. He deliberately

*Confirmation Case No. 22 of 1885.

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chose a time when he would find his victims asleep: he climbed over a partition wall to effect his purpose: he used a knife with a blade eight inches long. I really can see no extenuating circumstance, except perhaps the bare fact that the prisoner gave himself up and voluntarily from the first made ample confession. But this fact is not strong enough to permit me to pass anything but the capital sentence." The Sessions Judge then passed sentence of death, subject to the confirmation of this Court.

The prisoner has appealed on the ground that he did not kill Aba, and that there was no enmity between himself and Aba. In the absence of any suggestion that he was not aware of what he was doing when he pleaded guilty, we are of opinion that this appeal is in admissible under section 412 of the Code of Criminal Procedure, and we therefore reject it.

But with regard to the confirmation of the capital sentence, it is the duty of this Court, before passing order, to examine all the facts of the case, and to consider the arguments advanced for the prisoner and the circumstances if any in his favour, whether they tend to acquittal, or merely show reasons for commuting the capital sentence.

It has been contended here that the prisoner did not know the nature of his act or that it was wrong. We are asked to infer this state of mind from the evidence about his melancholy for sometime before the homicidal acts, and from the absence of any concealment or attempt to flee from justice. This contention amounts to a plea for acquittal, and we have therefore to see on what evidence it is supported.

His military superior Mr. Nelson stated that when he complained of the deceased to him about the adultery, he was somewhat excited and cried a little. Witness has considered him of weak intellect, but says that on this occasion he was quite rational. Narsingprasad deposes that about 15 days before the murders, prisoner complained to him that the deceased had jeered at him. He adds that prisoner was always of a melancholy disposition, and that he used to say that he was burning because he was mocked. The havaldar Sakharam who was examined before the Magistrate said.—" Many people used to say that accused was insane. After accused's wife left him to return to his country, accused appeared to have gone out of his mind and used to abuse people." The prisoner in his statement accused the deceased of invoking spirits to kill him and said that he got ill and spent 28 days in hospital, this period terminating only a few days before the murders.

Section 105 of the Indian Evidence Act places the burden of proof on the accused person, who alleges the defence of insanity, and he has his

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opportunity of bringing forward his proof at the trial. What he has to prove is defined in section 84 of the Indian Penal Code in the following language:—

"Nothing is an offence which is done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

On reading such evidence as is at present on the record, we see no reason to suppose that the prisoner did not know the nature of the act. He was under no delusion as to the consequence certain to result from the wounds he inflicted on the men he killed. It is not a case like that suggested in illustration by the Judges in answer to the fourth question in *R.* v. *Macnaughten*, where under the influence of a delusion, a person supposes another man to be in the act of attempting to take away his life and kills that man, as he supposes in self-defence: or to quote the illustration in Mr. Justice *Stephen's* Digest of the Criminal Law of England where A kills B under an insane delusion that he A is breaking a jar. The case more nearly resembles that supposed by the Judges in the answer already referred to, where a person has a delusion that the deceased has inflicted a serious injury to his character and fortune and kills him in revenge, in which case, the Judges were of opinion that he would be liable to punishment. In quoting this illustration, we must, however, remark that there is no evidence to show whether the prisoner's opinion about his wife's infidelity was based on fact or was mere delusion. We do not see sufficient materials in the evidence to show that the prisoner differed from ordinary people in his knowledge of what is wrong or illegal. It was for him shew that some disease of the mind had unfitted him from knowing what other people know about the wrongfullness and illegality of murder: and we do not think he has proved this at the trial.

Speaking generally, the great difficulty in cases of unsoundness of mind is, as remarked in *Russell on Crimes*, "to determine where a person shall be said to be so far deprived of his senses and memory as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions. Lord *Hale* speaking of partial insanity, says, that it is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in the committing of any capital offence. And he says further,—'Doubtless most persons that

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are felons of themselves and others are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect and partial insanity: but it must rest upon circumstances, duly to be weighed and considered both by the Judge and Jury, lest on the one hand there be a kind of inhumanity towards the defects of human nature, or on the other side, too great an indulgence given to great crimes."

The authorities collected in *Russell on Crimes* seem to us clear that partial delusion or the mere existence of mental disease does not necessarily exempt a person from criminal responsibility. "Many a man whose mind is in an unsound state, knows perfectly well whether he is doing wrong, and so long as he knows *that*, he is subject to the criminal law." *Taylor's Medical Jurisprudence*, Vol. 2, page 546, Third Edition. It appears too from medical authorities that many persons under partial delusions, and many others who are liable to strong impulses, homicidal and other, are materilly controlled by the same motives that influence and control ordinary people, among which the fear of criminal punishment must be included. Thus it happens that insane impulses which some medical writers wrongly call *irresistible* are, by the application of such motives, resisted. See *Taylor*, Vol. 2, p. 551, and *Stephen's* History of the Criminal Law of England, Vol. 2, p. 172.

Sir *Fitz James Stephen* at page 175 of the same volume instances a case supposed by Dr. *Mandsley*, a medical authority, in a work on *Responsibility in Mental Disease*. "He describes a madman, under an insane delusion that he has been injured, who knows that murder is wrong and after long resistance to the temptation to murder, at last gives weary to it and he (Dr. Mandsley) adds:—To say of such a one that he has no power of control, or to say of him that he has the same power of control as a sane person would be equally untrue. To be strictly just, we must admit some measure of responsibility in some cases, though not the full measure, of a sane responsibility in any case." It is true as observed by Dr. *Taylor*, that many medical authorities classify among lunatics persons whom English Judges, would have directed the juries to find guilty, and whose state of mind would not fall within the exception of section 84 of the Indian Penal Code. "Those who are labouring under confirmed insanity are fully conscious of the difference between right and wrong and are quite able to appreciate the illegality as well as the consequences of their acts." (*Taylar's Medical Jurisprudence*, Vo 2, p. 547, 3rd Ed.) "Most lunatics have an abstract knowledge that right is right

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and wrong wrong; but in true insanity the voluntary power to control thought and actions, and to regulate conduct by this standard is impaired, limited or over-ruled by insane motives, a lunatic may have the power of *distinguishing* right from wrong, but he has not the power of *choosing* right from wrong."

As among sane men, the intellectual power and the power of self-control may have become weakened; but as such people are more liable to commit crimes, there is, it seems to us, the greater need of the criminal law as an over-balancing motive to prevent them yielding to such temptations. It is only when a more general derangement is proved that they are entitled to acquittal; and in India the proof must be that indicated in section 84 of the Penal Code. Every man is presumed to be sane and responsible for his crimes, and it is for a prisoner to prove the contrary—*Queen* v. *Nobin Chunder Banerji*, (1). To meet the case of these weak-willed persons who suffer from mental disease, but whose state is not such as to give them the benefit of acquittal, Mr. Justice *Stephen*, has suggested an amendment of the law which ought, he thinks, "where madness is proved, to allow the jury to return any one of three verdicts:—Guilty; Guilty, but his power of self-control was diminished by insanity; Not Guilty on the ground of insanity." (History of Criminal Law, Vol. 2, p. 175.). The sign of partial insanity, the insane delusion suggested in the questions put to the Judges in *Macnaughten's case*, the monomania which, considered as a mere mistake, may have no importance at all, may in the learned writer's opinion be of the utmost importance as evidence of more general unsoundness of mind. See too the charge of Baron *Rolfe* in *Reg.* v. *Layton* (2) and report of *Reg.* v. *Law*, (3). The delusion though trifling in itself, may, viewed as a symptom, be of high importance as indicating profound disturbance of every faculty of the mind. Melancholia, to take a common example, frequently leads to suicide or murder, and persons affected with it require very close watching. The delusion or even the existence of insane depression or excitement of spirits, apart from specific delusions may, Mr. Justice *Stephen* considers, be evidence that the person affected was labouring under a more general weakness or confusion of his reasoning power or that his power of self-control was diminished by his being less able than other people to refer to distant motives and general principles of conduct. The learned writer goes on to consider whether these results may not amount to the "want of knowledge" which the law of England as explained by the Judges in *Macnaughten's case* admits as excuse for what would otherwise be a criminal act. In the present case at least at this stage it is unnecessary to deal with that phase of the ques-

(1) 13 Bengal L. R. Appendix 20. (2) 4 Cox, C. C., 149. (3) 2 F. and F., 836.

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tion: but as the existence of abnormal weakness, through disease, of the reasoning powers amounts in our opinion to an extenuating circumstance, such as this Court in dealing with a capital sentence may and ought to consider, it is necessary to advert to the nature of the evidence by which a Court should be guided.

There are many causes of these mental diseases. There may be hereditary or cogenital disposition. Physical injury to the head, sudden mental shock, excessive fatigue, drunkenness or vicious habits may directly affect the brain, apoplexy, paralysis and epilepsy, child-birth, functional disturbance and other diseases may directly or indirectly have the same result. The symptoms vary and show themselves in very different degrees of eccentricity, despondency or excitement: sometimes the first indication of violent mania noticed by the neighbours and acquaintances is a suicidal or homicidal act. Sometimes long lucid intervals intervene between paroxysms; the earlier instances may have been forgotten through lapse of time. The collection of the facts is often difficult and without some familiarity with the medical considerations, it is not easy to arrange and estimate them rightly. The Indian Evidence Act, section 57, allows a Court to resort for aid to appropriate books, such as *Taylor's* Medical Jurisprudence : and under section 45 the expert may be called as a witness to give his opinion. One of the illustrations to that section deals with the opinion of the expert on the question of unsoundness of mind and the particular points raised under section 84 of the Indian Penal Code. Of course, the medical man who has had the particular person under his care may and, as a rule, ought to be called. Section 540 of the Code of Criminal Procedure gives all the Criminal Courts very extensive powers of calling witnesses: and, under section 165 of the Indian Evidence Act, these Courts have very extensive powers of putting questions.

Now, as proved unsoundness of mind of the sort described in section 84 of the Penal Code is a complete defence, and as mental weakness caused by disease may be an extenuating circumstance affecting the sentence, careful inquiry into such facts is important in every way. The person accused may from this very sort of weakness, be less capable than others of alleging it or proving it. When therefore the absence of any motive, preparation or purpose for a criminal act is admitted, or evidence of some mental derangement such as melancholy or excitement, or of very extraordinary conduct has been given, or other index of disease of the brain appears in the case, the Magistrate or Judge ought, in our opinion, to use the means pointed out to him in the various provision of law noted above, so as to find out as much as possible about the mental state of the accused. In our experience important evi-

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dence has been obtained by inquiry through the village officers or by questioning friends and relations about a prisoner's earlier life, or about his general behaviour, and the nature of these actions. It is easy to place the prisoner under the continued observation of a medical man from whom the Court can afterwards learn not only the particular things observed, but also something about their bearing and value as evidence of the unsoundness of mind. In these ways the experience of the expert aids the Court on which is placed the responsibility of deciding whether that mental state exists and in what degree. The frequent ignorance and helplessnes of the accused in suggesting and procuring the requisite evidence leads us to emphasise and extend to Magistrates dealing with such cases a remark of *Melvill*, J., in *Reg.* v. *Tukaram Bhawani* (3) that in every case it is the duty of the Sessions Judge not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the utmost into the truth of the matter before him. A similar obligation rests on the Public Prosecutor who is to be assistant to the Court in the furtherance of justice, and whose only object should be to aid the Court in discovering truth (see per *Westropp*, C. J., in *Reg.* v. *Kasinath Dinkar*, (4)).

The principles which we have indicated in this judgment have been applied by the other High Courts from time to time.

One of the more recent cases, the *Empress* v. *Vaimbilee* (5) is in some respects similar to the present. The learned Judges before whom the case came in appeal remarked in their judgment that there were circumstances which should have induced the Additional Sessions Judge to have taken evidence, instead of convicting the prisoner solely on his plea of guilty. The circumstances were peculiar and suggested a doubt regarding the prisoner's state of mind at the time. "The committing Magistrate had evidently misgivings on this head and specially examined the medical officer, Dr. Joubert, under whose special observation the prisoner had been since his admission to jail. That officer's evidence cannot be considered as by any means decisive on the point, and it is therefore somewhat surprising that the Magistrate should have omitted to put any questions to the witnesses, who were the prisoner's fellow workmen regarding his ordinary habits and behaviour, and his demeanour before and immediately after the fatal occurrences. The Additional Sessions Judge would have exercised a wise discretion if he had examined the witnesses in Court and taken the verdict of the jury on the fact of the soundness or unsoundness of the prisoner's mind. This was the more

(3) Vide, *ante*, p. 53. (4) 8 Bom., H. C. 126, 133. (5) I. L. R., 5 Cal., 826.

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necessary, because, although it might be established that the prisoner at the time when the acts were committed was not by reason of unsoundness of mind incapable of knowing the nature of the acts charged, yet his physical and mental condition might be such as to cause a Judge to weigh carefully the measure of punishment to be inflicted."

In that case the charge had not been properly *explained* as section 271 of the Criminal Procedure Code requires, and the report does not show that the prisoner had any legal assistance.

In the case before us the record does not show that the charge was explained, but the prisoner had the services of a pleader; and it is clear that the plea of guilty was made advisedly. Although it is perhaps to be regretted that the prisoner did not claim to be tried so that the question of unsoundness of mind might have been fully investigated, it might tend to confuse procedure and interfere with the rightful discretion of counsel, if we went the length of directing a new trial.

At the same time we are constrained to say that the evidence on the record is not sufficient to guide the Court in dealing with the capital sentence. The symptoms of melancholy mentioned in the earlier part of the judgment and the slight evidence of weak intellect may doubtless appear in maniacal and other diseased states, but they are also found often-times in conjunction with sanity in ordinary people. His officers, comrades and other associates do not appear to have treated the prisoner as insane before the murders. The motives of jealousy and revenge are common enough, and are often based on a mistaken opinion of the conduct of the wife or the person suspected of adultery with her. It was for the prisoner to prove any facts regarding his weakness of mind entitling him to mitigation of punishment. Enough, however, has been shown to put the Court on more thorough inquiry; and it is important to notice that no medical witness has been examined.

The peculiar value of the evidence of the medical witness in doubtful cases of sanity is discussed by Sir J. P. *Wilde* in *Smith* v. *Tebbit* (6). "While the world at large can only contrast the doubtful case with the sane, the physician has at hand the alternative contrast with the insane. It is a consequence of these alternative methods of judgment that the question of insanity, though it falls to the lot of a legal tribunal is properly a mixed one, partly within the range of common observation and in so far fit to be considered by a jury: partly within the range of special experience, and in so far the proper subject of medical inquiry." See too the case of *Sheikh Moostafa* (7) where the evidence of the Civil

(6) I. R., 1 P. & M., 398. (7) I. W. R., 1.

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Surgeon after sufficiently long special observation of the prisoner was ordered to be taken. The evidence recorded in the case before us is very similar to that in *Nobin Chunder Banerjee's case* (8) on which the jury held the unsoundness of mind proved. The Judge, disagreeing, referred the case to the High Court, which convicted the prisoner and sentenced him to transportation for life. The *indicia* relied on as showing insanity are very much the same as in the present case. The learned Judges remarked about them as follows:—

"It may be that if there had been substantial evidence of the prisoner's unsoundness of mind, these facts, or some of them might have been deemed to be corroborative of it. But in themselves these facts, whether taken singly or together, are no real evidence of unsoundness of mind, for there is not one of them which might not, in the natural course of events, have been found to exist in the case of a man who was perfectly sane, but who was labouring under the influence of great grief and passion."

We notice that the prisoner in the case before us said he had been in hospital for 28 days, not long before the crime with which he had been charged, and that his officer Mr. Nelson describes him as of weak intellect. Our proper course we conceive to be to direct, under section 375 of the Code of Criminal Procedure, that further inquiry be made and additional evidence taken by the Sessions Judge, in presence of the prisoner as regards his state of mind at the time of the occurrence, and before and since. If he was in hospital as alleged, the medical officers should be examined. So also the medical officer who has attended him since the occurrence, and any hospital attendants, jailors and warders who have had to look after him. The military officers who have had him under their authority should if possible be questioned on the point. The Sessions Judge should submit the evidence with his opinion to this Court, which will then be in a better position to determine whether or not the sentence should be commuted. We have thought it our duty to deal with general principles as well as the particular circumstances of this case, because it is not the first in which we have lately deemed it right to direct further inquiry about unsoundness of mind, and because it often happens that an ignorant prisoner does not know how to conduct a defence of that nature, or what sort of evidence may be useful as inclining the Court to reduce the measure of punishment.

Upon receiving the report under the further inquiry required by the High Court, their Lordships recorded the following Judgments:—

(8) 13 Beng. L. R., App. 20.

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BIRDWOOD, J.—The doubts as to the prisoner's sanity, which were raised by certain portions of the evidence recorded by the Committing Magistrate, induced us, when this case was last before us, to order further inquiry. That inquiry has now been made with much care by the Sessions Judge, Mr. Candy, and though the result of it is to leave those doubts still unsettled, yet it shows, at all events, that the conviction must be upheld. I think it probable that the accused's brain, which seems never to have been strong, was affected by continued annoyance to which he was subjected by the two men whom he killed; but, the *onus* being on the defence, to prove that the case falls under section 84 of the Indian Penal Code, it would be impossible for us to find, on the evidence, that the accused, at the time when he killed the deceased Aba and Jagu, was, "by reason of unsoundness of mind," "incapable of knowing the nature of the act, or that he" was doing what was "either wrong or contrary to law."

After summarizing the evidence recorded by him, Mr. Candy says: —"I think that enough been recorded to show that Nepal has always been of weak intellect, and that the mocking and jeers which he had to bear from Aba and Jagu, did, to a certain extent, lessen his power of self-control. I do not think I should be justified in going further; but I may say this much, that if I had known on 9th December, what I know now, I think I should then have taken on myself the responsibility of passing a sentence less than capital." Having regard to this expression of opinion, and to the circumstance that the conduct of the deceased evidently had the effect of inducing in the accused's mind a belief in his wife's infidelity, which, however unfounded it might have been, tortured him, nevertheless, beyond measure, I am inclined to hold that the crime was committed when the accused was reduced to a state of desparation by his suspicions against his wife and his anger with the men by whom he believed he had been dishonoured. His examination before the Committing Magistrate seems to be a truthful statement; and it discloses sufficient indications as to his state of mind to show that, for some time before he committed the murder, he was not as ordinary men are. Reading that statement with the evidence now recorded, I think that there are grounds for holding that the accused committed the murder under provocation, which, to some men, might have seemed slight, but which to him seemed most grave. In our Judgment of the 18th January we referred to the case of *Regina* v. *Nobin Chandar Banerji* (1) in which the *indicia* relied on as showing insanity were very much the same as in the present case. A sentence of transportation for life was passed in that case. I would pass the same sentence in the present case.

(1) 13 Beng. L. R., App. 20.

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JARDINE, J.—The prisoner pleaded guilty to the murder of two other persons whom he killed in their room in the night of the 20th November. The question of the prisoner's state of mind was discussed by the Judge; and it was pressed upon us by the prisoner's pleader that, when he committed these murders, he was in an unsound state of mind which prevented him from knowing the nature of his acts. We noticed, among other things, that no medical evidence has been recorded; and we directed further inquiry.

The evidence of the prisoner's state of mind before the 19th October, when he went into hospital, being ill with dysentery, is not that of experts; but it shows clearly that, until the commission of the murders, the prisoner's military superiors and comrades treated him as a sane and generally responsible man. There is evidence that the prisoner's wife went to Hindústan in June; and that before then he entertained suspicions that the deceased had both committed adultery with her. He complained about this, and even got one of them to take oath that he was innocent, but this ordeal did not satisfy him, and he continued his jealous complainings. I see no reason to suppose that he had formed a correct opinion of his wife's conduct. He appears to have made himself ridiculous in the eyes of his associates; and when they called him *diwana* or mad, I believe they merely expressed their contempt for him as a fool, and did not intend to indicate unsoundness of mind. I find no evidence on record to show that the two murdered men, or either of them, gave him provocation. He says they did; but he has produced no evidence in support of his assertion; and I see no reason for attaching any particular value to it. At the utmost, the provocation consisted in words, and it may have been the ordinary natural reply to the accusations which the prisoner was fond of making against them.

Some of this provocation is said to have been given months before. There was none of it during the period extending from the 19th October till the 14th November, during which he was in the hospital with dysentry. After the 14th November, there is no evidence whatever of provocation, except the prisoner's mere statement; and whatever the words were, it is clear that they did not immediately precede the crime. The confession shews that they were said on some previous day. I am of opinion that there is no proof of provocation; and supposing it to be proved, compared with the atrocity of the two murders, I would be unable to consider it as a circumstance sufficient to justify an interference with the sentence.

With regard to the prisoner's state of mind, the same evidence which proves to the satisfaction of the Sessions Judge and my brother *Birdwood*

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that the prisoner was properly convicted of the murder, no defence, under section 84 of the Indian Penal Code, being proved, satisfies me that the conduct of the prisoner is best explained by what we know of ordinary motives and passions of ordinary men. I think the theory of the disease of the brain, impairing the power of self-control, need not be resorted to, and besides I find that theory disproved.

Many murders are committed from jealousy: and, as remarked by the Judge in *Hall* v. *Semple* (1) the erroneous opinion, which the murderous husband often entertains adverse to his wife's chastity, is not a mental delusion, but a mistake of fact. Three of the signs of the sane as distinguished from an insane act appear in the prisoner's crime. There is no delusion, there is motive, the crime is not sudden, but premeditated (2). There is no evidence of the prisoner having suffered disease of the brain, or having been treated as a person of unsound mind. It happens that there is better evidence about his mental state than can usually be produced in these cases. After the 19th October till the 14th November he was under observation in hospital, and from the 20th November till the present time he has been under observation in jail. The further inquiry was begun by the Sessions Judge on the 1st and ended on the 3rd February. The witnesses 7 and 13 are the Hospital Assistant and the Surgeon of the Hospital; they saw no signs of mental disease. Neither did the ward servant, witness 20.

There are four officials connected with the Yerrowda Jail, who depose to the prisoner being like other people. Dr. Salomon, the superintendent, who, for two months since the affair, has seen him almost daily, deposes that he has no reason to suppose that he has been or is suffering from mental disease. The Hospital Assistant, another skilled witness, who has watched the prisoner and attended him, gives similar evidence. I see no reason for not giving weight to evidence like this. It altogether out-weighs the statements of persons, who say they heard the prisoner muttering to himself and gesticulating five or six months before the occurrence. These habits are not very uncommon as also those of melancholy and love of solitude, when a disconsolate and jealous husband knows he is the subject of mirth; and I think it would be unsafe to treat such indications, by themselves, as signs of diseased brain.

There is evidence, too, that prisoner admitted having had something to drink on the night of the occurrence, and some of the people who saw him the next morning deposed that he seemed as if he had been drinking.

(1) Taylor's Medical Jurisprudence, Vol. 2, p. 516, 3rd. Edition. (2) Ibid, p. 554.

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In my opinion, the evidence disproves the theory of diseased brain; and instead of that hypothesis, I would assume that the prisoner gave way to malicious unreasonable feelings, which ordinary people like himself control through fear of criminal punishment or higher motives. The confession and the number of wounds shows the existence of intense hatred, which is, perhaps, the sensation he describes by the word "burning." The murders must have been cleverly and cautiously carried out as the cutting of the throat and the stabbings seem to have awakened no one near. The absence of any sudden provocation and the fact that two persons were killed appear to me reasons for confirming the capital sentence. I may add that there is evidence that, after his arrest the prisoner suggested that he might be hanged,—a fact which indicates that he knew that his act was contrary to law. At the same time, I have no doubt that the prisoner never has been a man of any great intellectual capacity.

ORDER.—The conviction confirmed; but the Court being equally divided as to the sentence, the case must be referred to a third Judge for decision on that point.

Minute recorded by the Hon'ble Mr. Justice *Nanabhai Haridas*.

NANABHAI, J.—I would commute the sentence to one of transportation for life.

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21 January 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Bhikari*

Criminal Procedure Code (Act X of 1882), Sec. 545—Obstructions to Fair Ways Act (XVI of 1881,)—Indian Penal Code (Act XLV of 1860), Sec. 283—Compensation.

The accused was ordered by the Superintendent of the coast guard service to remove certain fishing stakes and of his failing to comply with that order he was convicted, under section 283 of the Indian Penal Code, and sentenced to pay a fine of Rs. 20, of which Rs. 15 were awarded by the Magistrate to be paid to the complainant, the coast guard, to cover the expenses of removing the stakes:—

Held, that the case not having been dealt with under the Obstructions to Fair Ways Act, the order of compensation was illegal, the same not coming within the terms of section 545 of the Code of Criminal Procedure.

THE accused was convicted of an offence under section 283 of the Indian Penal Code, the gist of his offence being that he did not remove his fishing stake when he was ordered to do so by the Superintendent of Coast Guard Service. The accused was punished with fine of Rs. 20, of which Rs. 15 were ordered to be paid to complainant to cover the expenses of removing the stake.

The Sessions Judge of Thana, in refering this case to the High Court, observed: " I considered the order of compensation illegal, the same not

*Criminal Ruling 8 of 1886 Criminal Reference No. 181 of 1885.

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coming within the terms of section 545, Criminal Procedure Code. It is an attempt to import the provisions of Act XVI of 1881 into this case without that Act applying at all."

JUDGMENT.—As the expense incurred by the Superitendent, Coast Guard, in removing the stake was not incurred for any of the objects contemplated in Section 545 of the Code of Criminal Procedure and as the case was not dealt with under Section 3 of Act XVI of 1881, we annul the order awarding compensation to the complainant and direct that the sum paid be refunded.

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1 February 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Nagindas.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Document—Evidence.

A document is given in evidence within the meaning of section 195 of the Code of Criminal Procedure, when it is handed over by the person tendering it to the Court, though the Court may reject it as evidence for insufficiency of stamp or want of registration.

ORDER.—We are of opinion that a document is given in evidence within the meaning of section 195, Criminal Procedure Code, when it is handed over by the person tendering it to the Court, even though on inspection the Court may reject it as evidence, for insufficiency of stamp or want of registration. The sanction in the present case was awarded after taking evidence and we see no reason to revoke it. We, therefore, reject this application.

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3 February 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Bhagi.†

Retracted confession—Evidence—Corroboration.

It is obviously important that, in cases where a retracted confession is the evidence chiefly relied on by the prosecution, not only should the Court be satisfied as to the falsity of any allegations as to improper pressure by the Police, but should use every reasonable effort to ascertain to what extent, if any, the details of the confessions are corroborated.

ORDER.—There can be no question that the deceased Dundia was poisoned with arsenic, which had been mixed up with the food prepared for his evening meal. The charge against the accused Bhagi was that she had put the poison in the food. The deceased made a declaration before he died to the Police Patel, in which he expressed his suspicion that his wife, the accused, had poisoned him. His suspicion, however, cannot be treated as evidence against her. The only evidence against her is that contained in her retracted confession, in which she said that by desire of the accused, Balia, and under compulsion of his threats of beating, she

*Criminal Ruling 10 of 1886. Criminal Application for Revision No. 373 of 1885.
†Criminal Reference No. 7 of 1885.

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had placed the contents of a packet which he gave her into the dish of fish which she had prepared for her husband. She adds that Balia had been at enmity with her husband, and that he warned her not to eat the fish herself and provided other fish for her own meal. At the trial, she said that she had been beaten by the Police, who had told her to say that Balia had given her the poison, and that the "Sarkar would not let her go". This allegation was not enquired into by the Sessions Judge, who directed the Jury to acquit Balia as the confession of Bhagi was not admissible as evidence against him. The jury acquitted Bhagi also; and the case has now been referred to us by the Sessions Judge, under the section 307 of the Code of Criminal Procedure, as he is unable to accept the verdict.

It would appear that the Jury must have disbelieved the confessions made by Bhagi. It is possible that they believed her story that the confessions had been induced by improper pressure by the Police. On the record, as it stands, it would be difficult for us to say that the evidence has been wrongly appreciated. If Bhagi's allegations against the Police are true, her confessions must be worthless. These allegations are not proved, but they stand uncontradicted on the record. As, however, we have to decide whether the verdict of the unanimous Jury or the opinion of the Sessions Judge is right, we cannot dismiss the case with these remarks. It was clearly incumbent on the Sessions Judge to make some enquiry into the truth of the allegations; especially as it appears from the present case and other cases which have come before us that juries sometimes give less weight to duly recorded confessions, subsequently retracted, than the Sessions Judge is inclined to give. The duty of Courts of Session, in such circumstances, was prescribed by the late Chief Justice of this Court in *Regina* v. *Kasinath Dinkar* (1) and we are of opinion that, in the present case, even at this stage of it, an enquiry, such as Sir *Michael Westropp* considered to be generally necessary, should be made by the Sessions Judge. We would also observe that the case would probably have been presented to the Jury in a more satisfactory manner if the Sessions Judge had suggested to the prosecution the advisability of adducing more evidence than appears on the record, in corroboration of the retracted confessions of the accused Bhagi. Was it possible to ascertain whether she or Balia had procured any arsenic from any dealer in the village or elsewhere shortly before the commission of the offence? Did Balia provide her with fish for her own meal, as she says he did? Had she ever had any cause of quarrel with her husband, as she alleges? There are questions which naturally suggested themselves; but to which we find no sufficient answer in any evidence adduced at the trial. The same

(1) 8 Bom. H. C. 138

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remark applies to the question on which the Jury had doubts, *viz.*, whether it was the prisoner or Balia who prepared the food eaten by the deceased. It is obviously important that, in cases where a retracted confession is the evidence chiefly relied on by the prosecution, not only should the Court be satisfied as to the falsity of any allegation as to improper pressure by the Police, but should use every reasonable effort to ascertain to what extent, if any, the details of the confessions are corroborated. We would adopt in this case, as we have lately done in other cases which have come before us, in which the enquiry has been defective, the language of , *Melvill* J., in *Regina* v. *Tukaram valad Bhavani* (2) "that it is the duty of the Sessions Judge, not merely to receive and adjudicate upon the evidence submitted to him by the parties but also to inquire to the utmost into the truth of the matter before him."

We think also that the Sessions Judge might, in this endeavour, have put questions to the prisoner to ascertain what she knew about the nature of the poison administered,—a subject which is discussed in his charge. He would thus have given her such an opportunity as the law intends of explaining certain portions of the retracted confessions which stand in evidence against her. The Sessions Judge should take such evidence as may now be procurable with reference to the allegations of the accused against the Police, the existence of which may be suggested by the accused on further examination or by the Police papers in the case or otherwise, as such evidence also by way of corroboration of her confessions, as may now be procurable without undue delay; and certify the same with his opinion thereon within one month.

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8 February 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Mahomad Husan.*

Criminal Procedure Code (Act X of 1882), Sec. 439—High Court—Revision—Questions of fact.

Section 439 of the Code of Criminal Procedure confers on the High Court, as a Court of Revision, the powers of an Appellate Court, but, in the exercise of its discretion, it will refuse to interfere in regard to findings of fact, except on very exceptional grounds.

PER CURIAM.—We are of opinion that the grounds on which the learned counsel asks this Court to revise the findings of fact of the Magistrate and of the Sessions Judge in appeal are inadequate. There are a great many witnesses who depose to the presence of the convict at the riot and to his taking a leading part therein. It was within the competence of the Courts below to convict on such evidence, and the fact that the name of this prisoner was not mentioned in the Police proceedings till some days after the riot, is not only ambiguous in its bearing on the case, but has

(2) Vide, *ante*, p. 53. **Criminal Ruling* 11 *of* 1886. Criminal Revision No. 14 of 1886.

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also been discussed by both Courts. Any interference with such findings would tend to weaken the feeling of responsibility of the Courts which have to deal with the facts, and would encourage applications which are really appeals, in cases where no appeal is allowed by law. It is true, no doubt, that section 439 of the Code of Criminal Procedure confers on the High Court, as a Court of Revision, the powers of an Appallate Court; but, as observed by *Kemball, J.* in *Queen* v. *Shekh Saheb Badrudin* (1) the Court, in the excercise of its discretion, will refuse to interfere in regard to findings of fact except on very exceptional grounds. We, therefore, reject the application.

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9 February 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Rupya.*

Confession—Retraction—Police-beating and inducement—Criminal Procedure Code (Act X of 1882), Sec. 298—Judge.

The accused, who was charged with the offence of murder, had made two confessions: the first before the First Class Magistrate of Junnar and the second before the committing Magistrate. On his trial before the Court of Sessions he retracted the confessions and alleged that he was beaten by the Police and that the confessions were caused by inducement offered by the Police:—

Held, (1) that for the proper disposal of the case it should have been determined whether the confession was first induced by the illegal promise to which the Police Patel deposed, and whether that inducement still existed, or had been effectually dispelled when the Magistrate recorded the confessions. If such inducement had been given, and had not been effectually dispelled until after the respective confessions had been recorded, it must be held that they were inadmissible;

(2) That under section 298 of the Code of Criminal Procedure it is the duty of the Judge, "at his discretion, to prevent the production of inadmissible evidence whether it is or is not objected to by the parties"; and also "to decide upon all matters of fact, which it may be necessary to prove in order to enable evidence of particular matters to be given". The Judge ought, therefore, to have made some inquiry into the allegation of the prisoner about the tutoring, which, he said, had resulted in his confessions.

JUDGMENT.—The prisoner, Rupya, a *koli* by caste, was tried before Dr. Pollen, Acting Sessions Judge of Poona, and a jury, on a charge, under section 302 of the Indian Penal Code, of murder, by causing the death of one Nami, the wife of Barkya, at Sonavle, on or about the 13th October last. The Jury were not unanimous in their opinion: one only considered the prisoner to be guilty of murder: the other four found that he was not guilty, either of murder or culpable homicide. The learned Judge inquired of them whether the majority found that Nami's death was caused by the act of the prisoner: on which two of them answered in the negative and the other two said it was doubtful. The Judge recorded that he disagreed so completely with the verdict of the majority that he consider-

(1) I. L. R., 8 Bom. 197. **Criminal Ruling* 12 *of* 1886, Criminal Reference No. 160 of 1895.

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ed it necessary for the ends of justice to refer the case for the orders of the High Court under section 307 of the Code of Criminal Procedure. In his letter referring the case, he states his opinion that the prisoner was guilty of the murder. The letter shows that this opinion was chiefly based on the prisoner's confession to the Committing Magistrate, which although retracted at the trial, was, the learned Judge considered, confirmed by a previous confession made to another Magistrate, by the admission of the prisoner at the trial that he had hidden the woman's *sari*, by the fact that he pointed out this *sari* to the Police, and by certain other corroborations in the testimony of witnesses. These corroborations and the value to be attached to the confession are more fully set forth in the charge to the Jury.

At the hearing of the case, it was urged before us that the prisoner had alleged in his answers to the Sessions Judge that he had been beaten by the Police and told to say to the Magistrate that he had put the dead body into the pool where it was found. This and other parts of the confession he denied to be true. We noticed that the Judge had made no inquiry into these allegations, as he ought to have done for the reasons stated by *Westropp*, C. J., in *Regina* v. *Kashinath Dinkar* (1). We directed further evidence to be taken in order to ascertain whether the confession was voluntary, and, therefore, admissible in evidence. A number of witnesses have since been examined on this point by Mr. Candy, who has succeeded Dr. Pollen as Sessions Judge.

From this evidence, we gather that the corpse was found in a pool of water on the 14th October: it was then taken out and put back again until the arrival of the Chief Constable. The Police Patel does not appear to have held the inquest forthwith as he ought to have done under Bombay Act VIII of 1867, section 11. The prisoner was, however, suspected as being the murderer, and information was at once sent to the Police. The next day, Thursday, the 15th October, the Chief Constable arrived and arrested the prisoner. The Patel told the Committing Magistrate that, on this occasion, the prisoner confessed to the Police, and was then sent to Junnar in order that his confession might be taken by a Magistrate. On Friday, the 16th, the Chief Constable sent the prisoner to Junnar, a distance of 14 miles. On the road, they met a Magistrate, Mr. Joshi, who has stated that he saw no signs of ill-treatment, but who does not appear to have spoken to the prisoner. Mr. Joshi told the Police to bring him to Junnar. The same evening, without again seeing the prisoner, but on reading a communication from the Chief Constable

(1) 8 Bom. H. C. 126-138.

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which has not been produced, Mr. Joshi sanctioned the detention of the prisoner in Police custody for six days. He did not record his reasons for giving this sanction and so failed to comply with the requirement of section 167 of the Criminal Procedure Code.

On Saturday, the 17th October two Constables took the prisoner back to Sonavle and very soon after his arrival in that village he made a statement after which he pointed out the *sari* in a place where it had been concealed. The evidence taken since the trial about this statement which is said to have amounted to a confession is discrepant. The police witnesses say it was not made to the police but to the villagers, and under exhortation proceeding from the villagers alone. If so the statement might be admissible in evidence but we notice that evidence of its purport was not given at the trial. The Police Patel has deposed as follows:—"The Police did not beat the prisoner, but they said to him 'we will save you, we will not get you into trouble; if you did it, confess the truth.' Naruya Mhar, Constable, and Gangya a village Mhar and Dhanji, prisoner's uncle, said this." If the Patel's story is believed it may be doubted whether the alleged confession, or at least part of it, would be admissible in evidence.

On Sunday, the 18th October, the prisoner was taken back by the Chief Constable and Police to Junnar.

On Monday the 19th, he was brought before Mr. Joshi at 3 P.M. This Magistrate ordered the Police to withdraw; and then, as the prisoner admits, asked him if he had been ill-treated, and on his denial recorded his confession. A question to this effect and an answer denying inducement are recorded at the end of the examination.

Mr. Snow, a Magistrate then in Poona, had ordered the case to be sent there to him; and on Thursday the 22nd October the Police party started with the prisoner for Poona, where they arrived on the following Sunday. On the Monday Mr. Snow transferred the case to Mr. Kanga who is the Committing Magistrate. On Tuesday this Officer began his inquiry. The Chief Constable made a suggestion to him that he should record the prisoner's confession at once, lest he should retract it. Mr. Kanga declined to do this, but took some of the evidence for the prosecution. On Wednesday, the 28th October, he recorded what was treated by the Sessions Judge as a full confession; and on the 30th, he committed the prisoner to be tried by the Court of Session. It is brought to our notice by Mr. Candy that from the time of leaving Junnar the prisoner was in the custody of the Junnar Police, and that the Chief Constable was present in Mr. Kanga's Court throughout the inquiry suggesting questions for the

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prosecution. He was also present when the confession was recorded. Mr. Kanga deposes that, at one stage of the case, having some suspicion, that the prisoner might have been beaten and ill-treated by the police, he asked him if such was the case, when the prisoner replied that he had no complaint to make. The Junnar Police were present in Court at the time. The question and answer have not been shown us on the record. When the complainant was being examined the prisoner fainted and fell down; and it has been asserted by him that he had been primed with *ganja*.

Had all this evidence been before the Sessions Court at the trial it is probable that the pleader for the defence who urged on the Jury that the confession was neither voluntary nor true could have argued that its origin was the inducement offered by the Police at Sonavle on the 17th October after the prisoner's return from Junnar, and that this inducement was still operating on his mind on the 19th when he made his confession to Mr. Joshi. It would then have been the duty of the Judge to consider whether this same inducement had continued to operate until the 28th October when the second confession, *viz.*, that made to Mr. Kanga was recorded, the prisoner having all this time been in the same Police custody. See—3 *Russell on Crimes*, 458, 5th Ed.; *Taylor on Evidence* section 802; *Regina* v. *Navroji Dadabhai* (2). We have anxiously considered the new facts elicited by Mr. Candy, some of which have been recited, while many others closely connected with them are mentioned in the depositions he has recorded. It is necessary, we think, for the proper disposal of the case to determine whether the confession was first induced by the illegal promise to which the Police Patel has deposed, and whether that inducement still existed or had been effectually dispelled at the times when Mr. Joshi and Mr. Kanga recorded the later confessions. If it should be the fact that such inducement had been given and had not been effectually dispelled until after the respective confessions had been recorded, it would have to be held that they were inadmissible. This point should have been dealt with by the Judge. The Code of Criminal Procedure in section 298 lays down the duty of a Judge in cases tried by Jury. Among other things it is his duty "at his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;" and also "to decide upon all matters of fact, which it may be necessary to prove in order to enable evidence of particular matters to be given". For these purposes, the Judge is armed with very considerable powers of putting questions by section 165 of the Indian Evidence Act. These powers, he ought to exercise on fit occasion. We think that the Judge ought to have made some enquiry into the allegation of the prisoner

(2) 9. Bom. H. C., 358.

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about the tutoring, which, he said, had resulted in his confessions.

As remarked by *Westropp*, C. J. in *Regina* v. *Kashinath Dinkar* (3), "it would be a most perilous doctrine for the subject were this Court to sanction the supposition that the retraction of confessions and assertion of ill-usage as their producing cause are so invariably true as to warrant Courts of Justice in rigidly closing their ears and refusing to entertain and investigate that assertion." The same learned Judge remarks also that "the constant iteration of such charges against the Native Police is also suggestive that their recurrence would not be so continual were they at all times without foundation. In the lengthy discussion of this subject in *Queen-Empress* v. *Babu Lal* (4) by a Full Bench, the Officiating Chief Justice of the HIGH COURT OF THE NORTH WESTERN PROVINCES observes that "it is impossible not to feel that the average Indian Policeman, with the desire to satisfy his superiors before, and the terms of the Police Act and Rules behind him, is not likely to be over-nice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess." Where learned Judges of great experience think it necessary to inquire into and scrutinize this sort of evidence with caution and hesitation it is no matter of wonder that in capital cases the Jury should often refrain from convicting on retracted confessions. Accordingly in the present, as in other similar cases lately before us, the reflection forces itself upon us that the evidence about the circumstances of the confession should have been so presented to the Jury as to clear up any doubts based upon their general experience of confessions which they might reasonably entertain although these doubts may not be shared by the Sessions Judge. It must never be forgotten that where trial by Jury exists it is the province of the Jury to decide matters of fact and the tests they apply may vary from those which commend themselves to the Judge. Were these considerations more carefully acted on there would doubtless be fewer occasions of difference between the Jury and the Judge and fewer references to this Court, on which, in such cases, the duties of both Judge and Jury are imposed.

The additional evidence taken under our direction makes it necessary to examine into the admissibility and value of the confessions—matters not sufficiently dealt with at the trial. In charging the Jury the Sessions Judge said " If the confession before the Junnar Magistrate stood alone, a question might arise as to its voluntariness and admissibility: but in this case it is confirmed and amplified by his examination before the committing Magistrate which is admissible and may be presumed to be voluntary." The record of the trial does not disclose the reasons which

(3) 8 Bom. H. C., 138. (4) I. L. R., 6 All., 509.

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may have induced the Judge to suspect the validity of the confession made to Mr. Joshi; but the additional evidence confirms the impression he seems to have entertained. It would appear that the confession at Sonavle was wrongly induced. The Police say that the Chief Constable got the villagers to put the questions, whereas the Police Patel says that the Police themselves made the illegal promise to prisoner that, if he would confess, they would save him from the consequences of the crime. With the light of the new evidence to guide us we must hold the confession made to Mr. Joshi to be invalid. If the Police had given the prisoner any hint or threat that he was in their power, the conduct of this Magistrate was in every way calculated to confirm the impression, and lead him to suppose that the protection of the Magistracy was merely formal and wholly ineffectual. Mr. Joshi has deposed as follows:—"I did not record any reasons according to section 167. I thought that it was a murder case and as the Police had obtained no clue it was necessary to give sanction." The illegal omission to record any reason for confining the prisoner for six days in Police custody, a period far in excess of the usual 24 hours allowed for Police investigations shows the perfunctory character of the Magistrate's action. No order of the kind ought to be passed unless the Magistrate finds grounds for believing that the accusation is well-founded. But the Magistrate's statement quoted above leaves room for the inference that he passed the order under the supposition, that there was no ground for connecting the prisoner with the crime. Were such procedure general, the despair of protection against the Police would soon become a sufficient motive to accused persons for making confessions at their pleasure. If as Mr. Candy appears to think the case, it is the "custom" of some of the Magistrates of Poona District to evade their duty even in cases where the life of the prisoner may be in jeopardy and to authorize detention by the Police as a matter of course, without recording reasons, but only the phrase "for inquiry," the District Magistrate, to whom we direct that a copy of this Judgment be sent will doutless use to the utmost all his lawful powers to check a practice so fraught with danger to the administration of Criminal Justice.

When brought up again before Mr. Joshi on the 19th October after he had been taken to Sonavle and induced to confess and then brought back to Junnar the prisoner told Mr. Joshi that he had not been illtreated or induced to confess. But there is nothing to show that it came to Mr. Joshi's knowledge that he had already confessed at Sonavle; and the prisoner's own explanation to account for his reply is that he was afraid of the Police. We are bound to say that persons in custody are not likely to feel much protection in the presence of Magistrates who act in so per-

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functory and unconcerned a manner in cases of the very highest importance.

On consideration of the Patel's evidence about what took place at Sonavle and the procedure of the Magistrate, we are of opinion that the confession made on the 19th October to Mr. Joshi was probably made under the influence of an illegal promise and was really inadmissible as evidence.

This finding distinguishes the case from that of *Regina* v. *Balvant* (5) where this Court held that the confession had not been obtained by unlawful pressure, and concurred in the opinion of the Judge against the verdict by which a majority of the Jury found the prisoner not guilty. We have next to consider the remaining evidence. We think that in the absence of evidence to the contrary the presumption would be that the prisoner having once confessed might feel himself under the influence of the same inducement when before Mr. Kanga; and the facts already mentioned, especially the facts that during the interval he was in the custody of the Junnar Police, ought to make us hesitate to accept the latter confession as altogether voluntary. We ought not lightly to disregard the verdict of the majority of the Jury; and would not overrule it even by directing a new trial except for special reasons.

We think, however, that we are bound also to notice the corroborations of the confession mentioned in the Judge's charge and the fact that there is no proof of the beatings alleged by the prisoner to have been suffered by him from the Police on the way to Poona. But of the value of the corroborations, especially of the testimony of the child, Kondi, and the doubtful witness Esu, it would be difficult for this Court to judge without having the witnesses before it; and as we think we have already shown there is a great deal of important evidence which ought to have been elicited by the Magistrate, but was not collected until after this Court had ordered it to be taken. This evidence also can best be appreciated by a Court with the witness before it; and we hesitate greatly to decide a case of this kind on evidence which was not before either the Judge or the Jury by whom the prisoner was tried. The case is one which cannot be tried piece-meal; the facts bearing on the confession before Mr. Kanga and on the finding of the *sari* are too numerous, and the evidence too conflicting. The principle of the Criminal Procedure is that in districts where trial by Jury exists the verdict on facts should be that of the Jury. The prisoner would probably have been well advised if he had asked for an adjournment in

(5) 11 Bom. H. C., 137.

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order to prove the inducement under which he said he had confessed. But as the Judge took scanty notice of his repeated allegation of torture and tutoring, we do not think such omission can be justly pressed against an ignorant prisoner.

In determining the course we ought now to take, we have considered precedents and have been helped by the Judgment of *Melvill*, J., *Regina* v. *Ramaswami Mudliar* (6), where a new trial was ordered by this Court on the appeal of the prisoner. There some of the evidence was held to be inadmissible. In examining the remainder the Court found it "of such a character as to render it difficult to pronounce upon its value without having an opportunity of hearing the evidence given." This was one of the reasons for ordering a new trial: another was that further evidence was likely to elucidate the case. This decision was followed in *Regina* v. *Amrita Govind* (7), where the evidence left, after rejecting the inadmissible part, was not conclusive either of the guilt or innocence of the appellant. Mr. Justice *West* remarked in delivering Judgment:—"The adjudication on questions of fact in such cases appears to have been left by the Legislature (interpreting its words by these decisions) in the hands of a Jury in those districts in which the Local Government directs trials of offences to be held by Jury; and if we were to deal with this case as we should do in the ordinary case of a trial with assessors, we should be encroaching upon the functions assigned to a Jury." See also the ruling of *Peacock*, C. J. in the case of *Elaehee Buksh* (8). In these cases the learned Judges felt some doubt in interpreting the meaning of the Legislature. The fact that section 280 of the Code of 1872 was amended in accordance with these decisions, is a guide to the proper interpretation of section 423 of the Code of 1882 now in force. It distinctly allows this Court to use its discretion so as to order a retrial; and we have already given our reasons for holding that under the special circumstances and peculiar difficulties of this case, that is the proper order to make.

We think it necessary further to direct the Sessions Judge to have the prisoner brought before him in order that our judgment and order may be explained to him, and that he may have another opportunity of calling such witnesses as he may require for his defence. It is obvious that the testimony should be recorded with the utmost care; and in pursuance of the principle that the facts should be laid as carefully and fully as possible before the Jury, we suggest that the Hospital Assistant who examined the dead body should be called as a witness before the Court of Session.

(6) 6 Bom., H. C. 47. (7) 10 Bom. H. C. 497. (8) 5 W. R., Cr. R. 80.

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Mr. Candy has given reasons why that evidence should be taken with very great care and the grounds of the opinion of the witness fully inquired into.

For the foregoing reasons we now order that the prisoner be retried by the Court of Session.

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11 February 1886. BIRDWOOD & JARDINE, JJ.

In re Hormusjee Nasarwanji.*

Criminal Procedure Code (Act X of 1882), Sec. 188—Political Agent—Certificate—Recalling the certificate.

When a District Magistrate, in the capacity of Political Agent, once grants a certificate, under section 188 of the Code of Criminal Procedure, for the trial of a case by a Second Class Magistrate of the District, the latter is legally seized of the case, and the Political Agent has no authority, thereafter, to recall his certificate or to issue, as District Magistrate, a warrant for the arrest of the accused on the requisition of the State Authorities and to order his removal to the Native State.

THE petitioner Hormusji was a British subject residing in Venkal in Bulsar Taluka. On a complaint under section 323 of the Indian Penal Code having been made against him, in the Court of the Nyayadhish of Dharampore, a Native State, a warrant was issued against him by the District Magistrate of Surat, on the requisition of the Dharampore Authorities, for his apprehension and delivery to the Dharampore Authorities. Horumsjee, thereupon, applied for and obtained from the District Magistrate of Surat, an order under section 188 of the Criminal Procedure Code, directing that the trial should take place in British India before the Second Class Magistrate of Bulsar. This order, however, did not meet with the approval of the Dharampore Darbar who insisted upon Hormusjee being delivered upto them. The District Magistrate, thereupon, recalled his own order and issued a warrant against Hormusjee for his apprehension and delivery to the Dharampore authorities. Hormusjee applied to the High Court.

Mr. *Manekshah J. Talyarkhan*, for the applicant.

PER CURIAM.—When Mr. Mulock, as Political Agent, had once granted his certificate under section 188 of the Code of Criminal Procedure for the trial of the case against the applicant by the Second Class Magistrate of Bulsar, the latter was legally seized of the case, and the Political Agent had no authority, thereafter, to recall his certificate or to issue, as District Magistrate of Surat, a warrant for the arrest of the applicant, on the requisition of the Dewan of Dharampore, and to order the applicant's removal to Dharampore. Mr. Mulock's order of 23rd December 1885, directing the arrest and removal of the applicant is, therefore, reversed;

**Criminal Ruling* 13 *of* 1886. Criminal Revision No. 5 of 1886.

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and the Second Class Magistrate should now proceed with the case, according to law.

ORDER.—The order of the District Magistrate of Surat dated the 23rd December 1885 directing the arrest and removal of the applicant is reversed and the Second Class Magistrate should now proceed with the case according to law.

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15 February 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Miya Saheb.*

Abkari Act (Bom. Act V of 1878), Secs. 56, 60—Land Revenue Code (Bom. V of 1879), Sec. 209—Magistrate—Appeal—Enhancement of sentence.

The accused was convicted by a Second Class Magistrate of the offence of a breach of a license under the Bombay Abkari Act, 1878, and fined Rs. 10. In appeal the First Class Magistrate under section 60 of the Act and section 209 of the Bombay Land Revenue Code, enhanced the fine to Rs. 100:—

Held, that section 60 of the Bombay Abkari Act did not apply. The accused was convicted by a Magistrate under section 56 of the Act and in appeal the First Class Magistrate could not make any order under section 209 of the Bombay Land Revenue Code.

THE accused was convicted by the Second Class Magistrate of Judi, of the offence of a breach of a license under the Bombay Abkari Act, 1878, in selling liquor below the specified strength, under section 45 of the said Act, and sentenced to pay a fine of Rs. 10. In appeal, the First Class Magistrate of Bijapur enhanced the fine to Rs. 100.

ORDER.—Section 60 of the Abkari Act (Bom. Act V of 1878) has no application to the present case. The accused was convicted by a Magistrate under section 56 of the Act, and, in dealing with the appeal before him, the Magistrate First Class could not make any order under section 209 of the Land Revenue Code. We reverse the sentence passed by the Magistrate First Class and restore that passed by the Second Class Magistrate.

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15 February 1886 BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Revubai.†

Confession—Admissibility—Retraction—Magistrate—Recording of confession—Practice—Procedure.

The Courts, being well aware of the safeguards with which the law expressly surrounds the action of the Police, are bound to approach confessions in the same spirit as the Legislature, and to remember that these intended safeguards would become little better than pitfalls if the confessions were treated on the mere record, as conclusive of their own validity.

The practice of taking prisoners before Magistrates not having jurisdiction in the case, for the purpose of getting a confession is not generally desirable. It is still more objectionable to send prisoners before different Magistrates, each of whom would have imperfect knowledge of the matter from only taking one or two examinations.

**Criminal Ruling* 14 *of* 1886. Criminal Reference No. 9 of 1886

†Criminal Appeals Nos. 197, 198, 199 and 207 of 1885.

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JUDGMENT.—Many of the facts in this case have been admitted by the prosecution and the defence. The view to be taken of them may vary, according as the conduct of Revubai, in leaving her husband's house, and taking the ornaments with her is regarded as dishonest and as resulting from an adulterous connection with the second prisoner, Ramlal, or as the mere result of waywardness and passion, arising out of a quarrel with the husband, Chanbasapa. Mr. A. W. Hughes, the Committing Magistrate, committed the case to the Sessions, because as he says, he considered it disclosed a conspiracy requiring heavier punishments than he could award. One of the Assessors found all the six prisoners guilty evidently believing the theory of the prosecution: the other took the opposite view of the case and expressed his distrust of the evidence of the Policeman and the two other witnesses to the discovery of the property. Mr. Tagore, the Sessions Judge of Sholapur-Bijapur, convicted all the prisoners. His judgment shows that he accepted the prosecution theory and that he gave very considerable weight to the oral statements and recorded confessions made by the different prisoners to the Police and the Magistrates. He held that those prisoners who were said to have received the ornaments from Revubai, had not only done so, but had done so dishonestly. Mr. Tagore makes the following remarks on the confession made by Revubai to Rao Saheb Ravji Parashram Barve, Magistrate of the 2nd Class at Sholapur, on the 5th September, five days after the taking of the ornaments and four days after she had been arrested:—"Whether this confession in so far as it implicates Ramlal is admissible as evidence against him, is open to question, but I see no objection to its being used as against the person making it." This confession contains the theory of the prosecution: and it has been treated as the most important piece of evidence in the case.

There are many reasons which, in our opinion, make it matter of regret that the learned judge below did not make a careful enquiry into the circumstances under which that confession was taken. We also think that the question of its validity should have been thoroughly considered in the written judgment. The confession had been retracted before the committing Magistrate on the 2nd October, when, Revu said that she had made it through fear of the Police and that it was not true although nobody had told her what she should say. On the 10th November she explained to the Sessions Judge that she had been tutored, adding, "I was five days in the *Chowdi* before I made it. I was taken to the Magistrate on Saturday." In the same statement she accounts for confessing before the Second Class Magistrate to an improper intimacy with Ramlal, by saying that the Jamadar got her to say so. On the 12th November, she

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again informed the Judge, (who had reminded her again about what she had told the Second Class Magistrate on this subject), that it was not true, adding "I was confined for five days and tutored by the Police."

It was the duty of the Committing Magistrate to inquire into the matter of this alleged detention; and as he had not done this, it was, in our opinion, incumbent on the Session Judge to have gone to the root of the matter, more especially as the Head Constable, Syed Ahamad, when cross-examined, said he did not remember how many days Revubai was in Police custody before she was taken to the Magistrate, although he admitted it might have been two or three days. The accused are not entitled to see the Police diaries, but the Judge might, under section 172 of the Criminal Procedure Code, have sent for them; and when the Head Constable had stated that he did not remember whether he had entered his proceedings of the 31st August in a diary as the law requires, we think the propriety of sending for the Police diary was obvious.

It is true that Mr. Barve certified under the confession that he had warned the woman, and that she was not in Police custody when he wrote it down and that he believed it to be voluntary. It is not at all improbable, however, that a young woman, who has been kept for days in illegal custody by Policeman who are actively engaged in getting up evidence against her, may make a very full confession, imputing all sorts of guilt to herself and others, in order to terminate what must be a state of dreadful anxiety and terror. In a similar case the late Chief Justice of this Court, Sir *M. R. Westropp*, pointed out the necessity of great care on the part of tribunals in order to give proper effect to the very careful provisions of the law respecting confessions. The Courts, being well aware of the safeguards with which the law expressly surrounds the action of the Police, are bound to approach confessions in the same spirit as the Legislature, and to remember that these intended safe-guards would become little better than pitfalls if the confessions were treated on the mere record, as conclusive of their own validity. A prisoner, especially a young woman who for the first time has left her husband's care and protection and for the first time has found herself in Police custody on a criminal charge, is open to many inducements as regards confession; and it would be wrong to assume that the inducement disappears the moment the Police withdraw from the Magistrate's room, or that the Magistrate's warning or caution has an immediately re-assuring influence on her mind. The certificate of the Magistrate, under the record of the confession, was held by *Westropp*, C. J., not to "preclude an inquiry, on appeal to the Sessions Court, into the circumstances under which the confession might have been taken. It is quite possible", the Chief Justice went on to say,

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"notwithstanding that such a warning might have been given by a Magistrate, that the confessions, as evidence against the party confessing, may have been wholly valueless. For instance, a party may have been, at the time of confessing, intoxicated or insane or under some temporary delusion, or the influence of fear engendered by previous maltreatment of the Police or other persons or induced to make admission by some reward, or improper inducement previously held out to him. Allegations, made in a regular and proper manner to the Session Court, that a confession before a Magistrate was given under any such circumstances, should receive due attention and be inquired into, and if the Session Court were to refuse to make such inquiry, it would certainly commit a very great error in law and procedure. It is no legal answer to a demand for an inquiry upon such allegations that the Magistrate had warned the accused that it was optional with him to answer the questions put to him or not although the fact that such a warning had been given would be a legitimate matter for comment by the prosecutor." *Reg.* v. *Kashinath* (1). The above remarks had reference to an appeal before the Court of Session; they apply with equal, if not greater, force, to trials before such Courts. We have also been referred by Mr. *Kirkpatrick*, who has argued the appeals of the prisoners Ramlal and Dindayal, to the weighty observations of the Chief Justice and Judges of the HIGH COURT OF THE NORTH-WESTERN PROVINCES in the Full Bench case, *Queen-Empress* v. *Babu Lal* (2). Another instance, showing the great necessity of the inquiry by the Courts into retracted confessions, appears in *Queen* v. *Behary Singh* and others (3), which was a case of torture used by the Police to extort confessions. The judgment of Mr. Justice *Markby* may be perused with advantage by the Sessions Judges and Magistrates, as indicating the evils which the Legislature has tried to prevent. We are of opinion that the Sessions Judge, in the present case, ought to have followed the procedure laid down by Chief Justice *Westropp*, whose remarks constitute a particular direction, although the same obligation follows from "the duty of the Session Judge, not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the utmost into the truth of the matter before him." (Per *Melvill*, J. in *Regina* v. *Tukaram Bhavani* (4)). This view appears to have received legislative sanction in section 540 of the Code of Criminal Procedure and section 165 of the Indian Evidence Act.

In the present case there were special reasons for the inquiry. The twice repeated statement of the prisoner Revu Bai, to the Judge, when he pointed out to her that she had admitted adulterous intimacy with

(1) 8 Bom. H. C., 126. (2) I. L. R. 6 All. 509, 542. (3) 7 W. R., 3 (4) See, *ante* p. 53.

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Ramlal, was that she said this merely because she had been induced to say it by the Police, who had kept her five days in their custody. As already noticed, the Head Constable, who said that he did not remember the facts, admitted, in cross-examination, that she might have been two or three days in custody before she was taken before the Magistrate, Mr. Barve. What Revu said ought to have been treated by the Sessions Judge as an allegation of illegal practices by the Police. As the committing Magistrate, who appears to have been aware of all the facts about the custody of the prisoners, has not alluded to them in his proceedings of commitment, as the Sessions Judge made no inquiry, and as the alleged illegal custody is a principal ground of appeal, we have examined the vernacular correspondence passing between the Chief Constable, Moro Gopal, and the committing Magistrate, Mr. Hughes, the Second Class Magistrate, Mr. Barve, and the Third Class Magistrate, Mr. Vishnu Ramchandra. They all appear to have been in Sholapur at the time and one of them at least was cognizant of the arrest of all the six prisoners on the 1st September, the morning after the alleged theft. But on examining this correspondence and all the other papers before us and in the absence of any explanation to the contrary by the Government Pleader, we are led to infer that not one of the six prisoners was sent to a Magistrate within the legal maximum period of 24 hours, but that in all cases this period was exceeded without first obtaining the Magisterial sanction required by law. The evidence shows that Revu was arrested on the morning of the 1st September; the correspondence indicates that she was not brought before a Magistrate until the 5th September. If this indication is correct, and there is much to show that it is, and nothing to the contrary, the statement of Revu about the 5 days' illegal detention is substantially true. As the law is clear and must have been known to the Chief Constable, we are bound to inquire what motive existed for the apparent violation of law. Police Officers do not expose themselves to departmental censure and criminal punishment without some motive: and as the prisoners alleged a particular motive, namely, the wish to get confessions out of their mouths, it would have been a reasonable and righteous course for the Sessions Judge to have made inquiry even though the Police, the Magistrate, and the Public Prosecutor had remained silent, when it was their duty to ascertain and state the facts. The remarks of Chief Justice *Westropp* in *Regina* v. *Kashinath Dinkar* (5), about Public Prosecutors are applicable in spirit to all officers concerned with the administration of Justice.

The rules of the law providing for the prompt exercise of magisterial

(5) 8 Bom. H. C. R., 126, 153.

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authority in all cases of arrest are stringent as well as clear. The principal of them are the following:—

"Sec. 60. A Police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a Police station."

"Sec. 61. No Police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a Magistrate, under Section 167, exceed 24 hours, exclusive of the time necessary for the journey from the place of arrest to theMagistrate's Court."

"Sec. 62. Officers in charge of Police stations shall report to the District, Magistrate, or if he so directs, to the Subdivisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise."

"Sec. 167. Whenever it appears that any investigation under this Chapter cannot be completed within the period of 24 hours fixed by section 61, and there are grounds for believing that the accusation is well-founded, the officer in charge of the Police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed, relating to the case, and shall at the same time forward the accused to such Magistrate.

"The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days. If he has not jurisdiction to try the case or commit it for trial and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

"A Magistrate authorizing under this section detention in the custody of the Police shall record his reasons for so doing."

"If such order be given by a Magistrate other than the District Magistrate or Subdivisiona Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate."

In interpreting the corresponding sections of the former code, in the torture case alluded to above, Mr. Justice *Markby* made the following remarks:—

"Moreover, even if a person be rightly arrested, it does not rest with the discretion of the Police officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate more than 24 hours. At the expiration of 24 hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to a Magistrate, and any longer detention is absolutely unlawful." We may add, as the Courts below have not noticed the matter of illegal detention, that the High Court attaches so much weight to the due observance of the 24 hours' rule as to require explanation in the returns, rendered every month, of cases in which the period has been exceeded, and has given particular directions to the Magistrates at page 42 of the Circular Orders of 1884.

It is admitted that, on the 1st September, all the prisoners had been

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arrested, all the ornaments, except two (unimportant in the consideration of the case) has been found, that certain admissions by the prisoners at the time of the discovery of the property and relied on as incriminatory at the trial had been made and written down, and that all the evidence relied on by the prosecution existed on that day, except the confessions. There was, in our deliberate judgment, no reason to prevent the Magistrate having jurisdiction from beginning the trial or inquiry the very next day, *i. e.*, on the 2nd of September. A great deal of the evidence relied upon by the Judge, but disbelieved by one Assessor, consists of statements made by Revu to Ramlal, by Ramlal to Dindayal, and by the other prisoners in the hurry of Police investigation when they were going about finding the property. This kind of evidence, evanescent in character, easily escapes the recollection of witnesses; it may easily be increased or altered; and it is in every way desirable that it should be recorded by a careful Magistrate soon. But besides these alleged admissions there were earlier denials; and in justice to the persons accused, these should have been recorded quickly. Yet Mr. Hughes did not begin his inquiry until the 21st September, although it is stated in a charge sheet, dated the 8th September, that the case was ready on the latter date. No evidence of any value was got in the interval between the fifth and the twenty-first. If any remand had been really necessary, it could have been granted by the Magistrate after beginning the trial and under section 344 of the Criminal Procedure Code; and from the 5th September, a judicial mind might have been engaged on the case, watching over the interests of justice and the discovery of the truth. Both Mr. Hughes and Mr. Barve were Magistrates competent to dispose judicially of the case against all the prisoners; and what is most important to notice they were in the same town and in frequent communication with the Police.

The extraordinary course was adopted of sending the prisoners, not to the one Magistrate, the Deputy Collector Mr. Hughes, who was to try the case, but to two other Magistrates, one of whom had no jurisdiction to try dishonest receipts of stolen property. We find that the confessions were recorded as follows:—

3rd September, Devisingh's by Mr. Vishnu Ramchandra, Magistrate of the 3rd Class.

4th September, Yeshoda's, by Mr. Vishnu Ramchandra, Magistrate of the 3rd Calss. The correspondence shows that the Chief Constable sent her to Mr. Barve on the 3rd to have her confession recorded and that he placed her in jail.

4th September, Laxman's, by Mr. Barve.

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5th September, Dindayal's, by Mr. Vishnu Ramchandra, to whom, according to the correspondence, he had been sent on the 4th.

5th September, Revu's, by Mr. Barve.

The correspondence appears to show that Devisingh and Yeshoda were brought before Magistrates on the 3rd, Laxman and Dindayal on the 4th, Revu on the 5th. What happened to Ramlal and why he was given no opportunity of explaining the circumstances alleged against him does not appear. Mr. Hughes was informed of all that occured by the other Magistrates who took the confessions: and promptly sent them on to him. But there is no examination of Ramlal on the record until the 6th October.

It was held by this Court, in *Regina* v. *Vahala Jetha* (6) that the practice of taking prisoners before Magistrates not having jurisdiction in the case, for the purpose of getting a confession is not generally desirable. It is still more objectionable to send prisoners before different Magistrates, each of whom would have imperfect knowledge of the matter from only taking one or two examinations. We see no reason whatever why Mr. Hughes or whoever was the Magistrate usually exercising the jurisdiction, did not promptly exercise it under section 252 of the Criminal Procedure Code, by ordering the accused to be brought before him, and then, if necessary, recording their statements under section 364. Mr. Hughes might have recorded them at once,—*The Empress* v. *Anantram Singh and others* (7) or he might have allowed Mr. Barve to deal with the case. By the adoption of either course the long delay might have been avoided. We think that the circumstances of the detention by the Police, which appears to have been permitted by these Magistrates, require explanation; and we shall call on Mr. Hughes to render an explanation through the District Magistrate.

The correspondence, to which we have referred, accompanies the record of the case, and the Government Pleader has not suggested that it is not authentic, or that it conveys an inaccurate notion of the facts. It shows that the Chief Constable, Moro Gopal who had Revubai and the other prisoners in his custody, was well aware of the 24 hours' rule; and that Mr. Hughes twice pointed out the illegal character of the Chief Constable's action. We append a translation of the correspondence.

It is the duty of the District Magistrate to prevent illegalities of a similar kind occuring again, and he can do this by examining the reports of arrests made to him under section 62 of the Criminal Procedure Code. We will direct copies to be sent him of this correspondence as well as of this Judgment.

(6) 7 Bom. H. C., 56. (7) I. L. R., 5 Cal., 954.

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The letter signed by Chief Constable appears to confirm the allegations of Revubai and other prisoners about the police having endeavoured to induce confessions by illegally keeping them in custody, instead of sending them before Magistrate, where they would have felt some sort of protection.

To adopt the language of Chief Justice *Westropp* we think the Session Judge committed an error in the law and procedure in ignoring complaints of prisoners and neglecting to inquire into the facts stated in this correspondence, which appear to support those allegations. A prisoner who believes that the Police are capable of deliberately violating the law, and so committing a criminal offence in order to get her to confess, and who finds that the Magisterial protection, though provided by law, is not exercised on her behalf, may, as day by day of illegal imprisonment passes by, despair of justice and be induced to confess, in order to terminate the imprisonment with its attendant pain and terror. The attention of the prosecution was pointedly and more than once directed to the delay in producing Revu Bai before a Magistrate: and we think that this unexplained delay and the longer delay before Mr. Hughes began his inquiry suggest, irrespective of the correspondence, good reasons for suspecting the confessions. No Judge with the correspondence before him should have allowed the confessions to go to a Jury without careful inquiry and directions suggesting great caution in dealing with them. We are bound now to scrutinize both the confessions and the testimony of the witnesses sent up by the Police, with the utmost care.

This scrutiny is the more essential because the principal ground of the appeals is that the Police have tampered with the case; and so it has been argued by the learned Counsel who has appeared for Ramlal and Dindayal. The petition sent by Revu Bai from the jail is more impressive than most appeals that come before us. She urges that her act is taking away the ornaments and hiding them is to be explained by the passion and waywardness of a young woman, who has quarrelled with an old and ill-conditioned husband. She sees that some of the appearances are against her, but she claims that we shall exercise the judgment of men used to human affairs over the whole case. Among other arguments are the following:—

"The Police people without taking the true intention into consideration devoted their attention, as usual, to secure my conviction and shaped the case accordingly. Accused 4, 5, 6, being afraid, transferred the property from one to another. I am not responsible for this foolishness on their part . . . . I was arrested on the 1st September 1885. I was confined for 5 days and threatened, and, in consequence thereof, I was obliged to make such statement as the Police people told me to make. The said statement

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being entirely false, it has been used against me. This is unjust . . . . Would any woman of her own accord admit any criminal intimacy ?" She denies acquaintance with the alleged paramour and urges that she herself hid the ornaments found in the fort ditch: and that the Police with intent to make that circumstance evidence against Ramlal and Dindayal made them act as persons who point out hidden property. She points out many circumstances of value in dealing with her confession, as also the absence of probability and of corroboration. The prisoners Devisingh and Laxuman, who have appealed from the jail, charge the Police with altering the complexion of the facts: and the Counsel for Ramlal and Dindayal has argued to a similar purport, while also pointing out the defective character of the evidence, and the danger of giving much weigh- as evidence to the selfexculpatory confession of the other prisoners, on which the Sessions Judge has relied against his clients.

We notice that there is no corroboration by testimony of the most important part of the theory of the prosecution. This theory is to be found in Revu Bai's confession: and may be called the theory of the paramour. She confesses to this, after all the other prisoners, except Ramlal and Dindayal, who did not confess, had made their statements to Magistrates. She does not hint at any previous conspiracy with Ramlal or others. She leaves her husband's house because of ill-treatment; and it is, apparently, by accident, that she finds Ramlal at the house of Devisingh and Laxuman. The idea of giving him the ornaments only occurs to her then, and she leaves them with him only to take care of. It is again by accident rather than design that she goes to the house of the woman Yeshoda, as she wants a lodging for the night. In her very first answer, however, she says she gave the ornaments to her friend, that is, as she explains, her lover. The Magistrate afterwards inquires how long she has known Ramlal, and she says she has known him for four months and has habitually had intercourse with him, going out at noon every two or four days to meet him at Laxuman's house. When she gave him the ornaments, they promised to be faithful to each other, and she says, she intended after two months, when the affair had blown over, to sell the ornaments and live with him openly. She also stated that Ramlal took out the ornaments at the fort ditch and gave them to the Police.

Now, as she points out, this last statement is contradicted by the evidence for the Crown, which is clear to the effect that Dindayal did this. The confession seems to us improbable and suspicious. It discloses a struggle between the theory of waywardness and the theory of the paramour. It is incredible also that Revu could have believed that no inquiry

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would be made to recover the ornaments. The story about the criminal intercourse appears utterly improbable and is without any corroboration except the statement of a female cook, who denied before the Magistrate any knowledge of Ramlal, but stated at the Sessions that she had seen him talking to Revu. The husband told the Magistrate that he had no reason to distrust his wife. He was not asked about it at the Sessions. Under all the circumstances, we see no reason to believe the paramour theory, which, we think, if true, would have been supported by independent evidence.

The opposite theory seems to us to be strongly corroborated by the fact that there is no suggestion of Revu Bai having spent the night with Ramlal after leaving her own house, and by her not attempting to abscond. Gurusidappa, a witness for the prosecution, who is married to complainant's sister, had a talk with her at the Mahasida temple, before the arrest, when she told him that she had quarrelled with her husband. He adds that she said she had given the ornaments to the Kalal, by which we suppose he means Ramlal. This part of his story we distrust. Gurusidappa then informed the complainant. One other witness for the prosecution saw her at the same place: and she talked about the quarrel. We are of opinion that if Revu Bai had intended to steal the ornaments, with the aid of a paramour, she would have concealed them more effectually, and would probably have absconded, instead of going to a public temple. The case is not without *its* difficulties; but we think that Revu Bai's later statements give the best explanation. She says she meant to return to her husband, and left the silver ornaments with Laxman for safe keeping and hid the golden articles in the hole in the fort ditch herself.

As regards Ramlal and Dindayal we cannot give any great weight to the retracted statements, as against them, of other prisoners,—such statements being in the present case self exculpatory; and, not being on oath or open to cross-examination, less reliable than the testimony of an accomplice-witness. The only evidence against them is that of the Head Constable and the two witnesses who are called the Punch. There is no confession by either of these prisoners. We have not ascertained whether Ramlal was ever placed before a Magistrate until Mr. Hughes began his inquiry. It is in evidence that when first taxed with receipt of the property, he denied it; and there is evidence of one of the Punch that Revu Bai wavered in her statements for some time, and that she was taken into an inner room by the Police before she deliberately accused Ramlal as a receiver. We notice, too, that the so called Punch were not aware of each other's functions; they are not men of any peculiarly good position or respectability; they seem to have been casually summoned. We can

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hardly treat their presence as affording a security for fair play and due respect for the law. They differ in their statements as remarked by one o the Assessors and by the learned Counsel. None of the property was found with Ramlal and if Revu Bai in her first confession falsely stated that he pulled the gold ornaments out of the hole, there is no sufficient reason for believing her, if she said at the time of her arrest (which she now denies) that Ramlal had taken the property. The Police story is that she said something to Ramlal and then he said something to Dinadayal, and then Dinadayal pointed out the hole. We have discovered a statement made to the 3rd Class Magistrate on the 5th September, by Dinadayal, which, we think, ought to have been produced at the trial. He said that Ramlal told him that he had been beaten, and desired him to remove the ornaments from the place he indicated in the fort ditch, on which he went with the Police and pointed them out. Narhar, one of the Punch, a winder of turbans, says that, on being pressed by the Havaldar, Ramlal admitted having received the property. He states that for half an hour Revu wavered in her statements: then the Police took her into an inner room. In the meantime the Police sent for Ramlal. When Revu came out, she accused him. Narhar says also that it was not anything that Ramlal said that induced Dindayal to point out the property; neither Ramlal nor Revu spoke to Dindayal. The other member of the so-called Punch, Shankar, is a *pardeshi* Brahmin, only 20 years old, a watchman by calling, but out of employ. He says that Ramlal spoke to Dindayal, telling him to produce the ornaments, and that Dinadayal offered to produce them. Ramlal is stated to have said this, because Revu Bai had told him to produce the ornaments she had given him the night before. It is to be noticed that Shankar's account differs very much from that of Narhar, who was there first and did not hear this conversation. Shankar denies that the Police had previously taken Revu alone into an inner room, but he admits that Ramlal was not present when she named him. Revu Bai told Mr. Hughes that she knew nothing of Ramlal; and if her earlier confession to Mr. Barve is true, (and it is the evidence most relied on by the prosecution), these witnesses must have told falsehoods, as she says it was Ramlal, not Dindayal, who produced the hidden ornaments. On review of this incident we agree with the Assessor who regarded the evidence of the Head Constable and the witnesses Narhar and Shankar as untrustworthy. It is full of discrepancies. Its value depends upon the paramour theory, for which we think there is no foundation. The prisoners, Ramlal and Dindayal, have never confessed to a Magistrate. The evidence we have just recited amounts to a confession, put into their mouths, to explain their conduct. The learned Judge has believed these witnesses; but, in our opinion, their

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mutual contradictions make them untrustworthy. The Policeman did not produce the diary the law requires him to keep, and did not even know if he had written one. No doubt the Judge was influenced by his belief in the paramour theory which he assumes to be true, because confessed by Revu. For reasons already given, we think a grave error was committed in not inquiring into what seems to us a false confession, extorted through fear of detention in illegal custody. The evidence, to be of any value, ought to have been recorded the next day. Mr. Hughes did not take it till long after. These witnesses had opportunity even then of concocting a story, as Mr. Hughes did not examine them on the same day. Narhar was examined on the 24th September, Shankar on the 25th, and Sayad Ahamad on the 29th. The tendency of the delay and the separate examinations was to prejudice the prisoners. All the evidence has to be examined with close scrutiny, for, if all happened as the prosecution witnesses say, if Ramlal was really Revu's paramour, if the other prisoners admitted receipt of property so readily and without explaining that their intentions were not dishonest, why should the Police have taken so much trouble in procuring confessions? Why should the provisions of the law framed to prevent such confessions being improperly obtained have been broken? And why, when Saiyad Ahamad, the Head Constable, was challenged about the illegal custody and about the Police diary, were no explanations forthcoming?

The case against the oilman, Lakshman, and the tailor, Devisingh, who have appealed, and the woman, Yeshoda, who has not appealed, is based on confessions and the testimony of Sayad Ahamad and Narhar and Shanker, with this difference that a gold article, called a *tandulpot*, was given up by Lakshman, a *sari* by Devisingh, and a bundle of ornaments and some silver toe-rings by Yeshoda. Devisingh and Yeshoda were taken before Magistrates on the 3rd September, and Lakshman on the 4th September. It is to be noticed that there is no testimony showing that any of them had any previous connection with either Revu or Ramlal, or that any of them received any profit for what they did. It is not even insinuated in the confessions, that they were to be paid for their services. They do not appear to have retained anything after being asked to give up the property on the first September. No explanation is given why, as they were accused, the female cook, who kept two articles for several days afterwards, was not accused but called as a witness for the prosecution. Revu Bai's statement as to the intention being merely for safe keeping is borne out by the fact that most of these ornaments were found in one bundle, the way she says she wrapped them up. Devisingh confessed to receipt but denied dishonest receipt. He alleged that he took the orna-

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ments to Yeshoda because Lakshman asked him to do this, Lakshman telling him that the Police in search of Revu had searched his house. Saiyad Ahamad denied that he had gone to Lakshman's house on the 31st August; but complainant says he searched for his wife till 3 P.M. and then informed the Chief Constable and gave him a list of the missing property and went home. Sayad Ahamad says he searched for Revu that day. It is not probable that both the husband and the Police would be lukewarm, when so much property was concerned; and the omission to produce a diary or to give any details as to what searches were made between noon of the 31st August and the 1st September, adds to the unreal and unsatisfactory air of the whole of the Police evidence. Complainant says his wife left about noon: there is evidence that she went about unconcernedly next day, not concealing the quarrel, nor her disposal of the property and not attempting to hide herself. It seems unreasonable therefore to suppose that she could not have been found and the property recovered on the thirty-first. On the 7th October Devisingh had an opportunity of explaining matters to Mr. Hughes, when he dropped his previous implication of Ramlal and Dindayal, and stated that, at his fellow lodger Lakshman's desire, he took Revu to lodge for the night at Yeshoda's and that she carried her bundle of ornaments with her. Devisingh told Mr. Hughes that his statement to the other Magistrate was the result of tutoring and beating by the Police. He repeated this statement to the Sessions Judge and said his body bore marks of the beating: but the record does not show that inquiry was made into this allegation by either the Magistrate or the Judge. No property was found with Devisingh except a *sari* belonging to Revu. We do not venture to say how he got it, but as the retention of such an article is not by itself significant of dishonesty, we do not think it necessary to criticize the evidence of the Policeman and the Punch about it.

Yeshoda, with whom the silver ornaments were found in a bundle and some toe-rings separately, in her statement to Mr. Vishnu said that Devisingh had brought her the things for safe keeping, not in the night of the 31st August, as he said at first, but in the morning of the 1st September. She did not admit any dishonest intention. Her first statement is suspicious, as she goes out of her way to implicate Lakshman about the *tandulpot*, and, as we notice in the other confessions, she repeats statements of other people designed or at least having the result of implicating Ramlal. At first, she said she lived in Ramlal's house. On the 9th October, she got her opportunity of explaining matters to Mr. Hughes; she does not then repeat the statement, and no corroboration of it or of any other part of the paramour theory was offered

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at the trial. She explained to the Judge that she tried to get Devisingh to take the property back, and asserted that the bundle was not *concealed* under cowdung cakes.

Sayed Ahamad, Narhar and Shanker are called to prove the incriminating fact of concealment. Narhar said he was in the room when the bundle was got out of the heap of the cowdung cakes; but when cross-examined, he could not explain why he told the Magistrate that he was outside. Nor could he explain why he told the Magistrate that Ramlal exhorted the woman to surrender the ornaments. He states that she gave them all up as soon as she was asked. No explanation is given of the alleged statement of Ramlal that he had given the property to Yeshoda. Shanker told the Magistrate that Yeshoda there and then explained that Devisingh had brought the bundle, and that the latter stated, on the same occasion, that he did this at the request of Lakshman.

On examining the evidence about Yeshoda, we are unable to accept the statement about concealment as proved. We do not consider the witnesses trustworthy, and we think the other conduct of the woman, who has not much varied her statement from the beginning, is consistent with the theory that she had accepted the property for safe-keeping, perhaps, reluctantly. The door was locked, and even the placing of cowdung cakes upon the bundle may have been a mere measure of precaution against theft. Lakshman's statement to Mr. Barve agrees fairly well with the above, except as to the usual implication of Ramlal. It was taken on the fourth September. We notice that it contains no support of Revu's statement about her assignation with Ramlal at Lakshman's house; neither does it explain why Revu came that day, nor what Ramlal was doing there. No pre-arrangement between them has been suggested by the prosecution. It is sought to implicate Lakshman, by proof that he had buried the *tandulpot*. But the suspicion forces itself upon us that this convenient piece of evidence has been falsified. It is not insinuated that the *tandulpot* was left with Lakshman on purpose. According to the evidence, it was a mere accident. Sayad Ahamad told the Magistrate that it was hidden or rather buried in the earth. Narhar told the Magistrate that the *tandulpot* was hidden in a wooden cupboard, and that Lakshman produced it without hesitation. Shanker said that it was produced from a cupboard. These men altered the story in the Court of Session very materially. Narhar deposed as follows:—"We went in and found the *tandulpot* buried under a cupboard in an inner room. No. 6 (Lakshman) brought it out. The room was dark inside. No. 6 lit a lamp. We went in. In our presence he scraped the earth and brought out the ornament

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from where it was buried." Shanker deposed that Lakshman produced it at the exhortation of Ramlal. It was under a cupboard. The witness added:—"He, Lakshman scraped off the earth, and brought it out from where it was buried." No explanation has been given of the omission of these two witnesses to tell the Magistrate about the burying; and we notice that this direct implication of Ramlal in the discovery does not appear in Shankar's deposition before the Magistrate. The examination of Sayad Ahamad took place several days afterwards.

We do not think that such evidence as the above can be held to be very cogent or trustworthy. We consider the theory of the defence the more probable, namely, that the *tandulpot* was accidently left by Revu in her hurry and confussion. But even if concealment were proved by unimpeachable evidence, we should have to consider whether the concealment was the result of dishonesty, or of fear of the Police and of the consequences of mere possession.

In approaching the true theory of the case, we are baffled by the absence of any evidence about the husband's proceedings in searching for his wife till 3 P.M, on the 31st August and of what he did after that. Men do not usually treat the disappearance of their wives with a large amount of property in a cool and indifferent manner; nor would it be creditable to the energy and sagacity of the Police to suppose that they could not find a woman, the wife of a well to do Lingayet Wani, who went about without any concealment. We refrain, therefore, from giving any positive opinion as to how the ornaments were put into the hole in the fort ditch of Sholapur. It is not shown to be a place which a dishonest receiver would select; and unless Revu went there in the dark, which both Assessors think very unlikely, her proceedings would probably have been observed. It is not altogether credible that any person, even an ignorant woman, would select such a place for safe custody of her ornaments. We are well aware that many criminals are foolish; but the circumstances of the finding of the property are inconsistent with those of most dishonest receivings. There was no real attempt to hide it from the Police. Neither the woman nor any one of the prisoners absconded. No portion of the property has been lost, sold, pawned or melted down. The paramour theory has no support whatever except the retracted confession of Revu; and we believe this confession was in many respects false, especially in its implication of Ramlal, Dindayal and others, and was induced by illegal conduct of the Police and the absence of the protection of the Magistrates. We are of opinion also that the witnesses Narhar and Shankar, are not to be altogether believed. They were severely criticized by Mr. *Branson* at the trial, and by Mr. *Kirkpatrick* in the appeal, and, in our opinion,

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justly. The finding of the property in the ditch in the material circumstance used in order to get Ramlal and Dindayal convicted, just as the finding of the *tandulpot*, alleged to have been buried, is used to show dishonest intention on Lakshman's part. We think we are justified in looking with suspicion on the alleged concealment and discovery of the ornaments in the fort ditch, because these facts are essentially connected with the false and illegally induced confession of Revubai, and because both the Assessors disbelieve her later statement that she herself hid the ornament in the Fort ditch. On the other hand we may remark that it is possible that some person with whom Revu had lodged or with whom she had left the ornaments for safekeeping, may, from mere fear of the Police, have hidden them in the ditch after they had learned that the Police were making a search. The mystery, however, remains regarding the search or other conduct and acts of the husband and the Police on the 31st August; and as the Police have alleged as true an account of Ramlal's and Dindayal's connection with the matter which is, in our opinion, an untrue explanation, we are inclined to think that it behoves the Police to explain or to find out how the ornaments got into the ditch. It is important to notice that, although Ramlal and Dindayal are said to have admitted complicity on the 1st September, they do not appear to have made any such admissions to any Magistrate, even during the period when they were unlawfully detained in Police custody, and that the allegations made against them by other prisoners also detained by Police in unlawful custody were dropped after it had ended, and on the first opportunity afforded them by Mr. Hughes of explaining matters.

It is probable that there are facts in the case which have not been investigated at the Magistrate's inquiry or the Sessions trial. We would not be justified in delaying disposal of these appeals in order to get them elucidated; and at this distance of time, we doubt, if it would be possible to do what we think could only have been done effectually, by the Magistrate having jurisdiction, on the 2nd September, or within a reasonably early time afterwards. We do not think the paramour theory or the theory of dishonest receipt and disposal accounts in a satisfactory manner for the facts proved in the case. We also are of opinion that these theories of the prosecution are not proved. It remains now to pass some remarks on the theory for the defence.

We consider it is the best and also a probable explanation. We think that Revu left her house in a state of anger caused by a quarrel, but with the intention of returning; hoping, perhaps, that her husband would make overtures to her. It is probable that she went to Lakshman's

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house and saw him and Devisingh there. As the night came on she was under a necessity of finding some decent lodging and some place for her ornaments; under any circumstances, she would have difficulty in making these arrangements, as people object to entertaining run-away wives, and fear the action of the husband, especially when the woman brings property to the house. They must have guessed and may have heard that the husband had applied to the Police, perhaps also they heard that the Police were searching; and Lakshman says they actually searched his house. Revu may or may not have gone to the house of the woman Yeshoda with her ornaments. It may or may not have been the case that Devisingh took the ornaments there; either supposition is possible, and we have not sufficient materials for saying more. Wherever she was and wherever her ornaments were, the occupiers of the house must have wished to get rid of her and them. She could not safely go about the town with a bundle of ornaments; she may have left them with Lakshman or Yeshoda and gone to a temple, which being a sacred and public place, may have seemed to her a more proper place for passing the night than any other available to her. The news that the Police were investigating, or the belief that her husband was acting hostilely against her, would naturally prevent her from going home. But it is difficult to reason correctly as to how a young respectable wife in such a forlorn and friendless position would act. The difficulty is greater because of the absence of evidence between the noon of the 31st August and the next morning. There is no evidence even about the breaking open of the box except that of the husband and Sayad Ahamad.

The *pujari*, Kanappa a witness for the prosecution proves that Revu came to the Mahasidda temple at 4 o'clock in the morning, and told him, and, later on others, that she had quarrelled with her husband. The statement of Gurusidappa, that she told him that she had left her ornaments with the Kalal is vague and uncorroborated. If by "Kalal" Ramlal is meant, this statement of the witness ought to have been inquired into by the Court. It tends in Revu's favour; but we doubt if she made the assertion. She stayed in the temple until some hours afterwards; the Police arrested her there.

After carefully considering the whole of the evidence, we are of opinion that Revu was not guilty of theft, and that dishonest receipt or disposal is not proved against Ramlal, Dindayal, Devisingh or Lakshman. We must add that, as the evidence is very contradictory, we are not satisfied that the property belonged to the husband or that it was not his wife's *stridhan*. It is unnecessary, however, to deal with the question, whether a Hindu woman can commit theft of her husband's property, or

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with the questions which arise under section 27 of the Indian Evidence Act, as to the admissibility of the statements made by the prisoners on the 1st September. We take a different view of the whole case from that taken by the Judge; and are of opinion that no dishonest intention has been proved against any prisoner. We, therefore, reverse the convictions and sentences, passed on all the appellants and direct that they be set at liberty.

The woman, Yeshoda, has not appealed, but we consider that, in her case, we should exercise our revisional jurisdiction. We think the error of law and procedure committed in not inquiring into the manner in which the confessions were induced, has affected prejudicially the trial as against her. We follow also the *Empress* v. *Rango Timaji* (8) in holding that proof of something more than mere suspicion of the property having been stolen was essential in order to justify a conviction under section 411 of the Indian Penal Code. We regret that her period of imprisonment will expire almost before our warrant reaches her, as the sentence of three months began on the 16th November. We reverse the conviction and sentence passed upon her, and direct that she be set at liberty.

The Magistrates being under the superintendence of the High Court, we think it necessary to call on Mr. Hughes to explain some matters in the correspondence. These are:—

Why he did not begin his inquiry at a reasonably early date?

Why, as regards each of the prisoners, and especially Revubai, the lawful period of police custody was exceeded?

Why, as regards each of the prisoners, and especially Revubai, he did not direct them to be brought before himself, or some other Magistrate within the maximum time required by law, or as soon afterwards as possible?

Whether Ramlal was brought before himself or any other Magistrate before the 21st September?

We draw his attention to page 42 of the High Court's Criminal Circular Orders, where the duties of Magistrates as regards illegal detention by the Police are defined and explained.

The correspondence appears to show that the Chief Constable was aware of the provisions of the law about illegal custody, but continued to violate the law even after Mr. Hughes had warned him about it. The excuse given appears to relate to confessions and the discovery of the property by means of the prisoners. But the provisions of the Criminal Procedure Code, sections 61 and 167 are designed to prevent such dis-

(8) I. L. R., 6 Bom. 402.

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coveries by means of the duress and terror of wrongful confinement; and the violations of these provisions for the purpose of extorting property or confessions is punishable under sections 347 and 348 of the Penal Code. We think that this correspondence, in itself, and more especially in connection with the investigation of this case, ought to be brought to the notice of the Governor-in-Council.

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22 February 1886. NANABHAI & JARDINE, JJ.

Queen-Empress v. Amirkhan.*

Penal Code (Act XLV of 1860), Sec. 189—Public servant—Threat of injury.

In order to sustain a conviction under section 189 of the Indian Penal Code there must be "a threat of injury to either the public servant or to any one in whom he (the accused) believes that public servant to be interested." What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself or to some one in whom the accused believes he has an interest.

JARDINE, J.—The facts are that the prisoner more than once, and in a loud tone, said to the Magistrate that he, the prisoner, and others would obstruct the carrying of a Hindu God along the road, even though they might lose their lives and even though a riot might take place. One witness, the chief constable, says that he threatened to commit riot and murder. For the use of this language the prisoner was convicted of criminal intimidation and sentenced under section 506 of the Indian Penal Code to six months' rigorous imprisonment and fine of Rs. 200 or in default of payment three months' more of rigorous imprisonment. On appeal the Sessions Judge altered the conviction to section 189, confirming the sentence.

In order to sustain a conviction under that section there must be "a threat of injury," to either the public servant "or to any one in whom he (the accused) believes that public servant to be interested." It has been contended for the Crown that the official duties of the Magistrate and the Police Officer whom the prisoner addressed import an interest in every person in their jurisdiction to whom injury is threatened by criminal means such as criminal force, and that an official interest of this sort will satisfy the words of the section. It was further contended that we must construe the words so as to include the probable consequences of action taken in accordance with them; and that the evidence shewed that some injury to persons was intended, and that this intention was made sufficiently clear in the language used. Doubtless if a man says in general terms that he means to commit an offence, *e. g.*, theft or hurt, it is a logical inference that injury will be caused to some person, if he does

*Criminal Application for Review No. 6 of 1886.

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what he says he means to do. But such language does not in my mind necessarily amount to a threat to any person. What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself or to some one in whom the accused believes he has an interest. It is not the commission of the offence against the public order so much as the threat and corresponding apprehension of personal injury which are supposed to be inducements to the public servant to alter his course. If a man went to a Magistrate in his Court or to a public officer at the *thana* and said "Unless you stop the Hindu procession I will commit a theft" or "I will commit a riot," the mere fact that such offences often result in injury to persons, would not, I think bring the language within the section 189. If however instead of merely stating an intention to commit the offence, he added words threatening personal injury, such as "Unless you stop the Hindu procession I will commit theft of your property" or "I will cause a riot and attack you or your police force", the words of the section would be satisfied. So much for the general meaning of the section of the Penal Code. In the present case however the circumstances must be considered as explaining any thing that may be ambiguous in the words. It is in evidence that the Police Superintendent was actually proceeding at the time to make those arrangements for the procession of the God on a public road which he is authorized as a matter of duty, to make under section 27 or 28 of the Bombay Police Act VII of 1867. An order has been issued about this procession: and it was to the arrangement so made that the prisoner objected. He demanded of the Magistrate and Police Superintendent that arrangement should not be carried out: and to enforce this demand on the Magistrate and Police Superintendent, he used the language relating to riot and bloodshed. In a case like this, I would be disinclined to differ from the two Courts below, on matters of facts. After examining the vernacular record of the case, I am of opinion that the Courts below were justified in finding that the prisoner wished by the threat of serious injury to the Hindus, to prevent the Police Superintendent and the Magistrate from carrying out the arrangement already made. I think the prisoner at the time looked upon the Hindus as persons in whom these public servants were interested. This appears from the conversation. He may well have believed this to be the case, as the Magistrate and Police Superintendent were at that very time on their way to the place of the procession with the intention of providing that the Hindus should enjoy the lawful exercise of their right to pass along the road. I think this immediate though official interest is

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proved: and that it is a sufficient interest within the meaning of the section. For these reasons I would refrain from interfering.

NANABHAI HARIDAS, J.—I think that a crime punishable under the Indian Penal Code has been committed in this case, and that we should not interfere.

There is no question as to the facts. The evidence recorded in the case is all one way, for the prosecution, there being none for the defence. The facts of the case are thus briefly stated by the Sessions Judge Mr. Baker.

"It appears that some Musulmans of Malegaon, complained to Mr. Frost, Magistrate First Class, that a *tabut* had been stopped on the night of October 14th. Mr. Frost told them that he would inquire into the matter after the Dasara and Mohorum holidays were over. On October 19th Mr. Frost and Colonel Wilson, District Superintendent of Police, went in the morning into the town of Malegaon where they met a body of Musulmans among whom was the appellant. Appellant repeated the complaint about what had taken place on October 14th to Colonel Wilson who said that the matter would be considered, but that the Hindu "*ratha*" was to go in procession that day. Appellant first spoke civilly, but as Mr. Frost and Colonel Wilson were driving away, he said according to the evidence of Mr. Frost "We will obstruct the Hindu *ratha*, the procession of the Hindu *ratha* must be stopped; if this be not done I and my community will not care even if our lives be lost." Colonel Wilson then arrested the appellant. The Magistrate has convicted the accused of criminal intimidation under section 506 of the Indian Penal Code.

The following extracts from the Marathi depositions of Mr. Frost and three other witnesses (two of them Hindus and the third Musulman) may be taken to supplement the above account. [Mr. FROST'S DEPOSITION:—] (1)... I saw fifty or hundred Musulmans and Memons standing beyond the Masjid near the Police Station.... (2) Out of that assembly the accused Amirkhan *walad* Misrikhan representing himself to be their leader came to us. On being asked who the Police Superintendent was, I showed him....(3) The Police Superintendent said your complaint will be considered, but today is the day on which the God of the Hindus is to be carried in a procession, and to that no one's objection can be allowed. Disregarding what the Saheb said the accused threatened him, saying—"We will not allow it. If the God is carried in a procession we will obstruct, and it matters not if in this affair my life and the lives of our people are lost." He repeated this three or four times in a loud voice, bawling out..... (4) On the Saheb telling him 'Being the leader of all these people, if you threaten the Hindu communitty in this way,

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I will imprison you,' he said—'Never mind, we will commit a riot (*danga*), even though (my) life is lost.' On his saying so he was arrested. ..... (5) And immediately after we came out (after making him over to the Police) a large riot occured in the town caused by Musulmans, in which considerable loss was caused to the Hindus in different localities. (6) The riot in respect of which 42 accused are being tried in another case, began immediately after the accused had spoken (as above). (6) He said the Hindus showed disrespect to our *tabuts*; therefore we will not allow their God's procession to issue. (7) 'The Hindu *ratha* procession should be stopped. If that is not done, I do not care if I and people are killed.' So he said. (8) From the words used by the accused, I distinctly understood that there was danger to public peace and tranquility. He used the threat to us, that is to myself and the Police Superintendent and also to the Hindus. We were going to preserve the peace at the time of the procession. He spoke to us as he did to prevent us from allowing the Hindu procession to issue; and he spoke to us with the object of making it appear to us that if we permitted the procession, there would be a great riot and terror. (9) Question. Had you come to see that the procession passed along the road smoothly undisturbed by the Musalmans? Answer. Yes.....We were legally empowered to render such assistance, and the Hindus were perfectly entitled to carry their *ratha* procession. There was no prohibition against it in law.

[DHONDO'S DEPOSITION.]

(10) We will not allow the *ratha* procession of the Hindu God to issue. If it comes out, I do not care if I and 500 people happened to be killed (*Khun*).

[APPAJI'S DEPOSITION.]

(11) He said to the Sahebs; You should not allow Ballaji's *ratha* procession. If it is allowed, we will commit a great riot and cause blood-shed (*Khun*).....There were 150 or 200 Musalmans present there then.

(12) The Saheb said. He mentioned *khun* (blood-shed or murder) where upon both the Sahebs came down from the Tonga and arrested Amirkhan and made him sit in the Tonga."

It was urged in appeal before Mr. Baker, as it has been urged before us, that the words used by the accused were nothing more than a mere warning, that they did not amount to a threat. But looking to the words themselves, and the way in which they were uttered, and, further, having regard to the occasion on which and the circumstances under which they were uttered as also to the impression they made upon

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the minds of those who heard them, I have no hesitation in saying that they were meant to convey and did convey a very distinct threat, as both the Lower Courts have held, and not a mere warning. Whether the threat was such as is comtemplated in section 503 or section 189 of the Indian Penal Code is a question which I shall now proceed briefly to consider. The words used were understood to convey a double threat—a threat to the Hindus, and a threat to the Officers addressed. In this latter aspect those words will be considered a little further on when I come to consider them in connection with section 189, Indian Penal Code. At present I shall consider them only in connection with section 503. They clearly expressed on the part of the accused and his Musalman comrades whom he represented, a determination (1) to obstruct and stop the Hindu religious procession; (2) to commit a *danga* (riot); (3) to do that in or by which people might happen to be killed (*khun*). When a person threatens another in this way, it is by no means unfair to presume against him, that he intends at least "to cause *alarm* to" that other. Was it then a threat to *injure* any one's *person?* or property? Now the word *injure* used in the section 503 is defined in section 44 of the Indian Penal Code to denote "any harm illegally caused to any person in body or property," and in section 43 the word "illegal" is said to be "applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action." We have, therefore, to see whether the threat was to cause 'injury' as thus defined to the *person* or *property* of any one. Let us take it in its least threatening aspect that, therefore, which is most favourable to the accused. To obstruct or stop a *ratha* procession necessarily means voluntarily to prevent the persons in charge of that *ratha* or composing that procession, from proceeding in the direction they like to proceed; and if they have a right to proceed in that direction, such act of obstructing or stopping is an offence punishable under section 339, Indian Penal Code. It is thus prohibited by law and it also furnishes ground for a civil action as being an infringement of one's right of personal liberty. Such an act, therefore must be regarded as and "injury" to the "person" of him to whom it is done. That the Hindus who were to move in a procession on the 19th October last had a perfect legal right to do so, has never been questioned. Mr. Frost admits they had such right, and the trying Magistrate states in his Judgement, that a proclamation had been issued under section 27, Bombay Act VII of 1867 appointing a time for such a procession. We thus see most strictly established in this case such threat, as is contemplated in section 503 of the Indian Penal Code. It is true, that threat was not directly adressed to the Hindus who were to form the procession, but that

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was by no means necessary, if it was intended to reach their ears, and I see no reason to doubt, having regard to the object aimed at, that it was so intended. Two of the witnesses who heard it were Hindus. I am therefore of opinion that the accused was guilty of the offence of criminal intimidation as defined in section 503 of the Indian Penal Code.

In the view I have taken above of the applicability of section 503 to the circumstances of the present case, it is not necessary to discuss at length whether section 189 also applies to them. One of the functions of the Police is to preserve the public peace and to prevent the commission of offences, and it was expressly to perform that function that the two officers had come—namely to assist the Hundus or to protect them from any acts of violence on the part of their religious antagonists, the Musalmans. During the time appointed for the Hindu procession, the Hindus were to be under their special care and protection, and they were bound to see that no offence was committed against them. It was for the purpose of "inducing" them "to forbear" so to assist the Hindus that the threat was addressed to them. It is true no threat was held out of any injury to those officers themselves but the threat of injuring to the Hindus would suffice if they were "interested" in the Hindus within the meaning of that section. Cases of public officers being officially "interested" in private individuals can easily be conceived. A Collector appointed to act as a minor's guardian or administrator under Act XX of 1864 is an instance that readily suggests itself. In the absence of any authority, I am not prepared to exclude such interest from that section.

But whatever question may be raised as to the application of sections 503 and 189 of the Indian Penal Code, there is no room for any doubt as to the application of section 143. There was a large body of Musalmans assembled 50 or 100 according to Mr. Frost's account and 150 or 200 according to Appaji's account. The accused came to the officers as their leader or spokesman, and may be taken to have known, and truly represented their common objects. He was clearly indentified with them. As gathered from his words, which they were near enough to hear, their objects were (1) "to overawe by.....show of criminal force..."the public officers".....in the exercise of "their lawful power" and (2) "to commit.....mischief.....or *other offence*". He was therefore a member of an "unlawful assembly" as defined in section 141 Indian Penal Code, and punishable under section 143.

For these reasons and having regard to section 537 of the Criminal Procedure Code, I would dismiss the petition.

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8 March 1886. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sheik Sultan.*

District Police Act, (Bom. Act VII of 1867), Sec. 26—Police officer—Overstaying leave.

A Police constable overstayed the casual leave granted to him by the Chief Constable and was absent without leave for a month and two days :—

Held, that in staying without permission beyond the period of leave granted him, the accused withdrew from the duties of the his office without permission and that he committed an offence within the meaning of section 26 of the Bombay District Police Act, 1867.

SHEIK Sultan, a Police constable obtained casual leave from the Chief Constable for 6 days. No substitute was provided. He did not return to duty till he was transferred to another Taluka, when the Chief Constable reported him absent without leave. He was away for one month and two days and voluntarily presented himself for duty on his return. He gave no notice of his desire for further leave nor did he ask for any extension. The Magistrate, upon these facts, found him guilty of an offence under section 26 of Bombay Act VII of 1867 and fined him one rupee.

The District Magistrate of Khandesh in referring the case to the High Court observed: "The ALLAHABAD HIGH COURT have ruled in *Queen-Empress* v. *Saligram* (1) that overstaying leave did not constitute an offence, but in that case, the convicted man had employed a substitute. In this instance no substitute was entertained."

ORDER.—In staying without permission beyond the period of the leave granted him, the accused withdrew from the duties of the office without permission within the meaning of the section 26 of Bombay Act VII of 1867. We therefore think that he was rightly convicted under that section.

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11 March 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Dongar.†

Penal Code (Act XLV of 1860), Sec. 84—Criminal Procedure Code (Act X of 1882), Sec. 540—Evidence Act (I of 1872), Sec. 45—Lunacy—Defence.

When the defence is based on section 84 of the Indian Penal Code, the Sessions Judge may under section 540 of the Criminal Procedure Code and Section 165 of the Indian Evidence Act, ascertain the behaviour exhibited by the prisoner during the years of his life previous to the homicide, and, if accused has been kept in a lunatic asylum, record medical evidence of the facts observed there, and of the opinion formed as to his particular form of lunacy. Section 45 of the Indian Evidence Act, illustration (*b*), indicates this evidence as relevant to determine the issue raised.

JUDGMENT.—The accused, a Bhil, killed his wife on or about the 12th January, 1884, by striking her on the head with an axe. He was brought up for trial before the Court of Session at Nasik on the 5th March, 1884.

**Criminal Ruling No. 17 of 1886.* Criminal Reference No. 21 of 1886.

(1) I. L. R., 6 All., 475 †*Criminal Ruling 18 of 1886.* Criminal Appeal No. 178 of 1885.

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The Court found, on the 6th March, that the accused was, by reason of unsoundness of mind, incapable of making his defence, and reported the case for the orders of Government. Thereupon, the Government ordered the accused to be forwarded to the Lunatic Asylum at Colaba for safe custody. The accused was detained at the Asylum from the 1st April, 1884, till the 28th July, 1885. He was then tried. He was convicted by the Sessions Judge, on the 7th September, 1885, of murder; and sentenced to transportation for life. In passing sentence, the Sessions Judge said:—"There was no apparent motive for the crime, which was committed in a fit of sudden passion. Such a fact would afford no reason for not passing the extreme sentence as a rule. But some allowance should be made for the accused, who is a Bhil and of a very low order of intelligence. Besides, a long time has elapsed, during the greater part of which the accused has been in the Lunatic Asylum. Under these circumstances, I do not consider that it is necessary, as a warning to others, to pass the extreme sentence."

When this appeal first came before us, we were of opinion that, under all the circumstances of the case, an enquiry was necessary, in order to ascertain the state of the accused's mind at or about the time when he killed his wife. We, therefore, ordered a further enquiry; and stated the reasons for our order, at length, in the following terms:—

"Although the Committing Magistrate, on the 6th February, recorded his opinion that there was nothing in the conduct or appearance of the prisoner to show him to be of unsound mind, yet, on the 6th March, the learned Sessions Judge, after taking evidence, found that, owing to unsoundness of mind, he was incapable of making a defence. In consequence of this finding, he was confined in the Lunatic Asylum at Colaba. ..... The Sessions Judge records that there was no apparent motive for the crime, and the defence of the prisoner appears to have been that his sudden killing of his wife was the result of some sudden and uncontrollable action of the mind. This defence, the Judge records, was rejected by the Assessors; but from the meagre statement of the Assessors' opinion, we can only infer that their reason for believing the prisoner to be guilty was that he had confessed the commission of the homicide. We notice that, in March last, the Civil Surgeon, who had the prisoner for some time under observation, deposed that he had come to the conclusion that the prisoner was "a man of weak intellect bordering on idiocy," and that the Jailor described him as "not intelligent, but like a man drugged." No evidence was given at the trial as to the state of mind of the prisoner before the killing of his wife nor as to the nature of the unsoundness of mind disclosed by the symptoms and conduct

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observed during the time of detention in the Lunatic Asylum. Some of the witnesses appear to have been acquaintances of the prisoner, but they were not questioned about his previous behaviour, the existence of eccentricities or any other fact from which his state of mind during the previous portion of his life could be inferred.

"Under all the circumstances of the case, and having regard to what is in evidence about the state of mind of the prisoner between February and July, and the want of any sign of motive for the crime, we are of opinion that further evidence is required for the proper determination of this appeal. This Court has no sufficient material before it for judging of the state of mind of the prisoner on the day of the killing. We think the Sessions Judge might properly have proceeded, under section 540 of the Criminal Procedure Code and section 165 of the Evidence Act, to ascertain the kind of behaviour exhibited by the prisoner during the years of his life previous to the homicide, and that it was important to record some medical evidence of the facts observed in the Lunatic Asylum, and of the opinion so formed as to the particular form of lunacy under which he suffered. We deem it well to point out that section 45 of the Indian Evidence Act, Illustration (*b*), indicates this evidence as relevant, to determine the issue raised, when the defence is based on section 84 of the Indian Penal Code. We are also of opinion that the behaviour of prisoner since the conviction may be relevant to that issue."

We have now received the evidence certified by the Sessions Judge; and are unable to say, on a consideration of it and of the evidence previously recorded at the trial, that the accused was, by reason of unsoundness of mind, incapable of knowing the nature of his act, when he killed his wife, or that he was doing what was either wrong or contrary to law. He made as full a confession of the incidents of the crime as was possible in regard to an act which was, apparently, unpremeditated, and was committed, as the Sessions Judge finds, in a fit of sudden and motiveless passion. That confession seems to be a truthful statement; and although the accused says that he struck his wife when blind with rage, and cannot explain why he was blind with rage, yet as he, apparently, recollected the circumstances distinctly, and was able to point out the place where the axe was concealed, he must be taken to have been conscious of the nature of his act, and must, therefore, be presumed to have been conscious, also of its criminality. But we would go further than that. We do not think that this case ought to be classed with such cases as *Reg.* v. *Greensmith* (1) or *Reg.* v. *Brixey* (2) or *Reg.* v. *Burton*

(1) Med. Chir. Rev., XXVIII, 84. (2) Med. Gaz., XXXVI, 166, 247.

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(3), which are discussed by Dr. *Taylor* in the Chapter on Homicidal Mania in his work on Medical Jurisprudence, and which we had occasion to refer to recently in our judgment in *Imperatrix* v. *Lakshman Dagdu* (4), which was decided on the 4th instant. It certainly has some points in common with such cases. The offence was quite unpremeditated. There was no motive for it. The accused liked his wife. There was no quarrel. The husband and wife were on their way, apparently, to her father's village, to spend a holiday there. He took his axe with him, to cut a bundle of firewood, to bring home with him. After killing his wife, in the evening, when "blind with rage," he sat by her corpse, all night, till day break. At some time during the night, he seems to have tried to take his own life, but to have desisted from the attempt. The case differs from the cases which seemed to Dr. *Taylor* to establish the occasional existence of homicidal mania, in that there was apparently some attempt at concealment; for the accused says that the axe with which he killed his wife "was concealed under bushes," though he "showed it to the villagers of Ambegaon." He must have hidden the axe away. And then, when in the morning, one of the witnesses went towards him, "he began to go away;" and when an attempt was first made to arrest him, he resisted. It was only, apparently, when he was struck once or twice with a stick that he yielded. Neither did he confess at first. The witness, Sambhu, says:—"When accused was first questioned, he said nothing; when we said we would let him go, he said he was angry and had killed his wife." But it is not on account of these points of difference alone that we distinguish the case from those to which we have referred. We distinguish it because we think that the evidence now taken would support the theory that the murderous act of the accused may have been due immediately to the effect of *ganja*, taken by him on the day when he committed the murder, and that it is unnecessary to refer it to any other cause. (See the discussion in *Chevers' Medical Jurisprudence*, p. 777, as to the effect of *ganja* on the mental faculties and the cases discussed at p. 789 and the following pages). The accused, indeed, says, in his examination before the Court of Session, that he was not "given to drinking." But it is not clear that the question to which he gives this reply has reference to *ganja*. Some of the witnesses examined at the further enquiry say that "he used not to take *ganja*," but that for several years past he was "mad." From the reasons which some of them give for considering him mad, it seems that they use the term vaguely. One of them says:—"He used to be insane daily for an hour and regain his senses." When "out of his senses, he used to take his clothes off and run about." Such a constantly

(3) Huntingdon Summer Assizes, 1848. (4) I. L. R., 10 Bom., 512.

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recurring disregard of decency might be due to the daily use of *ganja*. Dr. Nolan, who had him under observation at the Colaba Asylum, says:—"Physical examination did not elicit any conformation typical of insanity; but the slowness and hesitation with which he replied to my questions indicated noticeable clouding of the mental faculties,—such a condition as would be expected in the case of a person addicted to the consumption of *ganja*." He adds:—"While excited, he sometimes stripped himself and refused to wear his clothes. This latter fact being indicative of absence of moral perception." It is possible that the witnesses denied that the accused habitually used *ganja*, because, at the *ganja* shop, *ganja* "is not sold to Bhils." Of course, any such prohibition may have been evaded. But what is more to the purpose is, that the accused told Dr. Nolan that he had eaten *ganja* on the day of the murder. This admission can leave no doubt on the point, when taken with Dr. Nolan's own observation of the accused's condition. Dr. Nolan, indeed, considered the accused to be insane. But he says that his insanity was due to his being a *ganja* eater, and he adds that "a paroxysm of homicidal mania" resulted while he was "under the influence of the drug." He bases this opinion partly on what the accused told him. On the evidence, therefore, we are disposed to believe that the accused killed his wife while in a state of "intoxication" from the recent use of *ganja*. We prefer so to speak of his state; for though it may be that the continued use of *ganja* for some years had induced a "noticeable clouding of the mental faculties," and that, while under the influence of the drug on the 12th January, 1884, he found himself unable to resist an impulse to kill that suddenly came upon him yet the case is clearly distinguishable from that of *Lakshman valad Dagdu* (5), in which, while confirming the conviction and sentence, as we could not bring the accused within the protection of section 84 of the Indian Penal Code, we nevertheless saw ground for recommending him to the consideration of Government. We see no sufficient ground for doing so in the present case, which must be considered with reference to the provisions of sections 85 and 86 rather than with reference to section 84 of the Code. As there is nothing to show that the *ganja* which intoxicated the accused was administered to him without his knowledge or against his will, he is not protected by section 84. Nor, indeed, as we have already said, was he incapable of knowing the nature of his act. If he had been so incapable, section 86 would have required us to deal with him as if he had the same knowledge as he would have had if he had not been intoxicated.

(5) I. L. R., 10 Bom., 512.

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We think that, under all the circumstances, the Judge rightly refrained from passing sentence of death. We dismiss the appeal.

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11 March 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Nana Mahadev.*

Abkari Act (Bom. Act V of 1878), Sec. 45—Penal Code (Act XLV of 1860), Sec. 33—Omission to open shops—Act—Breach of license.

The accused, a license under the Bombay Abkari Act omitted to open shops at certain places and to keep accounts; he was, thereupon, convicted of a breach of his license under section 45 (c) of the Act:—

Held, that neither omission was an "act" in breach of any condition of the accused's license, section 33 of the Indian Penal Code having no application to the case.

THE accused was convicted under section 45 (*c*) of the Bombay Abkari Act, 1878, in that he being a licensee for selling *bhang* and *ganja* in the Thana District and being bound by the terms of his license to open shops at the places appointed by Collector omitted to open shops at three places and also being bound to keep daily accounts at the shops omitted to keep account at the shop at Kalyan and thereby committed breach of the conditions of his license.

ORDER.—Neither the omission to open shops at certain places, nor the omission to keep accounts was an "act" in breach of any condition of the license held by the accused. As section 33 of the Indian Penal Code has no application to the case, the accused was wrongly convicted under clause (*c*) of section 45 of Bombay Act V of 1878. We, therefore, reverse the conviction and sentence, and direct the fine, if paid, to be refunded.

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11 March 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Shekh Husen.†

Opium Act (I of 1878), Secs. 5, 9,—Rule 35—Chundul—Opium.

Chundul is opium dissolved in water and the boiled so as to be smoked.

A man cannot be said to make a preparation or admixture of opium within the meaning of sections 5 and 9 of the Opium Act of 1878 and section 35 of the rules framed under that Act, for which a license would be required, by merely dissolving the opium, which he has legally purchased, in water for his own use in smoking.

THE accused was convicted under sections 5 and 9 of the Opium Act, 1878, and section 35 of the rules framed under that Act, of manufacturing opium witout a license in that he prepared *chundull* for his private use from opium that he had purchased in the usual legal manner from a licensed vendor.

The Sessions Judge of Thana in making this refrence observed: "I am of opinion that he has neither manufactured opium without a license nor

*Criminal Ruling 19 of 1886. Criminal Review No. 70 of 1886.

†Criminal Ruling No. 20 of 1886. Criminal Reference No. 26 of 1886.

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commited any offence by so doing. Sections 5 and 9 of the Act relate to the manufacture of opium and opium is said to include "preparations or admixtures of opium" (section 3). Section 35 of the rules refers to license for the retail of opium or the manufacture of all or any intoxicating drugs prepard from the poppy. *Chundul* is, I am told, merely opium dissolved in water and then boiled so as to be smoked. I am of opinion that by merely dissolving the opium, which he has legally purchased, in water for his own use in smoking, a man cannot be said to make a preparation or admixture of opium within the meaning of the Act for which a license would be required."

ORDER—For the reasons stated by the Session Judge, we reverse the conviction and sentence and order the fine, if paid, to be refunded.

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19 March 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Kumalia.*

Evidence Act (I of 1872), Secs. 25, 26, 27—Confession—Production of property by the accused themselves.

The Magistrate believed the witnesses, who deposed that the accused admitted the theft, and that the property was recovered in consequence of the admissions: but the judgment showed clearly that the identity of the *jowari* recovered with that stolen was not proved to the Magistrate's satisfaction, except by these admissions:—

Held, that as the prisoners themselves produced the *jowari*, it was by their own *act* and not from any *information* given by them, that the discovery took place, and that so much of the information as amounted to a confession of stealing was inadmissible in evidence.

JUDGMENT.—Mr. Winter, the Magistrate, who tried this case, believed the witnesses who deposed "that the accused admitted the theft, and that the property was recovered in consequence of the admissions." The judgment shows clearly that the identity of the *jowari* recovered with that stolen was not proved to the Magistrate's satisfaction, except by these admissions. The importance of the question, which arises, under sections 25, 26, and 27 of the Indian Evidence Act, is, therefore, apparent.

The two prisoners were in some sort of Police custody at the time. The Head Constable describes them as being among those Bhils whom the Police Patel "collected" on suspicion. The Police Patel himself accused them of complicity in the theft. What followed is described by different witnesses, some of whom depose to the facts, as if they were not of the sort described in section 27. The complainant, *e. g.*, says:—"Kamalia said that he and accused No. 2, Bhikia, had taken the *jowari*; and, on searching Bhikia's house, and in an earthen jar, we found *jowari*, which the two prisoners gave up as that stolen, *viz.*, the *jowari* in the sack." The Police Patel says that Kamalia said that "he and Bhikia had fetched the grain, and he said it was put in Bhikia's house in a jar, and then they

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**Criminal Ruling* 21 *of* 1886. Criminal Review No. 75 of 1886.

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both brought out the jar." Bhikia said nothing at the time according to this witness. Another witness gives similar evidence. The fourth witness says that Bhikia assented to what Kamalia said, and that both of them brought out the *jowari* as that stolen. The Head Constable gives similar evidence.

We may observe, following *Straight*, J., in *Empress of India* v. *Pancham* (1) that, as the prisoners themselves produced the *jowari*, it was by their own *act*, and not from any *information* given by them, that the discovery took place. That case is also an authority for holding in the same circumstances that the production of the property may be proved, but not the accompanying confession made to the Police. In the Full Bench case, *Queen Empress* v. *Babu Lal* (2), the majority of the Judges held, that, where in consequence of information given to the Police by the accused to the effect that he had stolen a cow and calf and sold them to a particular person at a particular place the animals were discovered, so much of the information as amounted to a confession of stealing was inadmissible in evidence. The reasons why the question of the application of the exceptional proviso in section 27 to the facts of the case should be carefully considered, have been expounded by this Court in *Reg.* v. *Jora Hasji* (3) and *Empress* v. *Rama Birapa* (4).

Being of opinion that the confession made to the Police was not admissible in evidence we reverse the convictions and sentences.

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25 March 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Lingo.*

Criminal Procedure Code (Act X of 1882), Sec. 240—Sessions Judge—Charges, more than one—Procedure.

Section 240 of the Code of Criminal Procedure applies to cases where more charges than one are made against an accused person. If he is convicted on one of these charges before the other charges are tried, such other charges may be withdrawn. But when the evidence bearing on all the charges has been recorded and the pleaders heard, it is the duty of the Sessions Judge under section 297 of the Code of Criminal Procedure, to sum up the whole of the evidence and the jury should then, under section 303, be required to return a verdict on all the charges.

ORDER—Sections 240 of the Code of Criminal Procedure applies to cases where more charges than one are made against an accused person. If he is convicted on one of these charges before the other charges are tried such other charges may be withdrawn. In the present case, all the charges were tried at one trial; and, after a conviction had been obtained on one of them, the others were allowed to be withdrawn. It was the duty of the Sessions Judge, under section 297 of the Code, after the evidence bearing on

(1) I. L. R., 4 All., 198. (2) I. L. R., 6 All., 509; see pp. 514, 547, 549.
(3) 11 Bom. H. C. R., 242. (4) I. L. R., 3 Bom., 12.
**Criminal Ruling* 22 *of* 1886, Criminal Review No. 27 of 1886.

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all the charges had been recorded and the pleaders had been heard, to sum up the whole of the evidence, and the Jury should then, under section 303, have been required to return a verdict on all the charges. This course was not adopted; but as the consent given by the Sessions Judge to the withdrawal by the Public Prosecutor of those charges on which the Sessions Judge did not sum up to the Jury has the effect of an acquittal, we do not, in the absence of any appeal by Government, interfere in the exercise of our revisional jurisdiction.

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25 March 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Lalu Khemchund.*

Opium Act (I of 1878),—Opium—Possession—Selling.

The accused kept $2\frac{10}{16}$ tolas of opium in his possession with the intention of selling it:—*Held*, that he did not thereby contravene any rule under the Opium Act.

ORDER.—The accused does not seem to have contravened any rule under the Opium Act by keeping $2\frac{10}{16}$ *tolas* of opium in his possession with an intention to sell the same. The conviction and sentence are reversed. The fine, if paid, to be refunded.

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1 April 1886. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Tukaram.†

Village Police Act (Bom. Act VIII of 1867)—Police Patel—Tamashas.

A Police Patel has no authority, under the Village Police Act to prevent persons from performing *tamashas* in their houses.

THE accused was charged with refusal to obey a lawful order issued by the Police Patel personally under section 15 of the Village Police Act 1867, in that he had a *tamasha* performed in his house during the night of the 13th January 1886 which the Police Patel had personally ordered him not to perform on the night in question and was convicted and sentenced under same section of the Village Police Act VIII of 1867.

The District Magistrate of Nasik, in making the reference to the High Court, observed:—"The Police Patel has no authority under the Police Act to prevent persons from performing "*tamashas*" in their houses and the order given by him was illegal and the disobedience of such an order no offence. The Police Patel erred in holding that the order was a legal one."

ORDER.—For the reasons stated by the District Magistrate, the Court annuls the Police Patel's order and directs that the fine, if paid, be refunded.

**Criminal Ruling* 23 *of* 1886. Criminal Review No. 23 of 1886.

†*Criminal Ruling* 24 *of* 1886. Criminal Reference No. 39 of 1886.

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8 April 1886. WEST & JARDINE, JJ.

Queen-Empress v. Ubhai.*

Criminal Procedure Code (Act X of 1882), Secs. 488, 490—Maintenance—Order—Place of enforcement—Jurisdiction.

The Second Class Magistrate of a place, where the husband is at the time, is competent to enforce the order for maintenance.

ORDER.—The Court is of opinion that the 2nd Class Magistrate of a place where the husband is at the time, is competent to enforce an order for maintenance made against such husband by any Magistrate competent in that behalf.

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8 April 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Nadharya.†

Criminal Procedure Code (Act X of 1882), Sec. 240—Charge—Withdrawal—Concurrent sentences.

The accused were found guilty by the Jury of offences under sections 366, 380 and 323 of the Indian Penal Code, and the Judge passed sentence under section 366 only, the other charges being withdrawn :—

Held, that the charges under sections 380 and 323 could not properly be withdrawn after the accused had been found guilty of them; and that concurrent sentences would have been proper in such a case.

ORDER.—Appeal rejected. The Sessions Judge to be told that the charges under sections 380 and 323, Indian Penal Code, could not be properly withdrawn after the accused had been found guilty on these charges. Concurrent sentences would have been proper in such a case.

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15 April 1886. WEST & JARDINE, JJ.

Queen-Empress v. Abdul Karim.††

Criminal Procedure Code (Act X of 1882), Secs. 297, 301—Judge—Jury—Verdict—Summing up.

In cases tried by jury, the Code of Criminal Procedure does not contemplate the reception of a verdict from the jury without their having the assistance of a summing up by the Sessions Judge since a careful summing up may often change the hasty and superficial impressions of a jury and the parties are entitled to this service.

ORDER.—We would reject. We would at the same time call the attention of the Sessions Judge to this that the Code of Criminal Procedure does not contemplate the reception of a verdict from the jury without their having the assistance of a summing up on the part of the Sessions Judge. A careful summing up may often change the hasty and superficial impression of a jury and the parties are entitled to this service.

**Criminal Ruling* 25 *of* 1886. Criminal Reference No. 42 of 1886.

†*Criminal Ruling* 26 *of* 1886. Criminal Appeal No. 62 of 1886

††*Criminal Ruling* 27 *of* 1886. Criminal Appeal No. 63 of 1886.

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29 April 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Balu Hathi.†

Police Regulation (XII of 1827), Sec. 27—Police Patel—Suspected characters—Failing to attend the daily muster.

The accused, suspected characters, were repeatedly warned to attend the daily muster, but failed to do so. They were all convicted, under section 174 of the Indian Penal Code, of non-attendance in obedience to an order from a public servant, *i. e.*, the Police Patel:—

Held, reversing the conviction, that section 27 of Regulation XII of 1827 contemplates the taking of security for good behaviour, or with the assent of the person concerned, the more lenient measure described therein; and that the Magistrate alone could take these steps and the proper remedy, for failure to comply with the terms imposed and accepted, was an exaction of security for good behaviour.

THE accused persons were convicted of non-attendance in obedience to an order from a public servant under section 174 of the Indian Penal Code. The accused were *kolis* and their names were entered in the register of suspected characters and they were warned repeatedly to attend the daily muster held by the Police Patel, but failed to do so.

The Sessions Judge of Ahmedabad, in referring this case to the High Court, observed:—"The question is whether the accused were legally bound to attend the muster at the 'roll-call' by Police Patel. The evidence does not show, and the judgment does not state under what law the order was given: The only law applicable seems to be Regulation XII of 1827, section 27, clause 2, but under that law as I understand it, a written order should have been given, and the signature of the accused should have been taken on a copy of it 'in token of his assent.' There is no evidence that this course was adopted".

ORDER.—It is necessary that the criminal classes and suspected persons should be kept under control but only in the ways prescribed by law. Regulation XII of 1827, section 27, contemplates the taking of security for good behaviour and alternatively with the assent of the person concerned the more lenient measures described in the latter part of the section. It is the Magistrate only who can take these steps and the proper remedy in case of a failure to comply with the terms imposed is an exaction of security for good behaviour.

In the present case everything was done contrary to the law and the Court reverses the convictions and sentences.

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29 April 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Sida.* Queen-Empress v. Jugdella.*

Criminal Procedure Code (Act X of 1882), Sec. 303—Judge—Jury—Questions.

In cases tried by jury it is inexpedient to put a series of questions to the jury unless when

†*Criminal Ruling* 28 *of* 1886. Criminal Reference No. 169 of 1886.

**Criminal Ruling* 29 *of* 1886. Confirmation case No. 8 of 1886; Criminal Appeals Nos. 50, 51 to 60 of 1886.

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called on for their verdict on the different heads of charge, they find themselves in difficulties which have to be resolved in that way.

ORDER.—The Court confirms the sentence of death passed on the accused Jugdella *bin* Muka.

The Court rejects the appeals of all the appellants.

The Sessions Judge to be told that the Court considers it inexpedient to put a series of questions to the jury, unless when called on for their verdict on the different heads of charge they find themselves in difficulties which have to be resolved in that way.

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6 May 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Rajaram.†

Abkari Act (Bom. Act V of 1878), Sec. 45 (c)—Toddy shops—Failure to open shops.

The accused was convicted of a breach of the license under section 45 (*c*) of the Bombay Abkari Act, in that he did not establish *toddy* shops at certain places within a certain time:—

Held, reversing the conviction, that the license, by not specifying any time for opening of shops, left the matter to subsequent adjustment between the Collector and the contractor, who finally came to terms.

THE accused was convicted under section 45 (*c*) of the Bombay Abkari Act in that he did not establish a *toddy* shop at Alibag and since he did not establish a shop at Tarni village until 10 November 1885, his license running from 1st August 1885.

JUDGMENT:—The Court reverses the conviction and sentence on the ground that the license, by not specifying any time for the opening of the shops, left the matter to subsequent adjustment between the Collector and the contractor who finally came to terms.

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6 May 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Shrinivas.*

Criminal Procedure Code (Act X of 1882), Secs. 437, 438—Discharge—District Magistrate—Reference.

The accused was charged with theft and discharged by the First Class Magistrate. The District Magistrate referred the case to the High Court:—

Held, that the High Court need not interfere in a case of mere discharge, the District Magistrate being competent to take steps himself should he deem it necessary.

THE accused was charged on behalf of the Southern Maratta Railway Company with the theft of certain wood and screws from the premises of the Badami Railway station, which wood he employed as a carpenter to convert into a child's craddle. He was placed before the First Class Magistrate of Bagalkot.

The District Magistrate of Bijapur referred the case to the High

†*Criminal Ruling* 30 *of* 1886. Criminal Review No. 128 of 1816.

* *Criminal Ruling* 31 *of* 1886. Criminal Reference No. 52 of 1886.

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Court, as he has of opinion that a sufficient *prima facie* case was made out to require the Magistrate to frame a charge against the accused and that he was wrong in discharging him.

ORDER:—The Court need not interfere in a case of mere discharge. The District Magistrate may take steps himself if he deems them necessary.

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6 May 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Revanshidapa.*

District Police Act (Bom. Act XII of 1867, Sec. 33—Master—School-boys—Nuisance.

The masters of school were convicted of wilfully permitting a common nuisance to continue, by allowing some two hundred pupils to obey the calls of nature daily in a plot of ground within the town and close enough to other houses to cause annoyance and danger to health :—

Held, that children once outside the school are not so under the control of the master as to make the latter criminally responsible, as their parents might be, for a nuisance created by their children.

If a school is so conducted as to be a nuisance the complainant can get a remedy by injunction.

THE accused were convicted of wilfully committing common nuisance to continue under section 33 of the District Police Act, 1867, in that, they, the Head and Assistant School Master of the Canarese school and girls' school permitted their pupils to the number of some two hundred to obey the calls of nature daily in a plot of ground within the town and sufficiently close to other houses to cause annoyance and danger to health.

ORDER.—The Court does not think the children once outside the school are so under the control of the master as to make the latter criminally responsible as their parents might be, for a nuisance, created by their children.

If the school is so conducted as to be a nuisance, the complainant can get a remedy by injunction.

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27 May 1886. JARDINE & FARRAN, JJ.

Queen-Empress v. Jakin.†

Abkari Act (Bom. Act V of 1878), Sec. 43 (a), 54—Importing liquor.

The accused was convicted of importing liquor from Goa into British India without a permit. The bottle and the liquor were ordered to be confiscated, but no other sentence was passed:—

Held, that the Magistrate was bound to have passed some sentence, however small, after convicting of the offence.

THE accused was charged with importing liquor into the Bombay Presidency without a permit, in that the accused brought from the Goa territory into British territory a bottle containing a small quantity of Goa liquor without a permit for the import of the same. She was found

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*Criminal Ruling 32 of 1886. Criminal Review No. 122 of 1886.

†Criminal Ruling 33 of 1886. Criminal Review No. 199 of 1885.

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guilty and the bottle and the liquor contained therein confiscated and no further penalty was imposed.

ORDER.—As the accused cannot be found, the record and proceedings to be returned with an intimation to the Magistrate that he was bound to have passed some sentence, however small, after convicting of the offence.

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27 May 1886. JARDINE, & FARRAN, JJ.

Queen-Empress v. Farsu.*

Abkari Act (Bom. Act V of 1878), Sec. 47—Mowra liquor—Quantity in excess.

Under section 47 of the Bombay Abkari Act, the possession of 2 gallons and 2½ seers of mowra liquor is illegal in the absence of any license, permit, pass or special orders and the law does not allow the head of a family to exceed that limit merely because he has a family of ten or twelve members, of whom five are adults.

ORDER.—It appears from the evidence that the two gallons of country liquor found in the house of the accused was in his possession. The possession of such a quantity was illegal in the absence of any license, permit, pass or special order; see section 47 of Bombay Act V of 1878. The Magistrate has held to the contrary, because there were several adult persons living in the house of accused; he has assumed that each of these persons was in possession of an aliquot part of the liquor which divided by the number of persons does not exceed the legal limit.

We think, however, that the law does not allow the head of a family to exceed that limit merely because he has adults living with him.

We are of opinion that the Magistrate was wrong in his finding. We set aside the acquittal and convict the accused under section 47 of the above Act and sentence him to a fine of eight annas.

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17 June 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Shriram.†

Poisons Sale Act (VIII of 1866), Sec. 13—Magistrate—Jurisdiction.

A First Class Magistrate alone can try an offence of omitting to keep accounts of the sale of poisons, under section 13 of the Bombay Poisons Sale Act, and a Second Class Magistrate has no jurisdiction to try such a case.

THE accused was tried by the Second Class Magistrate of Pachora on a charge of having omitted to keep accounts of the sale of poisons in the prescribed form, under section 13 of Act VIII of 1866 (Bombay).

The District Magistrate of Khandesh, in referring the case to the High Court, remarked:—

"The conviction and sentence appear to me illegal inasmuch as the trial was conducted by a Second Class Magistrate who, in my opinion, has no jurisdiction under this Act.

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*Criminal Ruling 34 of 1886. Criminal Appeal No. 48 of 1886.

†Criminal Ruling 35 of 1886. Criminal Reference No. 67 of 1886.

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"From the definition of the term "Magistrate" as given in this Act when read along with the definition given in General Clauses Act X of 1886 also of the Bombay Council, I am inclined to think that by the term "Magistrate" as used in section 13 of this Act is meant a Magistrate exercising the Full Powers of a Magistrate, *i. e.*, a First Class Magistrate under the Criminal Procedure Code."

ORDER:—For the reasons stated by the District Magistrate, the conviction and sentence are annulled. The fine to be refunded.

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17 June 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Sheik Saheb.*

Penal Code (Act XLV of 1860), Sec. 380—Theft—Railway carriage—Railway Station.

The accused was convicted on the offence of theft, under section 380, Indian Penal Code, in that he stole some luggage and cash from a Railway carriage when it was at a Railway Station:—

Held, upholding the conviction, that though the Railway carriage was not a building, the Railway Station was.

THE accused was convicted of an offence under section 380 of Indian Penal Code, of having committed a theft in a railway carriage. The accused stealthily removed the complainant's luggage containing rice, potatoes and ready cash, from a railway carriage, while the complainant was changing it at Manmar station at the request of the Station Master.

ORDER.—Record and proceedings to be returned because though the railway carriage was not a building, the railway station was.

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17 June 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Balu.†

Criminal Procedure Code (Act X of 1882), Secs. 423 (b) (2), 138—Penal Code (Act XLV of 1860), Secs. 414, 457—Conviction—Alteration.

The accused was convicted, by a Second Class Magistrate, of house-breaking by night, under section 457, Indian Penal Code. In appeal, the First Class Magistrate altered the conviction to one under section 414, Indian Penal Code:—

Held, (1) that section 457, Indian Penal Code, applied to a composite offence, and, under section 238, Criminal Procedure Code, an accused may be convicted of any element of the composite offence;

(2) that under section 423 (*b*) (2) of the Code of Criminal Procedure, it was competent to a Court of Appeal to record a new finding and sentence.

THE accused was convicted by the Second Class Magistrate of Pandharpur for the offence of house-breaking by night under section 457, Indian Penal Code. On appeal, the First Class Magistrate held that there was no evidence of house-breaking, and that the offence committed was one of assisting in the concealment of stolen property under section 414, Indian

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*Criminal Ruling 36 of 1886. Criminal Review No. 173 of 1886.

†Criminal Ruling 37 of 1886. Criminal Reference No. 63 of 1886.

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Penal Code. He accordingly altered the finding from house-breaking under section 417, Indian Penal Code, to one under section 414 of the Code.

The District Magistrate of Sholapur referred the case to the High Court, observing: "In the original trial no separate charge of theft was preferred against the appellant—he was only charged under Section 457, Indian Penal Code, and it is doubtful then if the provisions of section 237, Criminal Procedure Code, are applicable in the original case and if not applicable then, can they be made so in the appeal so as to authorise the the alteration of the charge and finding to an offence to which the accused (appellant) was not called on to plead at the trial."

ORDER:—Record and proceedings to be returned for the following reasons:—

Section 457, Indian Penal Code applies to a composite offence and under section 238, Criminal Procedure Code, an accused may be convicted of any element of the composite offence. Under section 423 (*b*) (2) the Court of Appeal can record a new finding and sentence and this is what has been done in the present case.

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17 *June* 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Kaoji.*

Cattle Trespass Act (I of 1871), Sec. 24—Seizure of cattle—Escape.

Certain cattle impounded in a cattle pound escaped: the next day they were found grazing in charge of their owner. The Police Patel attempted to seize them again, when the owner resisted. The Police Patel, thereupon, instead of attempting to seize the cattle, lodged a complaint before a Magistrate, who under section 24 of the Cattle Trespass Act, fined the accused:—

Held, that to resist the seizure of cattle under the circumstances was not an offence punishable under section 24 of the Act.

THE facts of this case were that some cattle impounded in the village of Roha escaped from the pound. The day following their escape the Patel attempted to seize them again from the place where they were grazing in charge of the accused. The latter resisted and the Patel apparently desisted from attempting to seize the cattle, and made a complaint on which the present case resulted.

The Third Class Magistrate, who tried the case, convicted the accused under section 24 of Act I of 1871 of rescuing cattle on their way to the pound, and sentenced the accused to pay a fine of three rupees, and further ordered that as it was necessary the fine due to the pound should be paid, the cattle should be re-impounded, and kept until the fines were levied in the usual manner, unless the accused paid at once what was due.

The District Magistrate of Colaba, in making the reference to the High Court, observed:—"Both portions of the order appear to me of doubtful legality. It is questionable whether after the cattle escaped the pound

**Criminal Ruling 38 of 1886. Criminal Reference No. 64 of 1836.*

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keeper had authority to seize them again, especially as this re-seizure did not follow the escape immediately, but took place the day following it, and therefore whether any offence was committed in opposing the seizure, and it is to me equally doubtful whether the Magistrate could pass the order directing the fines due to the pound to be levied in addition to the fine inflicted under section 24, and further direct that in default of such payment the cattle should be re-impounded :—

ORDER :—For the reasons stated by the District Magistrate, the Court reverses the conviction and sentence and the fine to be returned, if paid.

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24 June 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Gunya *

Penal Code (Act XLV of 1860), Sec. 291—Nuisance—Prohibition—Continuance—Proof.

In order to support a conviction of an offence of continuance of nuisance, after an injunction to discontinue under section 291, Indian Penal Code, it is necessary that the order of the Magistrate forbidding the continuance of the nuisance, or evidence of notice of such a character as to make plain the precise terms of the order and notice, be recorded in the case. Strict proof of all the circumstances constituting an offence, especially where the offence is one which is not *malum in se*, should be required as the basis of a conviction.

ORDER.—No order issued by Mr. Vidal is recorded in the proceedings, nor is there any evidence of any notice of such a character as to make it plain what the precise terms of the order and the notice were. Strict proof of all the circumstances constituting an offence and especially of one which is not *malum in se* should be required as the basis of a conviction as such proof in this case fails, conviction and sentence are reversed. The fine, if levied, is to be restored.

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1 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Dharamdas.†

Salt Act (Bom. Act VII of 1873), Sec. 54—Procedure.

Section 54 of the Bombay Salt Act, 1873, is not an enactment under which, by itself, a charge can be laid. There must, in addition, be reference to some other provision of the Act or some rule in pursuance thereof according to the actual character of the offence imputed. Nor can a mere loose description of salt as contraband satisfy the requirements of the law as to what is contraband salt for the purposes of the penal sections of the Salt Act. The definitions given in section 3 must, in each case, be satisfied by evidence of facts giving to the salt the character there indicated.

THE accused was convicted of an offence under section 54 of the Bombay Act VII of 1873, of retaining contraband salt in possession knowing it to be such, in that he being the Revenue and Police Patel of the village retained spontaneously produced contraband salt in his possession.

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*Criminal Ruling 39 of 1886. Criminal Review No. 181 of 1886.

†Criminal Ruling 40 of 1886. Criminal Review No. 161 of 1886.

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The High Court having called for the papers in review, the following order was recorded at the first hearing on 23rd May 1886.

JARDINE, J.—The Magistrate seems to have assumed too hastily that the salt was contraband, as if all salt spontaneously created was contraband when collected: and as if the person in possession of such salt, even when the quantity is less than 40 seers (see section 38 of Bombay Act VII of 1873) were bound to account for his possession. Now in this Act there is no such rule of evidence as in section 10 of Act I of 1878 (Opium Act). Collection of spontaneous salt is manufacture within the meaning of the definition: but to justify conviction under section 52, I think evidence is necessary to show (1) that the salt was manufactured or collected without a license, (2) that the accused had reason to believe it was contraband in regard to the collection having been unlicensed. The accused was not charged as an unlicensed manufacturer under section 49. The matter is one of great public importance as the Magistrate even when the 40 seers limit has not been exceeded puts the *onus* of showing the existence of a license on the possessor. I would adjourn the hearing and ask the Government Pleader to appear.

ORDER.—Section 54 of the Bombay Salt Act VII of 1873 is not an enactment under which by itself a charge can be laid. There must in addition be reference to some other provision of the Act or to some rule framed in pursuance thereof according to the actual character of the offence imputed. Nor can a mere loose description of salt as contraband satisfy the requirements of the law as to what is contraband salt for the purposes of the penal sections of the Salt Act.

The definition given in section 3 must in each case be satisfied by evidence of facts giving to the salt the character there indicated. We reverse the findings of the Magistrate at the point immediately preceding the preparation of the charge and direct that the case be enquired into anew and disposed of in accordance with the provisions of the law.

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8 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Ram Nhanu.*

Penal Code (Act XLV of 1860), Secs. 379, 380—Theft—Repetition—Grave offence—Sentence.

Every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishments.

THE accused was convicted of having committed theft in a dwelling house in that he dishonestly took away seven bundles of sprots belonging to the complainant Soth out of the building used by her as a dwelling

*Criminal Ruling 41 of 1886. Criminal Review No. 187 of 1886.

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house. The trying Magistrate, finding that the accused was previously convicted of offences under sections 379 and 380, Indian Penal Code sentenced him to two years' rigorous imprisonment. On appeal, however, the Sub-divisional Magistrate of Ratnagiri, reduced the sentence to six months.

ORDER.—Record and proceedings to be returned. The Sessions Judge to be informed that every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishments.

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8 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Bapu Jaga.*

Penal Code (Act XLV of 1860), Sec. 290—Nuisance—Cow-dung cakes—Public road.

The accused was charged with placing cow-dung cakes to dry close to a public road in such a manner as to cause annoyance to the public and convicted under section 290, Indian Penal Code:—

Held, that the mere placing of the cow-dung cakes, to dry, close to a public road, without any evidence to show that any material annoyance was actually caused to the public, did not constitute the offence of public nuisance.

THE accused was convicted under section 290 of the Indian Penal Code of committing nuisance in that he placed cow-dung cakes to dry close to a public road in the Kaira camp in such a manner as to cause annoyance to the public.

ORDER.—There is no evidence to show that the act caused material annoyance to the public. The Court reverses the conviction and sentence and directs that the fine, if paid, be refunded.

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15 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Currimbhoy.†

City of Bombay Municipal Act (Bom. Act III of 1872), Sec. 225—Wool—Storage.

The accused was charged with using a place within the City of Bombay for the storage of wool, without a license from the Bombay Municipal Commissioner, and fined Rs. 10 under section 225 of Bombay Act III 1872, as amended by Act IV of 1878:—

Held, that notwithstanding that there is express mention of "wool" for purposes of washing and drying in the first part of the section and none later on, the words "other articles" may include the case of the storage of wool.

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15 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Jethalal.††

Opium Act (I of 1878), Sec. 5—Accounts—Omission.

The accused was convicted of the offence of contravening a rule made and notified under section 5 of the Opium Act, 1878, by not keeping a regular account of the opium in his possession, in accordance with the stipulation in his license:—

**Criminal Ruling* 42 *of* 1886. Criminal Review No. 191 of 1886. †*Criminal Ruling* 43 *of* 1886. ††*Criminal Ruling* 44 *of* 1886. Criminal Review No. 160 of 1886.

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Held, that the person who contravenes a condition of a license imposed under a rule may be considered guilty of a breach of the rule.

THE accused was convicted under section 9 (*g*) of the Opium Act (I of 1878), of contravening the rule under the Opium Act, in that he contravened a rule made and notified under section 5 of the Opium Act of 1878 by not keeping a regular account of the opium found in his possession.

PER CURIAM.—The person who contravenes a condition of a license imposed under a rule, may be considered guilty of a breach of the rule. But this rule itself is not here set forth or specifically referred to. The Magistrate should complete his record by quoting the rule and referring to the Government Gazette and should then send up his proceedings again.

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22 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Mohanlal.*

Abkari Act (Bom. Act V of 1878), Distillery Inspector's report—Evidence.

In a prosecution under the Bombay Abkari Act, the report of a Distillery Inspector to the effect that certain liquor was illicit is not admissible in evidence, and there must be independent evidence to show that it was illicit.

THE District Magistrate of Kaira in making this reference, remarked:—"In case No $\frac{5}{17}$, the trying Magistrate has accepted a report of the Distillery Inspector as evidence against the accused, I, therefore, submit the record and proceedings in the case for orders."

ORDER.—For the reasons given in the accompanying minute, the Court reverses the conviction and sentence and directs the fine, if paid, to be refunded.

The Court reverses the conviction and sentence on the ground that the illicit nature of the spirit is not legally proved, as the report of the Inspector was improperly admitted in evidence.

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22 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Kutia Alu.†

Penal Code (Act XLV of 1860), Sec. 224—Charged—Escape—Custody—Peon of the Daroga in the Salt Department.

The accused was found carrying salt without a permit and was arrested by a Daroga in the Salt Department and handed to a peon in the Department to be taken to the office of the Daroga. On the way to the office of the Daroga, the accused escaped from the custody of the peon. The Magistrate discharged the accused on the ground that he was not charged with or convicted of an offence within the meaning of section 224, Indian Penal Code:—

Held, that the Magistrate took the word "charged" in too narrow a sense, such as would excuse a person who was arrested on the spot, for murder or grievous hurt and escaped. An arrest of a person by an officer authorised in that behalf is a charging, *i. e.*, an imputation

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**Criminal Ruling* 45 *of* 1886. Criminal Reference No. 85 of 1886.

†*Criminal Ruling* 46 *of* 1886. Criminal Reference No. 83 of 1886.

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of the alleged offence, though but a *prima facie* imputation until the case goes before some functionary authorised to deal with it.

IN this case the accused who was arraigned on a charge of escaping from lawful custody under section 224 of the Indian Penal Code, was discharged under section 253 of the Criminal Procedure Code. The circumstances under which he came into the custody from which he is said to have escaped are as follows:—

On the night of the 16th May 1886, in the village of Karvale, Taluka Basin, he was found carrying salt without a permit, and was arrested by the complainant Nasarwanji Edulji who is a Daroga in the Salt Department. He was then given in charge of Sakharam Mahadu—a peon in that Department; and while he was being taken to the office of Daroga at Juchandra he slipped away.

The Magistrate First Class discharged the accused on the ground that at the time the accused escaped from custody he was not, within the meaning of section 224, Indian Penal Code, "charged with or convicted of an offence."

The District Magistrate of Thana, in making the reference to the High Court, observed:—"I do not agree in the view taken by the Magistrate, and I think the Magistrate is wrong in holding that the word "charged" in section 224, Indian Penal Code, refers only to cases where an accused escapes after a formal indictment has been drawn up during the hearing of a case against him. If this were the intention of the Legislature, no man could ever be punished for escaping from custody at any time previous to the trial of the case. The reasoning of the Magistrate on which the order of discharge of the accused is based, suggests that the custody in the present case, from which the escape was effected was not a lawful custody. Section 9 of the Salt Act VII of 1873 authorizes an officer appointed under that Act to arrest and detain any person on reasonable suspicion of his having committed an offence against that Act. Lawful custody should, I think, be held to commence at the moment when a person is arrested by any officer who has the legal power to arrest him—whether the arrest is on suspicion or after formal complaint. In the present case the Daroga—complainant had the legal power to arrest the accused Kutia, and he did arrest him, and there is nothing in the proceedings to show that in taking the action he did, he was not justified by "reasonable suspicion" under section 9 of the Act.

ORDER.—For the reasons stated in the accompanying Judgment, the Court sets aside the order of discharge passed by the Magistrate and directs that the case be disposed of according to law.

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The Magistrate First Class has taken "charged" in a too narrow sense such as would excuse a person arrested on the spot for murder or grievous hurt for escaping. An arrest of a person by an officer authorized in that behalf is a charging, *i. e.*, an imputation of the alleged offence though but a *prima facie* imputation until the case goes before some functionary authorized to deal with it. The Magistrate's decision must be set aside and the case disposed of according to law.

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29 July 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Sagram.*

Penal Code (Act XLV of 1860), Secs. 35, 391, 397—Whipping—Consecutive sentences.

The accused was convicted of house-breaking by night in order to commit theft and of theft in a building and sentenced to suffer rigorous imprisonment for eighteen months and to receive twenty stripes with a light ratan, the sentence to commence after the expiration of the one in another case (*viz.*, eighteen months' rigorous imprisonment and twenty stripes):—

Held, that a sentence of whipping must be executed fifteen days after the sentence is pronounced or on confirmation of the sentence in appeal. It is only sentences of imprisonment that can be pronounced to take effect in succession (sections 35 and 397, Criminal Procedure Code). The sentence of whipping should not have deferred the infliction of the punishment so as to contravene the provisions of section 391 of the Code of Criminal Procedure.

THE accused Sagram Natha was convicted of house breaking by night in order to commit theft and theft in a dwelling house under sections 457 and 380 of the Indian Penal Code. He was sentenced by the First Class Magistrate to eighteen months' rigorous imprisonment and to receive twenty stripes with a light ratan (section 4 of Act VI of 1864), he having been twice previously convicted of the same offence. The Magistrate in his decision further ordered that this sentence was to take effect after the expiration of the sentence passed on the same accused in another case of the same Magistrate's file, the sentence in the previous case was eighteen months' rigorous imprisonment and twenty stripes with a light ratan.

The Sessions Judge of Ahmedabad, in making this reference to the High Court, remarked:—"It appears therefore that in case No. 48 of the same Magistrate's file, Sagram Natha was sentenced on 22nd May 1886 to eighteen months' regorous imprisonment and whipping twenty stripes in addition to such imprisonment and in case No. 49 of the same Magistrate's file, Sagram Natha was sentenced on the same date upon another conviction to suffer another term of eighteen months' rigorous imprisonment and to whipping twenty stripes on the expiration of the previous sentence passed in case 48. If the latter sentence is to be carried out then the convict Sagram Natha will have a sentence of whipping hanging over him *in terrorem* for eighteen months. Under section 391 of the Code of Crimi-

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**Criminal Ruling* 47 *of* 1886. Criminal Reference No. 86 of 1886.

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nal Procedure when an accused is sentenced to whipping in addition to imprisonment the whipping shall be inflicted as soon as practicable after the expiration of fifteen days *from the date of the sentence* or in case of an appeal as soon as practible after the receipt of the order of the Appellate Court confirming the sentence. It appears to me that a sentence of whipping to take effect eighteen months after the date of sentence is not only an improper sentence but an illegal one under section 391 of the Criminal Procedure Code. As the accused has already been sentenced to an additional punishment of whipping in the previous sentence passed in case 48, the second sentence of whipping could not properly be carried into execution at once under the provisions of section 391 of the Criminal Procedure Code."

ORDER.—The Court cancels the sentence of whipping passed by the Magistrate First Class as recommended by the Sessions Judge.

A sentence of whipping must be executed 15 days after the sentence is pronounced or on confirmation of the sentence in appeal. It is only a sentence of imprisonment that can be pronounced to take effect in succession. Section 35 and 397 Criminal Procedure Code. The sentence of whipping should not have deferred the infliction of this punishment so as to contravene the provisions of section 391, Criminal Procedure Code. It is, therefore, illegal.

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16 August 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Bhaiji.*

Penal Code (Act XLV of 1860), *Sec. False, representation—Caste—Maxim*—Ex turpi causa non oritur actio.

The accused falsely represented to a Kunbi that a woman Harkha of the Koli caste was of a higher caste, namely a Kunbi, and thereby induced him to remarry her and to pay to them some money. The Magistrate convicted them under section 420, Indian Penal Code. The Joint Sessions Judge in appeal reversed the conviction and sentence. On appeal by the Government:—

Held, that as the Joint Sessions Judge had found that the complainant was not really deceived, the order of acquital was right.

The maxim *ex turpi causa non oritur actio* is not a sufficient excuse for a man who acts in opposition to the provisions of a penal statute and this principle is best illustrated by the familiar case of a man who gave a spurious coin to a prostitute if the prostitute was suing the man, she could hardly succeed in getting compensation, but the person who cheated her committed a breach of the law and was convicted.

Criminal laws form generally a part of the public law not variable in any of the parts by the volition of private individuals and they are not necessarily deprived of their effect merely by the possible culpability of the individuals who may be the sufferers by the breach.

THE complainant was a *kunbi* by caste and the accused a *koli*. The accused represented to the complainant that he had brought a *kunbi* woman,

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**Criminal Ruling* 49 *of* 1886. Criminal Appeal No. 117 of 1886.

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and that she was eligible for marriage, although she in reality was a *koli* woman. The complainant agreed to take the woman from the accused for R. 65. The accused brought the woman in the evening and handed her over the complainant; and in the next morning he executed an agreement to the complainant to the following effect:—"We have handed Bai Harka to you; on that account you have paid us Rs. 40. The agreement between us is that if hereafter any one comes representing that he is the husband of Bai Harka or any relation of hers comes and makes a claim or if she runs away or if any one asserting a claim takes her away, then we are responsible to you. We take the responsibility and if he fail he will repay the Rs. 40 and costs. I Bhaiji voluntarily execute this bond. If the woman turns out not to be of the *kunbi* caste I will be responsible."

The First Class Magistrate of Broach found the accused guilty of cheating and sentenced him to four months rigorous imprisonment. On appeal, Joint Sessions Judge of Broach, reversed the conviction and sentence.

PER CURIAM.—This is an appeal made by the Government of Bombay against an order of acquittal in appeal by the Joint Sessions Judge of Broach, who reversed the conviction and sentence passed upon one Bhaiji Bechar by the Magistrate First Class on the 20th February 1886.

In this case we do not agree with the Sessions Judge that the maxim "*Ex turpi causa non oritur actio*" is a sufficient excuse for a man who acts in opposition to the provisions of a penal statute. A familiar case, which illustrates the principle, is the case of a man who gave a spurious sovereign to a prostitute. Here if the prostitute were suing the man, she could hardly have succeeded in getting compensation for a breach of contract or damages for an injury. Yet the person who paid her a false sovereign committed a breach of the law and was convicted and punished.

Criminal laws form generally a part of the public law not variable in any of its parts by the volition of private individuals and they are not necessarily deprived of their effect merely by the possible culpability of the individuals who may be the sufferers by the breach. Here, however, the Judge has found upon the facts that the complainant in the case was not really deceived by the accused. We cannot say that there was no ground for this view of the case. Without deceit, however, there can be no cheating within the definition given in section 416, Indian Penal Code.

We must, therefore, dismiss the appeal made on behalf of Government.

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16 August 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Khandu.*

Penal Code (Act XLV of 1860), Secs. 448, 457—Separate charges.

**Criminal Ruling 50 of 1886. Criminal Reference No. 90 of 1886.*

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The accused was convicted of house-breaking by night and of house-trespass in respect of the same acts:—

Held, that the second head of the charge was superfluous, inasmuch as it involved the same intention substantially as the first, which intention ought not to be applied to support two different charges.

THE accused Khandu was tried and convicted of house-breaking by night and house-trespass under section 457 and 448 of the Indian Penal Code and was sentenced to undergo three months' rigorous imprisonment for the first head of the charge and to undergo one month's rigorous imprisonment for the second head of the charge.

The District Magistrate of Poona, in making the reference, observed:—"As house-trespass forms a part of the offence of house breaking, a charge under section 457, Indian Penal Code, would have been sufficient."

ORDER.—The second head of the charge is superfluous. It involves moreover the same intention substantially as the first which intention ought not to apply to support two different charges. The Court reverses the conviction and sentence on the second head of the charge. Maintaining the conviction on the first head, the Court reduces the sentence to 40 days' rigorous imprisonment counting from the date of conviction. The fine, if paid, to be refunded.

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19 August 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Lakshmi.*

Penal Code (Act XLV of 1860), Sec. 114—Abetment—Presence.

To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement or unless some specific duty of prevention rests on him, which he leaves unfulfilled, in such wise that he may be safely taken as having joined in a conspiracy for the perpetration of the offence.

ORDER.—The Court alters the conviction to one under section 291, Indian Penal Code, and reduces the sentence to seven years' transportation for the following reasons:—

To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement or unless some specific duty of prevention rests on him which he leaves unfulfilled in such wise that he may safely be taken as having joined in a conspiracy for the perpetration of the offence. Here the accused woman held no special position and her mere knowledge of what was doing or about to be done cannot be converted into abetment. Her real offence, the one she virtually

*Criminal Ruling 51 of 1886. Criminal Appeal No. 129 of 1886.

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admits, was the concealment of evidence of the murder of the drowned boy. Of this she should be convicted under section 201, Indian Penal Code, and sentenced to 7 years' transportation.

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19 August 1886. RESOLUTION IN CHAMBERS.

Karwar Sessions Judge's Letter.*

Sessions Judge—Sessions—Holding the Session at another place.

The Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi, instead of at Karwar, for the Sessions of September 1886.

Held:—Assessors can only be chosen from the list prepared under section 321, Criminal Procedure Code, which can only be revised once a year (section 325, Criminal Procedure Code.). The Court, therefore, declined to grant the permission asked for, there being no Assessors available for Sessions at Sirsi.

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16 September 1886. WEST & NANABHAI, JJ.

Queen-Empress v. Govindrao.*

Criminal Procedure Code (Act X of 1882), Secs. 421, 423—Appeal Court—Rejecting appeal—Reducing sentence.

The accused was charged with voluntarily causing grievous hurt and convicted and sentenced to four months' rigorous imprisonment and a fine of Rs. 30 or in default further rigorous imprisonment for two months under section 325, Indian Penal Code. The District Magistrate rejected the appeal, but reduced the sentence of imprisonment in default of payment of fine to one month:—

Held, that the Magistrate could not, after rejecting the appeal, diminish the sentence, but should either have reported the case to the High Court or have heard the appeal as directed by section 423 of the Code of Criminal Procedure.

THE Sessions Judge of Ratnagiri in making the reference to the High Court, remarked:—

"In this case the accused having appealed to the District Magistrate, the District Magistrate without issuing a notice reduced the sentence and rejected the appeal. The convict Govind now applies to this Court desiring that the proceedings in appeal should be reported to the High Court. There is some doubt whether the expression 'inferior' in section 435 would include the Court of a District Magistrate. But this is a question which it does not seem proper for me to decide, so as to deprive the convict of any redress to which he might be entitled, if an irregularity prejudicing him has occurred. Under section 421 an appeal can be rejected summarily and without notice to the appellant only in cases when the Appellate Court considers there is no sufficient ground for interfering. Under section 422, if the Appellate Court is not so satisfied and does not summarily reject the appeal it is bound to cause notice to be given. Under section 423, the Appellate Court is further bound to peruse the

*Criminal Ruling 52 of 1886. †Criminal Ruling 53 of 1886. Criminal Reference No. 104 of 1886.

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record and hear appellant or his pleader before *dismissing* the appeal or reversing or altering the sentence or finding.

"The intention of the Legislature appears to be that if the finding or sentence of the Lower Court be regarded as 'unsatisfactory' in any point, the appellant should have an opportunity of being heard in the whole case. It is possible that the appellant, if he had been heard, might have been able to show grounds for further interference with the finding or sentence and the omission to give him notice under section 422 may, therefore, have possibly caused a failure of justice within the meaning of section 537 by prejudicing the accused-appellant in his defence. The applicant's pleader urges that the appellate judgment is not a judgment within the meaning of sections 367 and 424 of the Criminal Procedure Code. *Vide* I. L. R., 13 Cal., 110 and I. L. R., 11 Cal., 449, therein followed."

ORDER.—The Magistrate could not, after rejecting the appeal, diminish the sentence. He should have sent the case to the High Court or else have heard the appeal as directed by section 423, Criminal Procedure Code. His proceedings subsequent to his rejection of the appeal must be annulled. He may make the requisite reference to this Court.

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30 September 1886. WEST & NANABHAI, JJ.

In re **Abdul Kadri***

Criminal Procedure Code (Act X of 1882), Sec. 548—Proceedings—Copy.

Inasmuch as every one complaining of an offence by which he is injured is affected by the disposal of his complaint, whether the case has been sent up by a Police Officer or not, the petitioner is entitled to a copy of the Magistrate's order of discharge under section 253, Criminal Procedure Code.

ORDER.—The required copies should be furnished. The Magistrate should be told that his explanation is not satisfactory.

Every one complaining of an offence by which he has been injured is affected by the disposal of it, whether the case has been sent up by a Police Officer or not.

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21 October 1886. WEST & SCOTT, JJ.

Queen-Empress v. Mulia.†

District Police Act (Bom. Act VII of 1867), Sec. 31, cl. 4—Nuisance—Making water—Public Street—Annoyance.

To perform the offices of nature, as, *e. g.*, to make water in a public street is an offence, punishable under section 31 (4) of the Bombay District Police Act, provided there be evidence of annoyance to residents or passengers.

**Criminal Ruling* 54 *of* 1886. Criminal Application for Revision No. 236 of 1886.

†*Criminal Ruling* 56 *of* 1886. Criminal Reference No. 124 of 1886.

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THE accused was brought up by the Police before the First Class Magistrate of Ahmedabad on a charge of committing nuisance on a public road by making water at the edge of the Oliphant Road in Ahmedabad. He was acquitted and discharged by the Magistrate on the ground that making water on a public road is not a nuisance, quoting the High Court's Ruling in *Mahadshet Appashet* (1).

The District Magistrate of Ahmedabad in referring this case to the High Court remarked: " I am respectfully of opinion that Mr. Fernandez is wrong. It is true that as ruled by the High Court the act of performing the offices of nature in a public street is not any offence under section 278 of the Indian Penal Code " but it is, I presume, certainly an offence under section 31 clause 4 of the Bombay Act VII of 1867. The case before Mr. Fernandez was not under section 278, Indian Penal Code, but under section 31 clause (4) of Bombay Act VII of 1867. The words in the latter are " or commits nuisance. " The ordinary meaning of these words distinctly covers and I consider primarily implies such acts as making water or relieving nature in the street and there seems nothing in the High Court's ruling to conflict with this view. "

ORDER.—Record and proceedings to be returned and communicate the following:—

It is not worth while, in so petty a case, to call on the accused to show cause under section 439, Criminal Procedure Code. The proceedings may be returned. But the Magistrate should be told the Court concurs in the District Magistrate's view, provided there be evidence of annoyance to residents or passengers.

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21 October 1886. WEST & SCOTT, JJ.

Queen-Empress v. Nagowa.*

Abkari Act (Bom. Act V of 1878), Sec. 43 (b)—Transporting toddy—Pass.

The accused, a girl of about 16 years of age, was charged with transporting *toddy* without a pass under section 43 (*b*) of the Bombay Abkari Act, and on a conviction was fined eight annas. Her uncle, who held a pass for trapping *toddy* trees and carrying *toddy* to the shop told her to drive a buffalo laden with *toddy*, while he himself searched for his runaway pony. For doing so, she was convicted :—

Held, that the girl should not have been considered as herself transporting *toddy*, seeing that her uncle who had but momentarily withdrawn, might be deemed as still controlling the buffalo laden with it.

THE girl was convicted under section 43 (*b*) of the Bombay Act V of 1878 for driving a buffalo laden with toddy which was the property of her uncle Kristappa who held a pass for the transport of toddy. The girl deposed that Kristappa had left the road to search for a run-away pony.

(1) Vide, *ante*, p. 200. **Criminal Ruling* 57 *of* 1886. Criminal Reference No. 125 of 1886.

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The Sessions Judge of Sholapur, being of opinion that the conviction was illegal, referred the case to the High Court.

ORDER.—The Court, for the reasons given by the Sessions Judge, reverses the conviction and sentence passed on Nagowa and directs that the fine, if paid, be refunded.

The conviction and sentence to be reversed for the reasons given by the Sessions Judge. The girl should not have been considered as herself transporting toddy, seeing that her uncle, who had but momentarily withdrawn, might be deemed as still controlling the buffalo laden with it.

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21 October 1886. WEST & SCOTT, JJ.

Queen-Empress v. Chenbasapa.†

Criminal Procedure Code (Act X of 1882), Secs. 494, 309—Penal Code (Act XLV of 1860), Sec. 304—Public Prosecutor—Charge—Withdrawal—Assessors—Recording of opinions.

The accused was charged with the offence of culpable homicide not amounting to murder and on the Public Prosecutor having, with the consent of the Court, withdrawn from the prosecution, was acquitted and discharged by the Sessions Court after taking the assessor's opinions on the evidence recorded in the case:—

Held, that the Public Prosecuter having withdrawn from the prosecution with the consent of the Court, an acquittal should have recorded without taking the opinion of the assessors. An acquittal was a matter of right to the accused, whatever the opinions of the assessors might be.

ORDER.—The Public Prosecutor having withdrawn from the prosecution with the consent of the Court, an acquittal should have been recorded without taking the opinion of the assessors. An acquittal was a matter of right to the accused, whatever the opinions of the assessors might be.

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21 October 1886. WEST & SCOTT, JJ.

Queen-Empress v. Ugra.*

Criminal Procedure Code (Act X of 1882), Sec. 238—Penal Code (Act XLV of 1860), Secs. 71, 380, 454—Conviction—Sentence—Practice.

The accused were charged with the offence of house-breaking in order to the commission of an offence, and on a conviction by the Magistrate, First Class, sentenced each to six months' rigorous imprisonment under section 454, Indian Penal Code, though the facts showed that they not only committed house-breaking in order to the commission of an offence, punishable with imprisonment but also committed theft in a dwelling house (section 380, Indian Penal Code).—

Held, (1) that the law did not require more than a single conviction and sentence, the case being one of something done which fell under two penal sections and therefore one to which section 71, Indian Penal Code, applied;

(2) that the accused could have been tried under two heads of charge; see section 275, Criminal Procedure Code, but this is not imperative, only enabling.

IN this case the accused were charged with house-breaking in order to the commission of an offence punishable with imprisonment in that

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†*Criminal Ruling* 58 *of* 1886. Criminal Review No. 262 of 1886.

**Criminal Ruling* 59 *of* 1886. Criminal Review No. 270 of 1886.

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they effected their entrance into the house of the complainant at day time by removing the doors from the hinges and dishonestly took away without his consent his clothes and other articles of the value of Rs. 58.

ORDER.—The Court does not think the law requires more than a single conviction and sentence. The case is one of something done which falls under two penal sections and is therefore one to which section 71, Indian Penal Code, applies.

The accused could have been tried under two heads of charge (see section 235, Criminal Procedure Code) but this is not imperative, only enabling.

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21 October 1886. WEST & SCOTT, JJ.

Queen-Empress v. Mhadoo *

Abkari Act (Bom. Act V of 1878), Sec. 43 (d)—Cashew-nut tree—Juice-drawing.

The drawing of juice from a cashew-nut tree does not constitute the offence of drawing *toddy*, punishable under section 43 (*d*) of the Bombay Abkari Act, under the definition of *toddy* as given in the Act.

IN this case the facts were that the Abkari Sub-Inspector Vingorlu while on patrolling duty detected on the 29th April last that the accused had a distillery in his house for the purpose of manufacturing *caju* liquor without a license and also had in his possession 26½ quart bottles of liquor so manufactured. The accused admits that he committed the offence but pleads that he did so for the purpose of providing medicine for his diseased cattle. The Magistrate, accordingly charged him under the 4 clauses of section 43 of the Abkari Act.

The District Magistrate of Ratnagiri in making the reference to the High Court observed:—"I am of opinion that drawing juice from a cashew nut tree constitutes no offence, as the word "toddy" is defined in the Act to mean juice drawn from a coconut, crab-date or any other kind of palm tree and therefore the conviction and sentence under clause "*d*" is illegal. The Magistrate also appears to have over-looked the provisions of section 234 of the Criminal Procedure Code as interpreted in the Ruling of the Bombay High Court dated 26th February 1885, *in re J. I. Almeida* (1) which directs that more than three offences of the same kind (*i. e.*, offences punishable with the same amount of punishment under the same section) shall not be tried at one trial."

ORDER.—The conviction and sentence of fine under article (*d*) are reversed and the fine, if paid, to be refunded. No other change appears necessary.

**Criminal Ruling* 60 *of* 1886, Criminal Reference No. 122 of 1886. (1) Vide, *ante*, p. 212.

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11 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Bhima.†

Criminal Procedure Code (Act X of 1882), Sec. 250—False complaint—Municipal servant—Sanction of Municipality—Compensation.

The accused was charged, under the sanction of a District Municipality and on a complaint made by a Municipal peon, with the offence of easing herself within the Municipal limits in a prohibited place. The Magistrate, who tried the case, acquitted the accused and ordered the complainant, under section 250 of the Code of Criminal Procedure, to pay to the accused Re. 1 only as compensation. The District Magistrate, on the authority of *Keshav Lakshman* (1) referred the case to the High Court for reversal of the order of compensation:—

Held, that the case differed from the one cited, as there the complaint was preferred by a Judge acting judicially. An executive body cannot authorise a servant to prefer a wrongful complaint and so screen the complainant from the legal penalty.

THE accused Bhima was charged under the sanction of the Municipality of Sinnar with the offence of easing herself within the Sinnar Municipal limits in prohibited places, but was acquitted and discharged, section 245 of the Code of Criminal Procedure.

Azam Rangrao Raghavendra 3rd Class Magistrate acquitted the accused but passed an order under section 250 of the Code requiring the complainant Sitaram *walad* Khandu, a Municipal peon to pay to the accused a sum of Rupee 1 as compensation.

The District Magistrate of Nasik, in making the reference to the High Court, observed :—" The order for paying of compensation to the accused seems to be illegal. Because, in all Municipal cases sanction for the prosecution is required from the Municipality and under such a sanction a Municipal Carkun or a peon on behalf of the Municipality prosecutes cases upon a complaint before the Magistrate ; and thus it is not the peon or the Karkun but the Municipality who is to be held complainant in such cases (*Vide* High Court's decision in the case of Kesheo Laxman, published at pages 175 and 177 Indian Law Reports, Vol 1). The peon was in no sense a complainant. He could not have disobeyed the Municipality to proceed against the woman. The order of compensation is therefore illegal and should be reversed."

ORDER.—The case differs from the one cited, as there the complaint was preferred by a Judge acting judicially. An executive body cannot authorize a servant to prefer a wrongful complaint and so screen the complainant from the legal penalty. See *Mill* v. *Hawker*; (1) *Soonder-lall* v. *Dr. N. B. Baillie* (2).

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†*Criminal Ruling* 61 *of* 1886. Criminal Reference No. 136 of 1886. (1) I. L. R., 1 Bom 176.
(1) L. R., 9 Ex., 316. (2) 24 W. R., 287.

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11 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Kana.*

Abkari Act (Bom. Act V of 1879), Sec. 47—Country liquor—Possession—Quantity—Judgment—Contents.

The accused was convicted of the offence of being in possession of more than a gallon of country liquor without a permit or pass from the Collector, under section 41 of the Bombay Abkari Act:—

Held, that the conviction was on its face insufficient as the section did not make the possession of more than one gallon of country liquor penal.

Every conviction by a Court of limited jurisdiction ought to contain a statement of its legal justification within itself.

THE accused was charged with being in possession of more than a gallon of country liquor without a permit or a pass from the Collector, in that the accused was found in possession of one gallon and 34 drams of toddy liquor without a permit or pass from the Collector and was sentenced under section 47 of the Bombay Abkari Act, 1878, to pay a fine of rupees ten.

ORDER.—For the reasons given in the accompanying extract from its proceedings, the Court reverses the conviction and sentence and directs that the fine, if paid, be refunded.

"The conviction is on its face insufficient, as section 47 of the Act V of 1878 Bombay does not make the possession of more than one gallon of liquor penal and no other authority is cited. If any other authority existed for the conviction, the Magistrate was bound to cite it, as every conviction by a Court of limited jurisdiction ought to contain a statement of its legal jurisdiction within itself."

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11 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Moru.†

District Municipal Act (Bom. Act VI of 1873), Sec. 33 (3)—Magistrate—Review.

In dealing with a case of non-compliance with a legal order made by a Municipality, under section 33 (3) of the Bombay District Municipal Act, a Magistrate has no right to review the order from the stand-point of its propriety, and to consider what kind of structure would be sufficient for the purpose in view.

PER CURIAM.—The order made by the Municipality seems not to have been inconsistent with the Municipal Act, Bombay Act VI of 1873. The accused did not comply with the order and he thus became liable to a penalty under section 74 of the Act enforceable under section 84. The Magistrate seems to have thought that he had a right to review the order of the Municipality from the stand-point of its propriety and to consider what kind of structure would be sufficient for the purpose in view. He

*Criminal Ruling 62 of 1886. Criminal Review No. 274 of 1886.

†Criminal Ruling 63 of 1886. Criminal Appeal No. 172 of 1886.

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was in error. We reverse his order and in convicting the accused direct that he pay a fine of Rs. 5 and, in default, suffer one week's simple imprisonment.

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18 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Bayaji and Mukta.*

Evidence Act (I of 1872), Sec. 30—Taken into consideration.

The words "taken into consideration" in section 30 of the Indian Evidence Act mean "taken into consideration" for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not *technically evidence* within the definition given in section 3, it may still be used *quantum valeat* for the basis of a reasonable inference, and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more than by reason, from a finding of guilty thus sustained.

THE facts in this case were that the accused were charged with the offences of murder, abetment of murder, and causing disappearence of evidence of the offence of murder, punishable under sections 302, 109, and 302 and 201 of the Indian Penal Code, respectively, and were tried, at Poona by the Sessions Judge with the aid of a jury.

The jury found Bayaji guilty of the offence of abetment of murder and Mukta of the offence of murder. The Sessions Judge, accepting the verdict of the jury as regards the first accused Bayaji, sentenced her to transportation for life. He disagreed with the verdict of the jury as regards Mukta and referred the case to the High Court, under section 307 of the Code of Criminal Procedure, in so far as it affected Mukta.

The evidence in the case consisted of statements made by Bayaji before the Third and First Class Magistrates and before the Court of Sessions, in which she stated that she held the lands of the deceased, and sat on her chest, and that she handed to Mukta the implement with which the wounds were inflicted, and also helped him to carry the body and threw it into the well; and of the confession made by Mukta before the Third Class Magistrate, and repeated before the First Class Magistrate, to the effect that being called by Bayaji, he went to her, and took the dead body of the deceased and threw it into the well, thereby committing the offence described in section 201, Indian Penal Code. The Sessions Judge was of opinion that the statements made by Bayaji could not be used as evidence against Mukta, but could only be taken into consideration.

PER CURIAM:—"Taken into consideration" in section 30, Indian Evidence Act, means "taken so" for the purpose of arriving at a conclusion of fact. A co-accused's statement is not technically "evidence" within

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*Criminal Ruling 64 of 1886. Criminal Appeal No. 222 of 1886.

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the definition given in section 3, but it may still be used *quantum valeat* for the basis of a reasonable inference and if a Jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connexion with the crime imputed to him, they are not precluded by law any more than by reason from a finding of guilty thus sustained. We, therefore, convict the accused Mukta of murder and sentence her to transportation for life.

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18 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Bahiru.*

Penal Code (Act XLV of 1860), *Secs.* 395, 412—*Separate convictions—Same property.*

Separate convictions and sentences under section 395 and section 412, Indian Penal Code; with respect to the same property, are obviously improper, as section 412 implies receipt from another person, or an act by one not himself the dacoit.

ORDER.—Tell the Sessions Judge that separate convictions and sentences under section 395 and section 412 with respect to the same property are obviously improper as section 412 implies receipt from another person or an act by one not himself the dacoit.

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24 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Fazul.†

Penal Code (Act XLV of 1860), *Sec.* 420—*Evidence of similar transactions—Intention to pay at the time of purchase.*

The accused purchased some wool with delivery of possession from a firm, agreeing to pay the price on the next day. Default was made in payment of the purchase money at the stipulated time, and the accused pledged the wool to another and raised money thereon. In these circumstances the accused was convicted of cheating and thereby dishonestly inducing delivery of property, under section 420, Indian Penal Code. The Magistrate admitted in evidence the statements of two persons, Bhawan and Kundandas, from whom the accused purchased wool in similar circumstances, and who had not been paid yet, their wool also having been pledged by the accused to another :—

Held, (1) that the evidence of Bhavan and Kundandas must be excluded from consideration on the principles of *Reg.* v. *Parbhudas* (1) because their evidence related to transactions, the character of which was itself in question, and to accept their statements as proving cases of cheating against the accused would be to find him guilty in those instances without a trial;

(2) that a fraudulent purpose could not, under the circumstances, be safely inferred from the accused not paying, or from his inability to pay, for the wool on the next day as agreed;

(3) that to sustain a conviction of cheating under section 420, Indian Penal Code, there must be evidence to prove that when the accused bought the wool, he did not intend to pay for the same.

PER CURIAM.—The evidence of Bhawan Harban and Khoondandas, which has been admitted against the accused relates to transactions, the character of which is itself in question. To accept the statements of these witnesses as proving cases of cheating against the accused would be to

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**Criminal Ruling* 65 *of* 1886. Criminal Appeals Nos. 219, 220 of 1886.

†*Criminal Ruling* 66 *of* 1886. Criminal Appeal No. 216 of 1886. (1) 11 Bom. H. C., 90

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find him guilty in those instances without a trial. We think, therefore, that the evidence must be excluded from consideration on the principles of 11 Bom. H. C. R. p. 90 referred to by Mr. *Branson* for the accused. It is plain from Khoondandas's testimony that no great precision as to time of fulfilment was observed or expected in transactions between him and the accused, nor can a fraudulent purpose be safely inferred from the accused's not paying or from his inability to pay next day in the present case. H had credit and some money apparently at his command, but he was in difficulties which were brought to a climax by the complainant's eager, though not unnatural, endeavours to enforce payment at once of what was due to him. The evidence fails, we think, to prove that when the accused bought the wool, he was guilty of anything more than a culpable negligence as to his being certainly able to fulfil his engagement to pay for it. This is distinguishable from a positive purpose to decline. We accordingly reverse the conviction and sentence.

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24 November 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Jeria.*

Abkari Act (Bom. Act V of 1878), Secs. 9, 43—Importation—Liquor—Carrying liquor rom one village to another in a Native State through British India.

The bringing into British India of liquor without a pass or permit authorized by the Abkari Act is an offence, punishable under it, notwithstanding that it was so brought only for the purposes of taking it into another village of the same State from one of which it was brought; but where the importing of the liquor is not from one portion of British India to another, there can not be any offence of transporting liquor from one place to another within British India.

THE accused Jeria was convicted of transporting liquor without a pass under section 43 of the Bombay Abkari Act, and sentenced to one month's rigorous imprisonment and a fine of Rs. 100.

The gist of the offence was that he was carrying liquor from Ambetti to Barai, two villages of the Dharampore State, and was arrested with the liqour while in British India on his way to Barai.

The accused applied for revision to the High Court contending that the mere casual bringing into British India of the liquor, for the purpose of taking it from one village to another of the Dharampore State, could not constitute any offence.

ORDER:—The Court alters the conviction to one under section 9 of Bombay Act V of 1878 and remits the remainder of the sentence of imprisonment.

**Criminal Ruling 67 of* 1886, Criminal Application for Revision No. 251 of 1886.

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30 November 1886. RESOLUTION IN CHAMBERS.

In re **Vankatesh.***

Magistrate—Mukhtyar—Accused—Appearance.

The applicant applied to the High Court to set aside an order of a First Class Magistrate refusing to allow him to defend an accused in a case before him as a Mukhtyar:—

Held:—To refuse or allow the appearance of a Mukhtyar for an accused person is entirely within the discretion of the Magistrate concerned.

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9 December 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Mansukh.†

Criminal Procedure Code (Act X of 1882), Sec. 380—Assistant Judge—Sentence—Confirmation—Sessions Judge.

When an Assistant Sessions Judge passes a sentence of more than four years' rigorous imprisonment the whole sentence is subject to confirmation by the Sessions Judge.

ORDER.—The Assistant Sessions Judge was in error in supposing that only the excess of the sentence over 4 years' rigorous imprisonment was subject to confirmation. The excess made the whole sentence subject to confirmation or reversal by the Sessions Judge.

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9 December 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Mathi.††

Penal Code (Act XLV of 1860), Secs. 379, 403—Carpet—Hung up for drying.—Removal—Theft.

The complainant washed a carpet at the village tank and hung it up there to dry; the accused having dishonestly taken it away, was convicted of the offence of criminal misappropriation of property under section 403, Indian Penal Code:—

Held, that the carpet had never left the complainant's possession and the offence committed was that of theft.

THE District Magistrate of Kolaba in referring the case to the High Court observed, "The complainant washed a carpet at the village tank, and hung it up there to dry. The accused was convicted of dishonestly taking it away. The carpet had never left the complainant's possession, and therefore it seems to me that the offence committed was theft."

ORDER.—The Court alters the conviction to one of theft punishable under section 379, Indian Penal Code, without altering the sentence passed by the Magistrate.

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23 December 1886. WEST & BIRDWOOD, JJ.

Queen-Empress v. Mahomed.‡

Gambling Act (Bom. Act III of 1866), Sec. 11—Tiles—Instruments of gaming.

Pieces of tile are not instruments of gaming within the meaning of section 11 of the Bombay Gambling Act, 1866.

**Criminal Ruling* 68 *of* 1886. †*Criminal Ruling* 69 *of* 1886. Criminal Review No. 202 *of* 1886.
††*Criminal Ruling* 70 *of* 1886. Criminal Reference No. 146 *of* 1886.
‡*Criminal Ruling* 72 *of* 1886. Criminal Review No. 316 of 1886.

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THE accused were charged with playing for money with small pieces of tiles on a public road in that they were found playing for money with small pieces of tiles on a public road in the city of Broach within three miles of the Railway station.

ORDER.—Conviction and sentence reversed with reference to *Reg.* v. *Rama Zilu* (1) Criminal Ruling of 19th June 1873 and *Imp.* v. *Vithal* (2).

1887.

12 January 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Santaram.*

Criminal Procedure Code (Act X of 1882), Sec. 437—Sub-Divisional Magistrate—District Magistrate—Penal Code (Act XLV of 1860), Secs. 182, 500—False information—Master and servant—Defamation.

A Sub-Divisional Magsitrate can not properly withdraw a case specifically referred by his superior, the District Magistrate, nor can the District Magistrate properly insist on repeated further inquiries without fresh evidence.

The servant of an Abkari Licensee gave false information to his master that the Abkari Inspector asked him for money and adulterated the liquor to get him into trouble:—

He'd, that the accused was not guilty of on offence under section 182 of the Indian Penal Code, as his master was not a public servant, through he might be guilty of defamation.

THE District Magistrate of Bijapur referred this case to the High Court under section 438 of the Code of Criminal Procedure. The facts o this case as well as his reasons for making this reference will appear from the following extracts from the letter of reference. "The accused, a liquor shopman at Indi, reported to his master that the Abkari Inspector had asked him for money and had watered some liquor in the shop with a view to getting him into trouble. The master as intended by the shopman reported the matter to the Collector, who after causing inquiry to be made gave the Abkari Inspector permission under section 195 (*a*), Criminal Procedure Code, to prosecute the shopman under section 182, Indian Penal Code, in order to clear his own character. The 2nd Class Sub-Magistrate dismissed the complaint under section 203 on the ground that the false information was not given to a public servant but to the shopman's master. The District Magistrate ordered the 2nd Class Sub-Magistrate to make further inquiry under section 437. The 2nd Class Sub-Magistrate instead of making further inquiry forwarded an argumentative report through the Sub-Divisional Magistrate, who in sending it on expressed his concurrence with the Sub-Magistrate on the matter of no charge lying because the information was not given directly by the accused to a public servant. The District Magistrate in reply called attention to the provisions of the Penal Code regarding abetment, and especially to section 108, explana-

(1) Vide, *ante*, p. 75. (2) I. L. R., 6 Bom., 19.

**Criminal Ruling* 1 *of* 1887. Criminal Reference No. 162 of 1886.

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tion 3. After this the Sub-Divisional Magistrate First Class without reference to the District Magistrate transferred the case to his own Court, which he apparently had no power to do. Then without making any inquiry further than to listen to the argument of the accused's Vakil the Sub-Divisional Magistrate First Class dismissed the complaint as groundless under the 2nd portion of section 253, Criminal Procedure Code. The Sub-Divisional Magistrate First Class has quoted in his 'proceedings' certain rulings of the CALCUTTA HIGH COURT which he says he was bound to follow. These rulings all have reference to complaints against public Justice under Chapter XI, Indian Penal Code. I am respectfully of opinion that they have no bearing on the present case, wherein the Collector after such inquiry as he thought necessary, sanctioned under section 195 (*a*), Criminal Procedure Code, cognizance to be taken of an offence under Chapter X, Criminal Procedure Code. I consider that the Sub-Divisional Magistrate First Class has erred in the following way. He has transferred a case to himself without authority, which the District Magistrate had referred to another Magistrate. He has dealt with a summons case as if it were a warrant case by dismissing the complaint under section 253, Criminal Procedure Code, which relates to warrant cases only. He has without further inquiry dismissed as groundless under the second part of section 253 a case in which the District Magistrate had, in his capacity as Collector, sanctioned the prosecution, and had, as District Magistrate ordered further inquiry when he considered it to have been wrongly disposed of in the first instance. Thereby the Sub-Divisional Magistrate First Class has virtually ignored the authority of the District Magistrate. He has misunderstood and misapplied certain High Court rulings which have reference only to Chapter XI, Indian Penal Code; using them as if they bore upon Chapter X, Indian Penal Code."

PER CURIAM.—The accused was not guilty of an offence against section 182, Indian Penal Code, *i. e.*, of giving false information to a public servant with intent to cause injury, inasmuch as his master, to whom he gave certain information, alleged to be false, is not a public servant. Sanction for his prosecution was, therefore, wrongly granted by the Collector under section 195 (*a*) of the Criminal Procedure Code. If the accused committed any offence, it was the offence of defamation. For that if he committed it, he is still liable. The District Magistrate may, if he thinks it expedient, take steps to have him tried for that offence. The sub-divisional Magistrate could not properly withdraw a case specifically referred by his superior, the District Magistrate, who, however, could not properly insist on repeated further inquiries without fresh evidence.

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12 January 1887. WETS & BIRDWOOD, JJ.

Queen-Empress v. Ramia.*

Criminal Procedure Code (Act X of 1882), Secs. 6, 545—Village Police Act (Bom. Act VIII of 1867), Sec. 15—Police Patel's Court—Compensation.

As the Police Patel's Court is not a Criminal Court within the enumeration contained in section 6 of the Criminal Procedure Code, he has no power to make an order under section 545 of the Code.

THE accused Ramia was convicted by the Police Patel of Dehri under section 15 of the Bombay Village Police Act, 1867, of the offence of petty theft of property valued at Re. 0-8-0 from the possession of the complainant Bai Ruki and was sentenced to pay a fine of Re. 1. The Police Patel awarded eight annas out of the fine to the complainant as compensation for loss sustained by her.

ORDER.—The Court reverses the order as regards compensation for the reasons stated below.

As the Police Patel's Court is not a criminal Court within the enumeration contained in section 6 of Code of Criminal Procedure, he had no power to make an order under section 545. The order must, therefore, be reversed.

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12 January 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Shobharam.†

Stamp Act (I of 1879), Sec. 68—Selling—Stamps—Without a license.

The selling of a stamped paper previously bought from a licensed vendor because the seller did not require it is an offence under section 68 of the Indian Stamp Act as the accused was not "a person appointed to sell stamps."

SOBHARAM sold to Mayachand a stamp paper of the value of Rs. 3 which he had purchased on the 23 March 1882 from a licensed stamp vendor and which was not required by him for his own use, making an endorsement below the original endorsement of the stamp vendor to the effect that the stamped paper was sold to Mayachand as he had no use for it. The sale being contrary to the provisions of the Stamp Act as he was not a licensed stamp vendor and was not authorized to sell it, he was convicted and sentenced to pay a fine of Rs. 15 under section 68 of the Stamp Act, 1879.

The District Magistrate of Panch Mahals being of opinion that the conviction and sentence were illegal, referred the case to the High Court, stating:—"The order of the Lower Court appears to be doubtful, for the reason that it was (stamp paper) originally purchased from a licensed vendor and its re-sale has not caused any loss to the Government revenue."

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*Criminal Ruling 2 of 1887. Criminal Reference No. 158 of 1886.

†Criminal Ruling 3 of 1886. Criminal Reference No. 156 of 1886.

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ORDER.—Record and proceedings to be returned. As the accused is not a " person appointed to sell stamps " and has sold a stamp the conviction under section 68 of Act I of 1879 seems quite legal. Also inform the Magistrate that the English of the reference especially in para 3 leaves much to be desired.

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20 January 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Vithu.*

Penal Code (Act XLV of 1860), Sec. 426—Buffaloes—Road-side trees—Damage.

The accused's buffaloes in his presence, destroyed the road-side trees, but he did not restrain the cattle; the Magistrate convicted him under section 426 of the Indian Penal Code. The Session Judge set aside the conviction thinking it to be a case of negligence only and not of wilful conduct:—

Held, that the Magistrate was right. Driving of the cattle on to the road and then not controlling them in doing what they were almost certain to do, unless prevented, might be regarded as a causing of damage.

THE buffaloes of the accused destroyed two road-side trees worth about Rs. 6. He himself was present and did not take sufficient care of the animals. The First Class Magistrate of Mahal finding that "the accused who is Police of the village Dadley knew that his buffaloes were likely to cause damage to the road-side trees," convicted the accused under section 426, Indian Penal Code.

The Sessions Judge of Thana in stating the case to the High Court, remarked. "The accused is not guilty of negligence only and not of any wilful conduct under the ruling of the BOMBAY HIGH COURT reported at I. L. R., 9 Bom., 173 ; the conviction appears illegal."

ORDER:—Record and proceedings to be sent back. The Magistrate finds, as a fact, that the accused was present, and, being able to prevent the buffaloes from destroying the trees, failed to do so. His driving of the cattle on to the road and then not controlling them in doing what they were almost certain to do unless prevented, may, the Court thinks, be regarded as a causing of damage and the Court will not, on a mere reference, like to interfere.

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27 January 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Ramnaik.†

Criminal Court—Cognizance—Fine—Departmental inquiries—Cantonements Act (III of 1867), Sec. 11—Cantonement Rule, 71.

Held, that the fine judicially inflicted could not be remitted, not having been in itself an improper one. Departmental punishment cannot withdraw a wrong-doer from the cognizance of the ordinary Courts or relieve him from the penalties provided by the law. The fine imposed departmentally could probably be remitted departmentally.

**Criminal Ruling* 5 *of* 1887. Criminal Reference No. 2 of 1900.

†*Criminal Ruling* 6 *of* 1887. Criminal Reference No. 8 of 1887.

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IN this case, the accused, a soldier, was found drunk on a public road within cantonement limits, and punished departmentally. He was also placed before the Cantonement Magistrate, First Class, Belgaum, who convicted and sentenced him under Rule 71 of Chapter III of the Cantonement Rules framed under section 11 of the Cantonements Act III of 1867. The Commanding Officer, Colonel Grant, was of opinion that the accused having been dealt with regimentally, his conviction and sentence by the Magistrate was unnecessary and referred the matter to the Sessions Judge of Belgaum, with a view to the fine imposed on the accused being remitted. The learned Sessions Judge made this reference to the High Court, also submitting the report received by him from Colonel Grant.

ORDER.—Return the record and proceedings. The fine judicially inflicted cannot be remitted, not having been in itself an improper one. Departmental punishment cannot withdraw a wrong doer from the cognizance of the ordinary Courts or relieve him from the penalties provided by the law. The fine imposed departmentally can probably be remitted departmentally. The course proposed by Colonel Grant would be illegal and of very bad example.

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10 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Namdev.*

Practice—Magistrate—Commitment.

A Magistrate ought to commit a case to the Court of Sessions when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case.

PER CURIAM:—In the present case three persons deposed to having seen the accused setting fire to the complainant's crop or immediately afterwards. It is not alleged that these witnesses are persons of infamous character nor does it appear that any evidence was adduced tending to show that they could not possibly have spoken the truth. The accused was the brother of the Police Patel and owing, as the Magistrate says, to the Patel's desire to get the matter arranged, there was a delay of nearly a month before the case was brought before the higher authorities. In the case at 14 C. W. R. 16 Criminal Ruling, it is said that proper enquiries must be made before a Magistrate commits an accused for trial, and when the law prescribes a preliminary enquiry, it intends of course that the enquiry should be a serious one. But, as the case just referred to shows, an accused ought to be committed, when there is a *prima facie* case substantiated against him by the testimony of credible witnesses. According to

*Criminal Application for Revision No. 312 of 1886.

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the English law a commitment ought to be made whenever one or two credible persons give evidence showing that the accused has perpetrated an indictable offence. (See Hale's Pleas of the Crown, II, 121. Hawkin's Pleas of the Crown, Chapter XVI; *Cox.* v. *Coleridge* (1) and the sort of *prima facie* case that warrants a committal is defined by 11 and 12 Victoria, Chapter 42, Section 25 as one that "is sufficient to put the party upon his trial for an indictable offence." According to our Criminal Procedure Code, Sections 209 and 210, the Magistrate is to commit or not as there are or are not in his opinion "sufficient grounds for committing" what are "Sufficient Grounds for Committing" is not in any way defined, but it is manifest that they are not identical with grounds for convicting, since, taken in that sense, the provisions would enable the Magistrate virtually to supersede the Court of Session to which the cognizance of the case for actual trial belongs. The true principle appears to be that expressed in the English Statute. The Magistrate ought to commit, when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. Here there was manifestly a *prima facie* case such that the Magistrate ought to have committed the accused for trial, and we direct that he be committed accordingly by the District Magistrate or by such Magistrate subordinate to him to whom he may refer the case for that purpose.

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10 February 1887. WEST & BIRDWOOD, JJ.

In re **Mahadaji.***

Criminal Procedure Code (Act X of 1882), Sec. 317—Magistrate—Temporary orders—Nuisance—Evidence.

Where a Magistrate issues, a notice to a person to remove a nuisance or to show cause against the order, and the person appears to show cause, it becomes the duty of the Magistrate under section 137 of the Code of Criminal Procedure to take evidence as a basis for the order he is to make.

ORDER.—The applicant received notice from the District Magistrate to remove a privy built on his own land or to show cause against the order before Mr. Drew, a Sub-divisional Magistrate of the District. He appeared to show cause and thereon it became the duty of the Magistrate under section 137 of the Code of Criminal Procedure to take evidence as a basis for the order he was to make. Mr. Drew went to inspect the place, but he did not take evidence. His proceedings consequently show only his opinion that the structure was a nuisance. They do not show by evidence that the privy was an unlawful obstruction or nuisance to a

*Criminal Application for Revision No. 325 of 1886. (1) 1 B. & Cr., 37, 43, 46.

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way, channel or public place. But unless there was such a case for interference, the Magistrate had no authority to issue the order or to enforce it. It cannot be inferred from the mere order of an inferior Court or an administrative authority that all the conditions of its jurisdiction were satisfied and here the proceedings show rather that they were not satisfied. When a statute too directs any thing to be done in a particular way that "includes in itself a negative, *viz*, that it shall not be done otherwise," (Plowden, 206, 2 Moore's Indian Appeals, p. 435). The order made by Mr. Drew does not satisfy the requisite conditions; the confirming order of the District Magistrate was simply *otiose*. We accordingly reverse them.

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15 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Lahana.†

Criminal Procedure Code (Act X of 1882), Sec. 555—Personal interest—Obstruction—Village Police Act (Bom. Act VII of 1867), Secs. 28, 29—Driving on wrong side of a road.

Where a Magistrate is himself one of those obstructed by the driving of the accused on the wrong side of a road, he should not himself try the accused under sections 28 and 29 of the Bombay Village Police Act, 1887.

THE accused was driving on a wrong side of a road "to the obstruction of the passengers driving in the opposite direction." He was tried summarily by the First Class Magistrate of Ahmednager, and fined Re. 1 under sections 28 and 29 of Bombay Act VII of 1867.

The Sessions Judge of Ahmednager in referring the case to the High Court remarked:—

"The offence complained of and held proved is stated to be 'dis order on the public road' under section 28 of the Bombay District Police Act, 1867. That section, however, does not provide for any such offence. Under section 29 any person not obeying an order of the police as to the regulation of street traffic may be punished, but the record does not show that there was either a general order by the police as to the regulation of the traffic on the road or a special order to the accused as to the side on which he should drive, and the driving on the wrong side of a road is not in itself an offence. It appears from the report of a Police Constable who sent up the case, that the Magistrate was himself the person obstructed. If this was so, it is a question whether it should be held that the Magistrate was personally 'personally interested' and therefore could not try the case himself (Criminal Procedure Code, section 555). The report also suggests that there were no other carriages except those of the accused and the Magistrate, on the road at that time. Even if there has been a general order by the Police, if there were only two carriages on the road at the time, there

†*Criminal Ruling* 70 *of* 1887. Criminal Reference No 9 of 1887

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could not be any real obstruction, and I doubt whether there would any offence constituted by the disobedience in such a case of a general regulation obviously meant to provide for a considerable traffic on a public road."

ORDER.—The Magistrate having been interested as one of those obstructed ought not to have tried this case. His sentence should accordingly be reversed.

---

15 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Rama.*

Criminal Procedure Code (Act X of 1882), Sec. 40—Magistrate—Powers—Investiture and continuance.

Section 40 of the Criminal Procedure Code relates only to transfer from one district or area to another. A Mamlatdar invested by name with Second-class Magisterial powers in a district retains them though he cease to be a Mamlatdar, his revenue title being matter of description only.

MR. BINDU GOPAL, Head Karkun and Magistrate Third Class of the Taluka Pandharpur was invested with Second Class Magisterial powers when he was officiating as Mamlatdar at Pandharpur. On his reversion to his permanent post of Head Karkun in the same Taluka, he decided a theft case under section 380 of the Indian Penal Code and passed a sentence of three months' imprisonment in the exercise of his Second Class Magisterial powers.

The District Magistrate of Sholapur, in referring the case to the High Court, remarked :—

"The wording of section 40 of the Criminal Procedure Code raises a doubt as to the legality of the sentence passed, because, he was invested with the Second Class Magisterial powers as Head Karkun but as officiating Mamlatdar (*vide Government Gazette*, Part 1, page 617, Notification No. 4,164 of 19th July 1886) and therefore it may be said that his reversion is a transfer to an office lower in rank and that he cannot continue to exercise the second class powers. The same incumbent has now been appointed as Mamlatdar of Sangola in this District and it is necessary for him now to exercise Second Class Magisterial powers; but although he was appointed Second Class Magistrate for a similar area in this District, it is in my opinion necessary to reinvest him now, with the powers in question."

ORDER.—The Court declines to interfere for the reasons stated: section 40 of the Code of Criminal Procedure relates only to transfer from one district or area to another.

A Mamlatdar invested by name with Second Class Magisterial powers in a district retains them, though he cease to be a Mamlatdar.

**Criminal Ruling* 8 *of* 1887. Criminal Reference No. 1 of 1887.

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His revenue title is matter of description only.

The Court declines to interfere.

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15 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Pedru.†

Abkari Act (Bom. Act V of 1878), Sec. 45 (c)—Breach of the condition of the license—Minimum amount of liquor—Act—Omission.

The accused was convicted of not keeping, according to his license, the minimum amount of certain kinds of liquor. The District Magistrate was of opinion that the negligence of the accused amounted to an omission, and not an act, and under section 45 (*c*) of the Bombay Abkari Act, an act but not an illegal omission, was punishable :—

Held, that the conviction should be upheld, and that an act failing to comply with terms legally imposed is illegal in the affirmative as well as in the negative sense.

THE accused was a licensee of country liquor in the Yellapur Taluka during the revenue year 1885-86. By article 9 of his license, he was required at all times to maintain at each of his retail shops such minimum stocks of both strength of spirits as the Collector should from time to time direct, and on no account was the stock to be less than the quantity so fixed. For the liquor shop of Humshetlikop, the minimum stock fixed by the Collector was 35 bottles in the case of *chali*, *i. e.*, liquor of 40° U. P., and 5 bottles in the case of *feni*, *i. e.*, liquor of 25° U. P. On the 9th May 1886 when the Chief Constable visited this shop there were only three bottles of *chali* liquor and none of the *feni*. For this breach of his license the accused was prosecuted and was convicted under section 45 (*c*) of the Abkari Act.

The District Magistrate of Kanara, observed "The conviction and sentence are illegal, as the negligence on the part of the accused to supply liquor to the shop, so as to maintain the prescribed stocks, amounts to an omission not an act. Under section 45 (*c*) acts are only punishable but not illegal omissions."

ORDER.– In this case the accused was found to have kept at a particular shop, *viz*, that at Hunshetlikop, three bottles and three only of *chali* "liquor." The act of keeping three bottles was an insufficient compliance with the terms of his license, and the conviction may be sanctioned on the principle that an act failing to comply with terms legally imposed is illegal in the affirmative as well as in the negative sense.

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23 February 1887. WEST & BIRDWOOD, JJ.

In re Vishnu.*

Criminal Procedure Code (Act X of 1882), Sec. 526—Magistrate—Prejudice—Transfer.

Unless some cause is shown for believing that a Magistrate is likely to be prejudiced or influenced by any improper motive in the decision of a case, the High Court will support such Magistrate. It is highly improper by transfer of a case from his Court to throw a gratuitous slight on the Magistrate.

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†*Criminal Ruling* 9 *of* 1887. Criminal Reference No. 19 of 1887.

**Criminal Ruling*. 10 *of* 1887. Criminal Application for Revision No. 4 of 1887

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PER CURIAM.—A point in this application to which the Court had to give special attention was the alleged conversation of Mr. Drew with the liquor contractor. Nothing has however, been proved tending to show that the said conversation had anything to do with the prosecution in this case. The facts of Mr. Drew being a zealous officer is in no way a point in favour of the present application; it is only natural and proper that he should be so. It was also very natural that the complainant should have gone to an European officer, under the peculiar circumstances of the case, in preference to the Mamlatdar who was the local Magistrate. The Court is of opinion that there is no cause whatever shown for believing that Mr. Drew is likely to be prejudiced, or influenced by any improper motive in the decision of the case. Under such circumstances, a Magistrate should be supported by the High Court, and it would be highly improper to throw gratuitously a slight on the Magistrate by the transfer of the case from his Court. The applicant, moreover, is proved to have made reckless, if not wilfully false, statements as to threats having been made to his family. This fact alone would tend to deprive him of the sympathy of this Court. The Court sees no sufficient reason to interfere in the case and has no doubt that the Magistrate Mr. Drew will do his duty properly. As to the allegation that four similar cases have already been disposed of by Mr. Drew, the Court thinks that the fact of his decision in those cases not having been appealed against, or, in any other way objected to, would seem to justify the inference that they were properly and uprightly decided. The Court is of opinion that the present application is entirely unfounded and it must be rejected.

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24 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Ladba.*

District Municipal Act (Bom. Act VI of 1873), Secs. 48, 74—Carriage—Public road—Obstruction.

As a carriage with horses attached is not one of the things contemplated in section 48 of the Bombay District Municipal Act, a person cannot be convicted under sections 48 and 74 for causing obstruction to passers-by in having allowed his carriage to stand half an hour on a public street.

THE accused was charged with having allowed his carriage to stand half an hour on a public street in Peit Shukravar, Poona City and thereby caused obstruction to passers by, and was convicted by the Honorary second class Magistrate of Poona under sections 48 and 74 of the Bombay District Municipal Act.

ORDER.—The Court considers that a carriage with horses attached, is not one of the things contemplated in section 48 of the Municipal Act

*Criminal Ruling 11 of 1887. Criminal Review No. 38 of 1887.

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VI of 1873, and therefore reverses the conviction and sentence and orders the fine to be refunded.

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24 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Ghotiram.*

Criminal Procedure Code (Act X of 1882), Sec. 537—Accused—Evidence in his presence—Absconding—Conviction and sentence in his absence.

An accused was present throughout a trial whilst the evidence was taken; but having thereafter absconded, the Magistrate passed sentence upon him in his absence, and on his re-arrest, re-pronounced his judgment:—

Held, that the case might be regarded as falling under section 537 of the Code of Criminal Procedure, at least for the purposes of a review not sought by the accused; but that the Magistrate should not have pronounced judgment in the absence of the accused.

IN this case accused No. 1 Ghotiram was charged with abetting the commission of the offence of cheating by accused No. 2 Kallooram, in assisting him to obtain Rs. 5 from the complainant. They were placed before a Magistrate, where after all the evidence in the case had been taken, Ghotiram absconded. Thereupon the Magistrate convicted him and passed a sentenced upon him in his absence, and when the accused was re-arrested and brought before him, the Magistrate re-prounounced the judgment.

ORDER.—Return the record and proceedings and communicate the following remarks.

The case may be regarded as falling under section 537, Criminal Procedure Code, at least for the purposes of a review not sought by the accused. The Magistrate should be told not to pronounce judgment in such cases as this, but on the arrest of the accused to give him the opportunity of hearing the examination of the witnesses for the prosecution and cross-examining them.

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24 February 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Yeshwant.†

Penal Code (Act XLV of 1860), Sec. 183—Land Revenue Code (Bom. Act V of 1879), Secs. 12, 57—Resistance—Karkoon—Distraint—Proceedings—Lower Court—High Court—Presumption.

The proceedings of an inferior Court of limited jurisdiction must set forth the facts and orders (not being general statutes of which all Courts must take notice) requisite to give it authority in the particular case. The High Court cannot, on review, presume the existence of the necessary circumstances, which are not set forth.

Where it did not appear on the face of the conviction that the Mamlatdar was an officer to whom under the provisions of section 12 of the Land Revenue Code, the powers of the Collector, constituted by section 87 of the Code, had been delegated under any general or special order of

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*Criminal Ruling 12 of 1887. Criminal Review No. 29 of 1887.

†Criminal Ruling 13 of 1887. Criminal Reference No. 20 of 1887.

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the Government, nor that the karkoon employed to distrain was an officer directed to perform that duty by the Commissioner, under the orders of Government, a person resisting such a karkoon by force when the latter came to distrain some goods at his house, is not guilty of an offence under section 183 of the Indian Penal Code.

THE accused Yeshwant resisted by force the general duty karkoon, the complainant, when the latter came to distrain some goods, grain &c., at the accused's house in order to make recovery of dues on behalf of the Khote of Pomendi, who had applied for assistance to the Mamlatdar under section 86 of the Bombay Land Revenue Code, 1879. The resistance alleged consisted in the accused pushing away the karkoon and telling him not to attach. He was tried summarily under section 183, Indian Penal Code and was sentenced to pay a fine of Rs. 50.

The Sessions Judge of Ratnagiri referred this case to the High Court, for a decision the following points:—

(1) Whether resistance to a distraint under section 154 of the Bombay Land Revenue Code is justified by the fact that the claim to be satisfied has been actually discharged?

(2) Whether a conviction for such resistance can be had without strict proof that the authority for the distraint was still in force and proceeded from a competent source?

The learned Judge's opinion on the first question was "that an allegation of discharge would not justify resistance if the public servant were lawfully authorized and were not acting in contravention of the law;" and on the second, his opinion was "that the prosecution was bound to prove authority from the Collector or other officer duly empowered and also to prove that such authority was still in force."

ORDER.—It does not appear on the face of the conviction in this case that the Mamlatdar was an officer to whom under the provisions of section 12 of Bombay Act V of 1879 the powers of the Collector constituted by section 87 of the same Act had been delegated under any general or special order of the Government. Nor does it appear, on the face of the proceedings, that the karkun employed to distrain was an officer directed to perform that duty by the Commissioner under the orders of Government. The proceedings of an inferior Court of limited jurisdiction must set forth the facts and the orders (not being general statutes of which all Courts must take notice) requisite to give it authority in the particular case. The High Court cannot, in review, presume the existence of necessary circumstances which are not set forth. The Court on this ground reverses the conviction and sentence as manifestly defective.

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3 March 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Kustantin.†

Criminal Procedure Code (Act X of 1882), Sec. 198—Defamation—Female—Complainant.

In a case of defamation of a female, it is she herself, and not a mere male relative, who should make a complaint under section 198 of the Criminal Procedure Code.

ORDER.—The Court reverses the conviction and sentence passed upon Kustantin John De Souza for the reasons stated in the accompanying minute and directs that the fine, if paid, be refunded to him.

"It seems that the defamation was of the wife and mother of Baya neither of whom complained. The conviction, therefore, is illegal and must be reversed. Criminal Procedure Code, section 198.

Note:—This case is overruled by the Full Bench case of *Chhotalal* v. *Nathabhai* (1).

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5 April 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Lakshman.*

Criminal Procedure Code (Act X of 1882), Sec. 271 (2)—Sessions Judge—Alternative plea.

An accused should never be called on to plead in the alternative, but separately to each of the heads of a charge.

JUDGMENT:—The Sessions Court's proceedings are recorded in an almost unintelligible manner.

After giving the charge twice over, the record gives list of articles before the Court and then says:—"I accept this plea."

This plea as to the charge of culpable homicide was apparently one of a claim to be tried, yet the Sessions Judge did not try it. He proceeded to a conviction on the prisoner's confession of a minor head of the charge without any alteration such as he could have made in the charge as first framed. The Sessions Judge must be directed to comply with the law; and to enable him to do so, the Court must reverse the finding and sentence and annul his proceedings from the point at which the prisoner pleaded guilty to the 2nd head of the charge.

An accused should never be called on to plead in the alternative but separately to each of the heads of a charge.

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14 April 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Dau.††

Stage Carriages Act (XVI of 1861)—Public Conveyances Act (Bom. Act VI of 1863)—Carriage plying in a town.

The Stage Carriages Act, 1861, does not apply to a carriage plying only within a town and its suburbs, to which the Bombay Public Conveyances Act would apply if extended thereto.

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†*Criminal Ruling* 14 *of* 1887. Criminal Reference No. 24 of 1887. (1) 2 Bom. L. R., 665.

**Criminal Ruling* 15 *of* 1887. Criminal Review No. 61 of 1887.

††*Criminal Ruling* 17 *of* 1887. Criminal Review No. 66 of 1887.

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THE accused was charged with letting for hire unlicensed carriage under section 7 of Act XVI of 1861, in that he plied for hire a carriage drawn by two horses in the town of Satara without having taken out a license.

ORDER.—Conviction and sentence reversed for the reasons stated in the accompanying minute.

"The Act does not seem to apply to a carriage plying only within a town and its suburbs."

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5 May 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Kushee.*

Penal Code (Act XLV of 1860), Sec. 448—House-trespass—Going into lines without permission.

The going into a Horse Lines with a sowar without the permission of the Commanding Officer does not constitute the offence of house-trespass.

KUSHI was convicted of house-trespass under section 448 of the Indian Penal Code in that she came into the Lines Poona Horse with a sowar without permission of the Officer Commanding with intent to commit adultery and thus annoyed the Commandant in charge of the lines.

ORDER.—Going into the lines is not a house-trespass. The Court, therefore, reverses the conviction and sentence and directs that the fine, if recovered, be refunded.

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5 May 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Balkrishna.†

Criminal Procedure Code (Act X of 1882), Secs. 437, 253—Series of discharge—Series of further inquiry—Fresh evidence—Sessions Judge.

Section 437 of the Code of Criminal Procedure contemplates that the Court of Sessions shall simply direct the Magistrate of the District, either himself or by one of his subordinates, to make further inquiry.

When the further enquiry is into the effect of the evidence already on the record or the testimony of the witnesses already examined, it will usually be desirable that the fresh consideration of the complaint should be entrusted to a different Magistrate from the one who has already formed an opinion on the case.

When the further enquiry involves the taking and weighing of additional evidence, the function will generally be best performed by the same Magistrate who made the previous inquiry; though peculiar or prejudiced views, or even the possibility of them, may make it more desirable to bring a fresh mind to bear on the facts.

As was held by the Allahabad High Court, the power of ordering further inquiry should be "used sparingly and with great circumspection."

IN this case the accused was charged by the complainants with theft; and was placed before Mr. Doderet, the First Class Magistrate, who after holding an inquiry, was of opinion that the subject matter was of a civil

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**Criminal Ruling* 18 *of* 1887. Criminal Review No. 76 of 1887.

†*Criminal Ruling* 19 *of* 1887. Criminal Application for Revision No. 46 of 1887.

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nature and dismissed the complaint. The complainants, thereupon, applied to the Sessions Judge, who directed a fresh inquiry into the matter. Mr. Doderet conducted the further inquiry and again discharged the accused under section 253 of the Code of Criminal Procedure. Upon this, the complainants applied to the Sessions Judge for a second time, who again set aside the order of discharge and directed once more the further inquiry to be made. That further enquiry was held by Mr. Doderet who discharged the accused for a third time. The complainants applied over again to the Sessions Judge who again set aside the order of discharge and this time directed the District Magistrate to have fresh inquiry made by another Magistrate of experience. The accused, thereupon, applied to the High Court under its extraordinary jurisdiction.

PER CURIAM.—In the present instance the Sessions Court has sent back a case three times for re-investigation by the Magistrate who had discharged the accused under section 253 of the Code of Criminal Procedure. The form of the first order for a further inquiry was not such as to conform to the intention of section 437 of the Code of Criminal Procedure under which it was made. That section contemplates that the Court of Sessions shall simply direct the Magistrate of the District either himself or by one of his subordinates to make the further inquiry. It may often be desirable that the fresh consideration of the complaint should be committed to a different Magistrate from the one who has already formed an opinion on the case. This will indeed usually be so, where the further inquiry is rather into the effect of the same evidence or the testimony of the same witnesses than an examination and weighing of additional evidence. The latter function will generally be best performed by the same Magistrate who made the previous inquiry, but peculiar or prejudiced views, even the possibility of them, may make it most desirable to bring a fresh mind to bear on the facts when a discretional authority has to be exercised in dealing with them. See *Regina* v. *Adamson* (1).

The order of the Sessions Court directed the Magistrate of the District to send the case to the same Magistrate for further inquiry under circumstances which, accepting the view taken by the Sessions Judge, should rather have induced a direction to refer the case to another Magistrate. The second order is not as it ought to have been on the record. The third order is addressed to the Magistrate of the District and suggests that the further inquiry be committed to a Magistrate of experience by which the Sessions Judge indicates that the case should be sent to a different Magistrate from the one who had made the previous inquiries.

(1) L. R. 1. Q. B. D 131.

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The suggestion thus made may be deemed unobjectionable as it leaves to the District Magistrate the discretion intended by the law. But when accused persons have been already three times subjected to the harassment of a Magisterial inquiry on charges dwindling in importance as in the present case, we think that, save in extraordinary circumstances or on the discovery of new and important evidence giving quite a different complexion to the affair, the series ought to close. It savours of oppression to send a man, a fourth time, before a Magistrate for inquiry into a serious charge on the evidence which had already been thrice pronounced insufficient or untrustworthy. When the discharges and orders for further inquiry take the semblance of a contest of pertinacity, the dignity of justice is seriously compromised. The HIGH COURT AT ALLAHABAD (2) recently prescribed that the power of ordering further inquiry was one that should be "used sparingly and with great circumspection." In England the discretion of a Magistrate exercised in good faith and with any show of reason is not interfered with even by the highest Court though a mere pretended compliance with the law will be corrected as the case already quoted shows.

We reverse the order for further inquiry without prejudice to any complaint that may be made on the discovery of fresh and material evidence.

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23 June 1887. WEST & BIRDWOOD, JJ

Queen-Empress v. Vithoba.*

Penal Code (Act XLV of 1860), Sec. 506—Criminal Procedure Code (Act X of 1882), Secs. 248, 345—Compounding—Withdrawal of prosecution.

Although an offence under the latter portion of section 506 of the Indian Penal Code canno be legally compounded under section 345 of the Code of Criminal Procedure, yet a withdrawa from the prosecution may be allowed in a proper case, and in such a case *Reg.* v. *Devama* (1) would apply.

THE accused were charged with the offence of criminal intimidation under section 506, Indian Penal Code, the intimidation used being a threat to cause death and the offence being punishable with imprisonment for seven years. This offence, though not being compoundable under section 345, Criminal Procedure Code, was allowed to the Magistrate to be compounded.

ORDER.—Though compounding is not allowed, yet a withdrawal from the prosecution may be allowed in a proper case and in such a case I. L. R. 1 Bom. 64 would apply.

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(2) See *Queen-Empress* v. *Chhotu*. I. L. R., 9 All., 52 ED.

**Criminal Ruling* 20 *of* 1887. Criminal Reference No. 63 of 1887. (1) I. L. R., 1 Bom. ,64.

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30 June 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Dhondi.*

Criminal Procedure Code (Act X of 1882), Sec. 234—Offence against different persons—Same trial.

A person charged with two offences of the same kind within the definition of the second paragraph of section 234 of the Code of Criminal Procedure can be tried for both the offences at one trial, although the offences are committed against different persons.

THE accused was charged under section 211 of the Indian Penal Code, with having made false charge of an offence made with intent to injure; in that (1) he falsely charged one Dada with having committed criminal breach of trust in respect of a sum of Rs. 25 alleged to have been entrusted to him by the accused, and (2) that he falsely charged one Purshottam with having committed criminal breach of trust in respect of a sum of Rs. 25 alleged to have been entrusted to him by the accused. He was tried by the second class Magistrate at Chandore, jointly for the two offences and was sentenced to pay a fine of Rs. 20 in respect of each of the offences.

PER CURIAM.—We do not agree with the decision of the ALLAHABAD HIGH COURT in *Empress* v. *Murari* (1), which was dissented from by the CALCUTTA HIGH COURT in *Manu Miya* v. *Empress* (2). The two offences charged against the accused were of the same kind within the definition in the second para of section 234, Criminal Procedure Code. The sentences seem inadequate.

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7 July 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Sorabji. Queen-Empress v. Budan.†

Practice—Counter-charges—Penal Code (Act XLV of 1860), Secs. 342, 353—Hearing together—Compounding of charges.

Where there were counter-charges between the parties of offences under sections 342 and 353 of the Indian Penal Code, the Magistrate took evidence in both cases, without having come to a decision in either case, and eventually allowed the charges to be compounded:—

Held (1) that the Magistrate's procedure in hearing the two counter-charges before coming to a decision in either was not illegal, but that he should not have taken the evidence of an accused person on oath against the persons accused by him until the case against himself had been disposed of; and

(2) that the order of compounding should be reversed.

The circumstances of the two cases were as follows:—

A toddy farmer's agent (Mr. Sorabji Nasarwanji) arriving by night train at the Telgi Station was met by his karkun, whom he assaulted for some fault on that station platform. The Police interfered and were in turn assaulted. Whereupon they arrested Sorabji and kept him all night in

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*Criminal Ruling 21 of 1887. Criminal Review No. 127 of 1887.

(1) I. L. R., 4 All., 147. (2) I. L. R., 9 Cal., 371.

†Criminal Ruling 22 of 1887. Criminal References Nos. 75 and 76 of 1887.

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custody, he being released in the morning. The Police and Sorabji brought counter charges against each other of assault and of illegal confinement respectively.

The First Class Magistrate after proceeding some way with both cases allowed them to be compounded.

The District Magistrate of Bijapur in making the reference to the High Court observed:—" Although the Police have not pleaded it in defence of their action in arresting Sorabji, I am of opinion that they were acting within their duty under section 28 of Bombay Act VII of 1868 in interfering for the preservation of order when Sorabji assaulted his *karkun* on the Station platform; and that therefore if Sorabji resisted them he committed an offence under section 353, Indian Penal Code; which is not compoundable: also that the police if they arrested and confined Sorabji for his resistance committed no offence. I therefore think that the First Class Magistrate acted wrongly in allowing the cases to be compounded and that a new trial is necessary."

ORDER.—The Magistrate appears to have heard the two counter-charges before coming to a decision in either. This is not illegal, but he should not have taken the evidence of Sorabji an accused on oath against the persons accused by him until the case against Sorabji had been disposed of—*vide, Bachu Mullah* v. *Sia Ram* (1). It is the right and the duty of a police constable to prevent a breach of the peace and he may arrest any one who obstructs and therefore who resists him in performing this duty, Criminal Procedure Code, section 54 (5). The resistance offered by Sorabji, as described by the police, amounted to an offence under section 353, Indian Penal Code, which is " compoundable". Nor, if there was an offence at all, could the Magistrate reasonably suppose it was one of mere assault or criminal force against a non-official person. He ought to have laid the charge under section 353, Indian Penal Code, and have refused to allow the case to be compounded. He must now have left the district, but his successor in office will resume the trial of Sorabji, the order allowing a composition being reversed as illegal, and having disposed of that case, he will proceed to try the accusation brought by Sorabji against the Police Constables. In the latter case, he will take the evidence of Sorabji anew, the deposition formerly given by that person being regarded as excluded from the case.

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14 July 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Mahomad.*

Opium Act (I of 1878,) Sec. 9—Keeping open a shop after 9 p. m.—Offence—License.

The terms of a license issued under rules promulgated under sections 5 and 8 of the Opium

(1) I. L. R., 14 Cal., 358. **Criminal Ruling 23 of 1887. Criminal Reference No. 74 of 1887*

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Act 1878, are not to be regarded as part of the rules themselves; and, consequently, that an infraction of any of the conditions of a license issued under the said rules cannot be considered an infraction of the rules and punishable under section 9 (f) of the Act.

PER CURIAM.—In the present case a retailor of opium has been fined for keeping his shop open and allowing a person to remain on the premises after 9 P. M. By the terms of his license, these things are forbidden, and the license is declared subject to forfeiture in the event of a transgression of the prescribed rules. Its continuance is made conditional on the observance of these rules.

The license was issued under rules 39 and 40 of those made in 1885 under sections 5 and 8 of the Opium Act I of 1878. The former of these allows the license to be in such form as the Commissioner may prescribe, and the latter allows the Collector to impose such conditions on a license as the Commissioner may direct. The license in question, imposing the conditions of closing at 9 P. M., and excluding strangers after that hour, announces that failure in these respects will be visited with a forfeiture of the license. Taking it, therefore, as established that these rules were broken, the license could have been declared forfeited by the Collector. But it is contended that, besides this penalty, the licensee became subject to punishment under section 9 of the Opium Act, which (Art. (*f*)) says that whoever sells opium in contravention of rules, made or notified under section 5 or section 8, shall be subject to certain penalties. It is admitted that the rules promulgated under those sections do not directly prohibit the keeping a shop open after 9 P.M.; but it is urged that the terms of a license, issued under the rules, are to be regarded as part of the rules themselves. The answer to this is, first that the penalties can be inflicted only for a contravention of rules duly made and notified and that the delegated authority conferred on a Commissioner as to the forms of a license could not properly be extended into a sub-legislative authority to make additions to the penal law, and secondly that, even regarding the terms of the license as adopted into the rule under which it was issued, those terms go no further, when properly construed, than to say that, conditionally on compliance with such and such regulations, the licensee may sell opium and failing compliance his license may be forfeited. Terms thus set forth as conditions do not form independent rules, a breach of which is punishable otherwise than by forfeiture of the advantage made to depend on them. They are imposed only as conditions, nor do the rules, duly promulgated under the Act, contain anything so dangerous to liberty as that the breach of a condition in a discretional term of a license shall be an offence punishable under the Act.

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For these reasons, we agree with the Sessions Judge, and we accordingly reverse the conviction and sentence.

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21 July 1887. WEST & BIRDWOOD, JJ.

S. Howard v. Rustomji Dadabhai.*

Evidence Act (I of 1872), Sec. 91—Summary trial—Evidence—Oral evidence admissible to prove depositions of witnesses in summary trials.

In ordinary cases a Magistrate trying a criminal charge must take down the evidence, and then the record thus made is the only admissible proof of what was said, but in a summary trial the Magistrate need not generally record the evidence and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing, they may be proved by persons who heard them made in order to establish the fact that they were made.

ONE Mr. S. Howard was charged with theft before the Cantonement Magistrate of Poona, who discharged him under section 253 of the Code of Criminal Procedure. This case was tried summarily and the only record available was the particulars entered in the form prescribed by section 263 of the Code.

A Poona paper, *Poona Observer*, subsequently published a report of the trial. Mr. Howard found that the report was defamatory, inasmuch as, certain evidence given in his favour was delibrately omitted. In his complaint brought by him, before the Presidency Magistrate, the complainant proposed to call witnesses who were present at the said trial and to give his own recollection of the evidence. The learned Magistrate held, that the complainant's recollection of the evidence given at the summary trial was inadmissible as evidence in another criminal trial, and that the witnesses who had given evidence at the former trial could not be allowed to repeat their evidence in the present trial, for they might possibly add to, or subtract from, their former evidence. The Magistrate was also of opinion that these effect of allowing the witnesses to repeat their evidence wouldamount to a retrial of the case; he, therefore, discharged the accused.

The complainant thereupon applied to the High Court.

PER CURIAM.—The Magistrate's view of the law applicable to such a case as the present is erroneous. He would not, as he supposes, have to retry the case already disposed of by the Cantonement Magistrate at Poona. What he would have to try upon the information laid before him, would be the substantial fulness and the fairness towards the complainant of the newspaper report alleged to be defamatory. For this purpose the essential question would be, what the witnesses said in the course of the trial not whether it was true or what effect it produced or ought to have produced. In ordinary cases the Magistrate trying a criminal charge must take down

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**Criminal Ruling 24 of 1887. Criminal Application for Revision No. 164 of 1887.*

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the evidence and then the record thus made is the only admissible proof of what was said (Indian Evidence Act, section 91). But in a summary trial the Magistrate need not generally record the evidence (Criminal Procedure Code, section 263) and where no obligation is laid upon the Judge or law to reduce depositions or statements to writing, they may be proved by presiding officer or by persons who heard them made (see Taylor on Evidence 370, 371, 386, 516) in order to establish the fact that they were made (see *Regina* v. *Munton*) (1). In *Regina* v. *Gazard* (2) a chairman of Quarter Sessions was not allowed to depose to what was said before him. This serves to illustrate what we said on a previous occasion relating to the examination of Colonel LaPouche. The Magistrate's order of discharge must be set aside and he must proceed with the hearing of the complaint.

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21 July 1887. WEST & BIRDWOOD, JJ.

S. Howard v. Mahamadalli.*

Discharge—Presidency Magistrate—Appeal—Revision—High Court—Letters Patent s. 15.

There is no appeal against an order of discharge made by a Presidency Magistrate, nor can such a complainant apply to the High Court with a view to invoke its aid under section 15 of the Charter.

ORDER.—After reading the petition and the papers accompanying it and after hearing the petitioner who appears in person, we are prepared to send for the papers in the case.

The position taken by the petitioner is not indeed one that can be sustained. He has presented the application in the form of a memo of appeal, and in the case of *Poona Churn Pal* (3) the HIGH COURT OF CALCUTTA has decided that when an order of discharge is made by a Presidency Magistrate, right of appeal does not exist; nor can such a complainant apply to the High Court with a view to invoke its aid under section 15 of the Charter because to allow him to do so would be to allow him to obtain, under the extraordinary powers, that which he might obtain, had he a right of appeal. That decision was passed under Act IV of 1877, but the reasons which led their Lordships to pass the order in that case, still subsist after the passing of the new Criminal Procedure Code.

In the present case, however, we see sufficient reasons to call for record and proceedings with a view to make such orders as justice requires and for the correction of errors, if any, in the Magistrate's proceedings.

We, therefore, send for record and proceedings; and we send the affidavit put in by the petitioner to the Magistrate for him to lay before us any observations that he thinks appropriate in reference to the allegations

(1) 3 C & P. 498. (2) 8 C & P. 595. *Criminal Application for Revision No. 172 of 1887.
(3) L. R., 7. Cal., 447.

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of fact made in the affidavit in order that we may be able properly to deal with the matter before us.

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28 July 1887. WEST & BIRDWOOD, JJ.

Reference No. 81 of 1887.†

Criminal Procedure Code (Act X of 1882), Secs. 133, 138 and 435—Notice under S. 133 Jury under S. 138—Decision of the Jury—District Magistrate—Reference—High Court.

The decision of a Jury, appointed under Section 138 of the Code of Criminal Procedure, is not a proceeding in a Criminal Court which the District Magistrate can call for and examine and refer to the High Court under the provisions of section 435 of the Code of Criminal Procedure.

IN this case the District Magistrate of Kaira forwarded to the High Court under section 435 of the Criminal Procedure Code the papers in a case where notice had been used under section 133 of the Criminal Procedure Code and where the District Magistrate considered illegal the finding arrived at by the majority of the Jury appointed under section 138 of the Code.

JUDGMENT.—The decision of the jury in this case is not a proceeding in a Criminal Court which the District Magistrate could call for and examine and refer to the High Court under the provisions of section 435 (*et seq*) of the Criminal Procedure Code. Such a finding as the jury arrived at ought not to have been received without an endeavour to make their duty clear to them, but as the District Magistrate is not inclined to accept their modification of First Class Magistrate's order—which in fact is a reversal of it on certain terms,—he cannot take further proceedings under the Criminal Procedure Code. He will have to proceed on the right given to Government by Section 37 of the Land Revenue Code in the Civil Court or as he may be advised by the law officers of Government.

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31 July 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Kabhai.*

Criminal Procedure Code (Act X of 1882), Secs. 235—236—Sch. V, No. XXVIII—Contradictory statements—Police officer—Alternative charge—Penal Code (Act XLV of 1860,) Sec. 72.

An alternative charge framed according to Schedule V. No. XXVIII, section (2), clause (4) is not proper where a person is accused of making contradictory statements when examined by a Police officer under section 161, Criminal Procedure Code, and subsequently when examined by a Magistrate or a Court of Session. In such a case, if the two statements are regarded as so connected together as to form parts of one and the same transaction, section 235 of the Code should be applied to them. If they are regarded as unconnected, and it is doubtful whether the earlier or the later statement constituted the offence, section 236 should be applied. Separate heads of a charge should, therefore, be framed, imputing to the accused falsehood on each of the occasions on which he made the contradictory statements. If each of the statement is found to be false, conviction should follow on both heads of the charge. If a conviction is

†*Criminal Ruling* 25 *of* 1887. **Criminal Ruling* 26 *of* 1887. Criminal Appeal No 69 of 1887.

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justified only on one or other of the heads, and it is uncertain on which of the two occasions falsehood was uttered, then section 72 of the Indian Penal Code directly applies. The judgment should, in that case, be framed in the alternative, and punishment inflicted for the less serious of the two offences.

ORDER.—In the recent case of *Imperatrix* v. *Ismal*, it was held by this Court, that a statement made to a police officer making an investigation under section 161 was not made in a stage of a judicial proceeding. The offence committed by a falsehood in such a statement, could not, therefore, be identical in description with that constituted by a subsequent false statement before a Magistrate or in the Court of Session. It follows that the alternative charge framed according to Form XXVIII section 2 Art. (4) of schedule V of the Code of Criminal Procedure was not a proper one in the present case according to the ruling in *Queen-Empress* v. *Ramji* (1). Section 72 of the Indian Penal Code as well as section 233 of the Code of Criminal Procedure contemplates a separate consideration of every distinct offence; but it contemplates also a trial on the same group of facts of a charge with several heads varied to meet the different aspects in which the facts may be viewed under the penal law. In the present case, the two statements made by the accused are either so connected together as to form parts of one and the same transaction in which case section 235, Criminal Procedure Code, should be applied to them or else if they are unconnected they are such that it is doubtful whether the earlier or the later statement constituted the offence and in that case section 236 should be applied. Separate heads of a charge should, therefore, have been framed imputing to the accused falsehood on each of the occasion on which he made the contradictory statements. It might possibly occur that each of those statements should be false, and in this event, conviction might follow on both heads of the charge. Ordinarily a conviction would be justified only on one or other of the heads and it might be uncertain on which of the two occasions falsehood has been uttered. To such a case section 72 of the Indian Penal Code directly applies. The judgment should, accordingly, be framed in the alternative and punishment inflicted for the less serious of the two offences.

We reverse the conviction and sentence, and direct that the prisoner be retried on a charge with separate heads according to the procedure just indicated.

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4 August 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Ladkia.*

Criminal Procedure Code (Act X of 1882), Secs. 403, 406—Magistrate—Conviction for minor offence—Sessions Judge—Commitment.

(1) I. L. R., 10 Bom., 124. **Criminal Ruling 27 of 1887.* Criminal Reference No. 86 of 1887.

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Where an accused person appears to have committed culpable homicide, his conviction by a Magistrate for a minor offence does not prevent his trial for murder &c. The Sessions Judge, if he thinks there is a *prima facie* case, may call on the accused to show cause why a commitment should not be ordered, and may, thereafter order his commitment under section 436 of the Code of Criminal Procedure, if satisfied that there is sufficient cause for it.

IN this case the two accused Ladki and Bali were proved to have caused the death of Mangle, wife of accused No. 1, by a beating which accused No. 1 admitted he intended to amount at least to grievous hurt. The Magistrate found both the accused guilty of causing death by a rash and negligent act under section 304 A, Indian Penal Code. The Sessions Judge of Thana being of opinion that the conviction ought to have been for culpable homicide referred the case to the High Court.

PER CURIAM.—If the accused appeared to have committed culpable homicide, the Magistrate had not jurisdiction to try them for that offence, and under section 403 of the Code of Criminal Procedure, the conviction for a minor offence does not prevent their trial for murder &c. The Sessions Judge, if he thought there was a *prima facie* case, might have called on the accused to show cause why a commitment should not be ordered and thereafter directed their commitment, if satisfied that there was sufficient cause for it. The conviction and sentence must be reversed, and the Sessions Judge is to proceed under section 436 of the Code of Criminal Procedure.

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18 August 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Narayan.*

Village Police Act (Bom. Act VIII of 1867), Sec. 16—Rubbish—Head of the house.

It is a general principle that the head of the house is responsible for all nuisances which emanate from his house.

THE accused in this case was convicted under section 16, clause 3 of the Bombay Village Police Act, for depositing rubbish in a forbidden place. The accused preferred an application to the High Court under its revisional jurisdiction contending that he himself did not put the rubbish in the place were it was found, and that consequently he had not committed any offence under section 16, clause 3 of the Act. The evidence adduced in the case, however, tended to show that the accused had allowed some members of his household to do so.

ORDER.—The Court sees no reason to interfere with the decision of the Patel, and dismisses the application.

The argument which has been addressed to us that there was no proof that the accused had put the rubbish in the place where it was found and that it was not found on the accused's land is not to the point.

***Criminal Ruling 29 of 1887. Criminal Application for Revision No. 25 of 1887.**

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The general principle is that the head of the house is responsible for all nuisances which emanate from his house. A similar rule obtained in the Roman Law. The words used in the English Statute and also in the Indian Act (VIII of 1867) is "allows" to accumulate and that was what the Patel held that the accused permitted in the present case. If a Judge or Magistrate misquotes the proper section which is applicable to the conviction, it is the duty of the Superior Court before which the matter may come afterwards to look to the proper section of the law rather than by attributing the conviction to the wrong section cause a failure of justice. If we were to interfere in such cases we should assume a function which the law did not intend us to take upon ourselves. If the law had intended that the High Court should go into the merits of such decisions, it would have allowed an appeal which it has not.

It is better that in some cases petty mistakes should be left uncorrected rather than that the time of superior Courts should be clogged with the consideration of a large number of petty cases.

We, therefore, dismiss the application.

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25 August 1887. WEST & NANABHAI, JJ.

Queen-Empress v. Venkana.†

Criminal Procedure Code (Act X of 1882), Secs. 642, 555—Magistrate—Personally interested.

The Magistrate and the accused were fellow-passengers in a railway carriage. The latter were smoking; the Magistrate requested them to desist from smoking, but they contemptuosly refused to do so. After some altercation the Magistrate arrested the accused and subsequently tried and convicted them under section 35 of the Railway Act, 1879:—

Held, that under the circumstances of the case the Magistrate was legally and morally disqualified in exercising his judicial functions in relation to the offence imputed; and that although section 64 of the Criminal Procedure Code, gives to a Magistrate authority to arrest a person committing an offence in his presence, yet that section was clearly not intended to trench upon the great principle unbodied in section 555 of the Code, that no Judge or Magistrate shall deal judicially with a case in which he is personally interested.

IN this case the trying Magistrate and several of his *karkuns* were travelling to Karad, his own head-quarters by rail, after leaving a station about 12 miles from Karad the two accused who were travelling in the same carriage, lit their *bidies* or cigarettes. The trying Magistrate and his friends objected, but the accused continued to smoke and told the objectors to do what they pleased, as there was no harm in smoking.

On their arrival at Karad, the two accused, who were bound for a station further south, were summarily arrested, taken from the train and tried, and convicted by Mr. Govind, on the evidence of his *karkuns*. The sentence on the accused Venkana, no doubt the wealthier of the two, was a

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†*Criminal Ruling* 30 *of* 1887. Criminal Reference No 79 of 1887.

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a fine of Rs. 20, or in default simple imprisonment for 7 days; on the other accused, a fine of Rs 5, or in default simple imprisonment for 3 days.

The District Magistrate of Satara in making the reference to the High Court observed:—"I think the Magistrate should not have tried a case in which he was really prosecutor, and that the sentence would have been less severe if his dignity had not been wounded. To object to smoking in a third class carriage, or indeed in any carriage on an Indian Railway, is most unusual."

PER CURIAM.—It is urged in excuse or extenuation of the Magistrate's proceedings in this case that he acted under the provisions of section 64 of the Criminal Procedure Code, which gives to a Magistrate authority to arrest a person committing an offence in his presence; but that section was clearly not intended to trench upon the great principle embodied in section 555 of the same Code, that no Judge or Magistrate shall deal judicially with a case in which he is personally interested. In the present instance the admonition administered by the Magistrate to the accused in the railway carriage and the contemptuous disregard of that admonition by the accused, the subsequent arrest of the accused under the eye of the Magistrate at the railway station at Karad, and the altercation which took place between the Magistrate and the accused on the occasion, disqualified the Magistrate, legally as well as morally, for the exercise of his judicial function in relation to the offence imputed. The fine inflicted on the first accused was the extreme penalty allowed by the law for smoking in a railway carriage without the consent of fellow-passengers. The arrest of the accused midway in their journey must have caused them great discomfort and inconvenience. It is obvious that if the Magistrate thought the case so serious as to call for criminal proceedings, he ought to have sent it before another Magistrate, he himself being, under the circumstances of the case, so far personally interested that the prohibition of section 555 applied to him. We must, therefore, reverse the conviction and sentence and direct that the fine be returned.

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1 September 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Nagoo.*

Criminal Procedure Code (Act X of 1882), Sec. 438—District Magistrate—Reference—District Superintendent of Police.

The District Magistrate reported, the proceedings of the Second Class Magistrate, under Section 438 of the Code of Criminal Procedure, on representation of the District Superintendent of Police, who had himself been the complainant in the case before the Second Class Magistrate:—

Held, that the District Magistrate should have been guided by the Criminal Circulars p. 15, Section 42, and that he had acted irregularly in forwarding with is own incomplete report,

*Criminal Ruling 31 of 1887. Criminal Reference No. 94 of 1887.

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the communication addressed to him by the complainant protesting against the Second Class Magistrate's decision. The circumstance that the complainant holds office as District Superintendent of Police can give him no right to make any representation to the District Magistrate in the form of an official letter or memorandum in a case in which he was personally interested; nor can the High Court take such letter or memorandum into consideration when dealing with the case.

The District Magistrate of Ahmedanager in making the report to the High Court observed :—"I have the honour under the provisions of Section 438, Criminal Procedure Code, to forward here with the papers in the case of Nagoo tried by Azum Govind Sadashiv Bhide Head Karkun and Magistrate Second Class of Nagar which were called for by me under Section 435 of the Code, for such action as the Hon'ble the Judges of Her Majesty's High Court may think fit. The circumstances of the case are fully stated in the two reports from the Superintendent of Police among the papers and I agree with Mr. Vincent, the complainant, in the case that the Magistrate took for too lenient a view of the case. Cases of the nature are pretty common, the facilities being many and it is very desirable in my opinion that exemplary punishments should be awarded in one or two cases as a deterrent."

JUDGMENT:—In reporting this case to the High Court, the District Magistrate should have been guided by the Court's Criminal Circulars p. 15, section 42. He has acted irregularly in forwarding, with his own incomplete report, the communication addressed to him by the complainant, protesting against the Second Class Magistrate's decision. The circumstance that the complainant, holds office as District Superintendent of Police can give him no right to make any representation to the District Magistrate in the form of an official letter or memo, in a case in which he was personally interested. Nor can the High Court take his letter and memo into consideration when dealing with the case. The District Magistrate should therefore, report the case in the prescribed form, and leave the complainant, if he wishes to be heard, to apply to this Court for the requisite permission.

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1 September 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Saoliaram.*

Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Fine—Separate order.

When expenses properly incurred in the prosecution of a criminal charge are ordered to be paid by the accused under section 545 of the Code of Criminal Procedure, such expenses should be paid out of the amount of the fine imposed; a separate order for such expenses is improper.

ORDER.—In this case the Magistrate has imposed fines on the accused

*Criminal Ruling 32 of 1887, Criminal Reference No. 97 of 1887.

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according to law, and in addition to the fines he has ordered the accused to defray the expenses properly incurred in their prosecution. Strictly, under section 545, Criminal Procedure Code, he ought to have ordered the whole, or any part of the fines recovered, to be applied in defraying such expenses. Practically, his order has the effect of increasing the fines imposed by him by the amount ordered to be paid for expenses. So viewed, the order cannot be said to be illegal, though not in proper form. The Court increases the fine in the case of prisoner Savliaram by Re 0-15-6 and in the case of Govind Nanji and Keshav Nanji by Re. 0-7-9 each and varies the Magistrate's order by directing that a part of each fine, not exceeding the above sums, in the case of each prisoner be applied in defraying the expenses properly incurred in the prosecution.

As such order will not be a real enhancement of the sentence, no notice will be necessary.

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1 September 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Manekchand†.

Criminal Procedure Code (Act X of 1882), Sec. 133—General order—Disobedience—Penal Code (Act XLV of 1860), Sec. 188.

Where a Magistrate issues, under section 133 of the Code of Criminal Procedure, a general order prohibiting the establishment of cotton ginning yards in certain villages, a person establishing a cotton gin in contravention of the above order cannot be proceeded with under section 188 of the Indian Penal Code.

THE First Class Magistrate of Dhanduka issued an order on 23rd June 1886 presumably under section 133 of the Criminal Procedure Code in each of the villages of the Dhandhuka Taluka. By this order or proclamation he prohibited the establishment of cotton ginning yards in the village and directed that such cotton yards if established outside the villages should be 200 feet apart from each other. A copy of this order was posted at the *chowra* of each of the villages of the Taluka.

In the village of Malanpur Manekchand and Amarchand established a cotton ginning yard on the 1st of April 1887. On the complaint of the Police, the second class Magistrate convicted these two persons of an offence under section 188 of the Indian Penal Code.

The District Magistrate of Ahmedabad in referring the case to the High Court observed "the conviction and sentence are illegal and they should be quashed. The First Class Magistrate's order which was presumably made under section 133 was not legal as it was not an order directed to any particular person but a general proclamation prohibiting the act therein mentioned in general term without referring to any special case or individual. The Second Class Magistrate was therefore wrong in

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†*Criminal Ruling* 33 *of* 1887. Reference No. 96 of 1887.

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proceeding against the accused and even if he thought he was right in doing so, he ought to have obtained sanction of the First Class Magistrate under section 195 of the Criminal Procedure Code before taking any action in the case. Although even in that case the convictions and sentences would have been held to be illegal the order of the First Class Magistrate not being in accordance with the provisions of section 133 of the Criminal Procedure Code.

ORDER:—Reverse the conviction and sentence for the reasons given by the Magistrate.

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6 September 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Govardhan.* Queen-Empress v. Dullabhdas.* Queen-Empress v. Bhagwan.*

Criminal Procedure Code (Act X of 1882), Sec. 288—Witness—Deposition before committing Magistrate—Sessions trial—Admissibility—Cross-examination of the deposition—Evidence Act (I of 1872), Secs. 145, 155—Contradicting a witness—Statement in writing—Cross-examination.

When a Sessions Judge admits a deposition of a witness taken before the Committing Magistrate as evidence in the trial before a Sessions Court, under section 288, Criminal Procedure Code, he should, in his proceedings, distinctly note that he has done so and give the deposition a number in his proceedings and translate it, or the material portions of it, in his English minute of the proceedings.

When a counsel or pleader cross-examines a witness, with reference to a previous deposition, the parts thereof to which the cross-examination is directed should be set out in the Judge's minute of the proceedings. The deposition itself need not, in such a case, be made a portion of the evidence in the Sessions Court, unless the Government Pleader desires that it should be so recorded or the Sessions Judge adopts it under section 288, Criminal Procedure Code.

The pleader or counsel for the defence of the accused may introduce, as part of his own evidence, a previous deposition made by a witness, and in this case, the depositions must be numbered and translated in the minute of proceedings. The prosecuting counsel or pleader has a right in such a case to question the witness as to apparent contradictions and discrepancies between the two statements.

As to a contradictory statement in writing, the old rule was that the cross-examining counsel must produce the document as his evidence and have it read to found questions on it. But now a witness may be cross-examined on evidence, previously given by him without the introduction of the previous deposition as evidence by the cross-examining counsel. But before contradicting the witness in this way, his attention is to be called to the part of the writing that is to be used for this purpose. The Judge may require production of the document and then use it at his discretion. A cross-examination is necessary in order to *introduce* the alleged contradictory writing.

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8 September 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Shekh Husan.†

Penal Code (Act XLV of 1860), Secs. 379, 380—Theft—Recovering one's own property—Custody of the Police constable—Good faith—Furtive action.

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*Criminal Ruling 34 & 35 of 1887. Criminal Appeals Nos. 114, 106 and 111 of 1887.

†Criminal Ruling 36 of 1887. Criminal Appeal No. 99 of 1887.

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The accused was charged with having stolen his own property in the custody of a Police Constable: he admitted the taking but pleaded not guilty on the ground that the property was his own:—

Held, that the Police Constable, being intrusted with the bundle, for which he was accountable, had special property in it; and that therefore the accused was guilty of theft.

IN this case the accused was charged with having stolen his own property which was in the charge of a Head Constable. The Joint Sessions Judge of Alibag convicted him of theft.

ORDER.—The Police Constable being entrusted with the bundle and accountable for it had special property in it (See Story on Bailments page 115 *n*). Had any person other than the accused taken the property in the same way, he would undoubtedly have been guilty of theft and the prisoner could be excused only on the ground that he acted in a honest assertion (*i. e.* in good faith) of his own right. See, 11 Cox Cr. Ca. 549. His furtive action excludes this supposition. He could not reasonably have supposed that he was legally warranted in taking possession as he did. He therefore gained by unlawful means that, to which, at any rate provisionally, he was not entitled and so committed theft, as he must have intended to take dishonestly, *i. e.*, so as to cause wrongful gain to himself and loss to the Constable. He could, with a similar intention, have stolen his own goods from his own bailees, *R.* v. *Wilkinson* (2) or his co-owner *R.* v. *Webster* (3). The conviction therefore is good. But the punishment is wholly disproportionate to the offence and should be reduced to one year's rigorous imprisonment.

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14 September 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Sayad Surfuddin.*

Evidence Act (I of 1872), Secs. 34, 152, 159—Account books—Corroboration—Refreshing Memory—Judge—Cross-examination.

Entries to be admitted as evidence by way of corroboration of other testimony must be made in the regular course of business. It is not sufficient to prove that the entries were taken from books which were regularly and correctly kept.

It is the duty of a Judge to control the cross-examination, so as to prevent any gross abuse and to protect a witness from being unfairly dealt with. The authority given by section 152 of the Indian Evidence Act ought to be exercised whenever the occasion arises; nor ought a counsel or a pleader to be allowed to terrify or browbeat a witness by vociferations or gratuitous suggestions of falsehood, calculated rather to crush a weak man or to enrage an irascible one, than to elicit the truth. A witness giving evidence is, *prima facie*, performing a public duty. The degree to which he may properly be pressed depends on circumstances, but it is subject to the general principle that the purpose in view is to get out the truth, not to force on the witness admissions that confuse or distort it.

A witness who is being asked in reference to any particular transaction if he had made any entry in a register or book on or about the time when an occurence took place, such as the

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(2) R. and R. Cr. Ca. 470. (3) 31. L. J. M. C., 17

**Criminal Ruling* 37 *of* 1887. Criminal Appeal No. 72 of 1887.

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posting of a letter of which an entry was made, might refer to such entry or memorandum to refresh his memory, but beyond that he could not go.

PER CURIAM.—Before proceeding to the discussion of this case on the evidence, we will make an observation on document S. The law is, that if the son of the accused had made any entry in the register S, on or about the time when an occurence took place, such as the posting of the letter of which an entry was made, he might have referred to such entry or memo to refresh his memory, but beyond that he could not go. He might be cross-examined, and re-examined on the entry, but he could not supply any defect in his evidence by it.

Unless he was in a position such as has been already stated, he could not use the document even to refresh his memory; much less could it be made use of as substantive evidence in the case. Section 34 of the Evidence Act allows entries made in the regular course of mercantile business to be admitted as evidence by way of corroboration of other testimony but it cannot be pretended that the entry here was in a book of account. It could not, therefore, be used as corroborative evidence. It was held by their Lordships in a case decided by the PRIVY COUNCIL, *Baboo Ganga Persad and another* v. *Baboo Inderjit Singh and another* on the 27th February 1875, that a mere statement of a banker was not sufficient to prove that his books were regularly and correctly kept and to make them evidence of a disputed transaction. Now, going to the substance of the case itself we are reminded of the saying, as ancient as Hesiod—that the half is often better than the whole. We think, looking at the case from the point of view the Government might not unreasonably take, that there was a strong case for appealing, *i. e.*, if the matter rested on only half the evidence for the prosecution before the Sessions Court. The case for the prosecution is infected with an excess of evidence much of which being probably false materially weakens the case as a whole.

The transaction of the 7th September 1886 is the central point in the evidence which the Court has to consider. When we are called upon to go to the extent of saying that the unanimous opinions of the Judge and Assessors are to be set aside, we are bound by the same principles as the Court would have to apply to a reference under section 307 of the Criminal Procedure Code as laid down in *Reg.* v. *Khanderav* (1). We should have to be convinced that the decision of the Judge and Assessors was perverse or patently wrong. Regularity of procedure, and the liberty of the subject can only be maintained and guarded by a strict adherence to these principles. Otherwise a man might be put on his trial again and again on the same charge notwithstanding repeated acquittals. Judges

(1) I. L. R. 1 Bom., 10.

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have ere now proved subservient and if there were any swerving from fixed principles in such cases the results might be disastrous.

As a Magistrate is, said the Court of King's Bench in an analogous case, in some cases substituted for a Jury the principles applicable to an acquittal by a Jury are applicable to an acquittal by a Judge or Magistrate (*King* v. *Davis* (1)) and the principle therein laid down should be applied to the case of acquittal by Assessors and a Sessions Judge, if not absolutely, yet in all cases in which their decision has not been plainly unreasonable.

Now the transaction of the 7th September is involved in great doubt. If the accused was on, or near, the premises of the Subordinate Judge on that date, it is not likely that he would have gone there for anything but to give evidence. If he did go there for that purpose, why did he not give evidence? Although the *roznama* of the case heard on the 7th September does not show that he was absent from sickness it must be remembered that there was no necessity for that being shown. It is however improbable that he was there on that day. On the previous day he had written on the summons that he was ill. If he had gone to the Subordinate Judge's Court and got ill there, he would probably have asked the Subordinate Judge's leave to go away. The Subordinate Judge remembers that Surfudin's son came and told him that his father was ill. He distinctly remembers that, and we have no reason to believe that he is not an honourable man. It would be gratuitous false testimony on his part to say so if that had not been the case. We must take it, then, that Sarafudin was not there.

The evidence of the two *talatees*, who say that they were passing by accident and heard an altercation going on in a loud voice between Sarafudin and Mulchand, is in itself very improbable. It seems unlikely that the accused would have spoken loudly about a matter, which, if he were guilty, he would have liked to keep quiet. The Assessors and the Assistant Judge think the whole incident as a fabrication, and we think their view is probably right. If this be so, then we cannot but feel that a doubt is thrown over the whole case for prosecution. If we had to rely on this evidence alone, it would be impossible to sustain a conviction. Nor we think is the case free from other difficulties. Although Musa Mia may have been confused to some extent by the cross-examination to which he was subjected, still his contradictions do not merely cancel each other. They throw doubt on his whole testimony. It is the duty of a Judge to control the cross-examination so as to prevent any gross abuse; and to protect a witness from being unfairly dealt with. The authority given by section 152 of the Indian Evidence Act ought to be exercised whenever the occasion

(1) 6 T. R., 178.

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arises; nor ought a counsel or pleader to be allowed to terrify or browbeat a timid witness by vociferations, or gratuitous suggestions of falsehood, calculated rather to crush a weak man, or to enrage an irascible one, than to elicit the truth. A witness giving evidence is *prima facie* performing a public duty. The degree to which he may properly be pressed depends on circumstances, but it is subject to the general principle that the purpose in view is to get out the truth, not to form on the witness admissions, than confuse or distort it. "A Court can always check improper conduct." (per *Fry*, L. J., in L. R. 11 Q. B. D. at p. 608). It is on this that the irresponsibility of advocates depends. We do not doubt that these principles were present to the mind of the Sessions Court; and when the Judge allowed the cross-examination to continue, we must conclude that he did not think that the witness was unfairly used, or that he was unable to give his evidence freely. If the case were however free from the *talatee's* story—if it were left to Musa Mia and Mulchand supported by the Mamlatdar—it would show that the accused falsely stated that he had given the document to a peon whom he could not identify and that he told a story about the loss of the document at Viramgam which could not possibly be reconciled with his other statements. His vacillation, his shuffling conduct, would appear to be that of a guilty person. This portion of the evidence has, perhaps, not been sufficiently considered by the Assistant Sessions Judge. We cannot, however, disregard the rest of the evidence. The stories of Lutafat's missions etc. are so inconsistent and improbable that we must give them weight rather as against the prosecution than in favour of it.

On the whole, we think, this is not a case where a Jury's decision could fairly have been challenged, as a grossly unfair or perverse verdict, patently wrong, and against the evidence. We think this principle applies with almost equal force to an acquittal in a criminal case tried with the aid of Assessors. In the present case, we have a unanimous decision of the Assessors and of the Assistant Sessions Judge. Under such circumstances, we should not be justified in saying that their view is unquestionably a wrong one. We, therefore, dismiss the appeal though without saying that the appeal was wholly unreasonable.

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20 September 1887 WEST & BIRDWOOD, JJ.

Queen-Empress v. Bhabhutgar.*

Evidence Act (I of 1872), Sec. 33—Deceased witness—Deposition in a previous case—Admissibility in a subsequent proceeding.

When there are two or more charges arising out of the same allegations made by an accused the testimony of a deceased witness in a previous proceeding against the accused is admissible in evidence in a subsequent proceeding against the same accused.

**Criminal Ruling* 33 *of* 1887. Criminal Appeal No. 70 of 1887.

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PER CURIAM.—It is proposed on behalf of the accused to put in evidence a deposition made by Nahani, now deceased, in a previous Magisterial inquiry against the accused. The Joint Sessions Judge has refused to receive this deposition, but we are of opinion that it is admissible. In the previous case the present accused was charged with cheating by personation in having set himself up as one Hiralal, supposed to be dead. In the present case he is charged with having given false evidence in asserting as a witness that he is in fact the same Hiralal. On each occasion the accused's aim was to obtain or to retain Hiralal's share in an estate as against the exclusive claim of his brother Manilal. Although the earlier criminal proceeding was different in form from the present one, yet the substantial question of whether the present accused was or was not Hiralal was the same in each. Nahani, the wife or widow of Hiralal, accepted the accused as her husband and gave evidence on his behalf in the earlier inquiry. Every question on the subject of the accused's identity that could have been properly put to her in the present case on behalf of the prosecution, had she survived and repeated her testimony, could have been as properly put to her in the earlier inquiry. Full opportunity for cross-examination in the same interest is the test prescribed by the English law when the deposition of a witness in an earlier case is tendered on the ground of his death as evidence in a later one—See *Taylor on Evidence*, sections 436 and 457. The Indian Evidence Act, section 33, says the proceedings on the two occasions must he between the same parties or their representatives and that the parties in a criminal proceeding shall be deemed to be prosecutor and the accused. "Prosecutor" evidently means the person who is substantially pursuing the accused, that is, generally the complainant. This may be proved by reference to section 59 of the Criminal Procedure Code, Act X of 1872,—an act almost contemporaneous with the Evidence Act I of the same year. See too *Queen* v. *Ramjai Muzumdar* (1).

In the case before us the original prosecutor or complainant in the earlier prosecution before the Magistrate has died. The present case has been prosecuted by his widow. It involves no doubt a certain harshness of construction to say that thewidow is the representative in interest of her deceased husband so as to make the disputed deposition admissible under the words used in the law by which we are governed, but the object sought in section 33 of the Indian Evidence Act was plainly no more than compression not a change of the English rule and apart from mere phraseology, the same reason precisely supports the admission of Nahani's deposi-

(1) 6 B. L. R. 46 ap.,

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tion in a prosecution by Manilal's widow as if he had survived to be prosecutor himself.

From one point of view, it might be said that the prosecution in each case being by the Crown there could be no difference of prosecutors in the two, such as to create any difficutly. This view, however, is not the one taken in the Indian Evidence Act, section 33, for, if it were, the Crown would have been described as a party to every criminal prosecution, and it is obvious that the questions in cross-examination that would be pertinent as between the accused and one prosecutor (in the ordinary sense) would frequently be irrelevant as between the same accused and another prosecutor (in the same sense). The full opportunity of cross-examination would therefore have existed in the earlier case only in name, the interests represented on the two occasions being very possibly quite different. But apart from the suggestion of a necessary identity of the prosecutor in all criminal cases we think the deposition is in this instance admissible for the reasons we have given and no question being raised as to the earlier proceedings, we receive it under section 428, Criminal Procedure Code.

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29 September 1887. WEST & BIRDWOOD, JJ.

In re Keshav Ramchandra.*

Penal Code (Act XLV of 1860), Sec. 490—Workman's Breach of Contract Act (XIII of 1859)—Breach of contract.

Section 490 of the Indian Penal Code does not apply to a contract to supply carts and work them for a certain period, but applies only to a contract to take particular goods or a particular load of goods from one specified point to another.

A contract for bringing and letting of carts, whether at a place where the contract is made or elsewhere, at a specified rate for the journey, is not a contract within the meaning of the Workman's Breach of Contract Act, 1859.

IN this case the petitioner having obtained a contract for carting goods on the Marmagoa Railway entered into an agreement with Genu, Rama and Raghuji by which they promised to supply eight carts to him and to work them from the 31st December 1886 till the 5th June 1887 on hire and received a sum of Rs. 23 in advance per cart. The petitioner, thereupon, charged the cartmen under section 492 of the Indian Penal Code and section 1 of the Workman's Breach of Contract Act.

ORDER.—We are of opinion that section 490, Indian Penal Code, being a penal enactment must not be extended by construction beyond its obvious scope. It applies properly not to a contract to go from one place to another in order at the latter to give the use of a cart at a particular rate of remuneration to carry goods for a particular distance, but that it applies only to a contract to take particular goods or a particular load of

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**Criminal Ruling* 39 of 1887. Criminal Application for Revision No. 229 of 1887.

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goods from one specified point to another. We exclude the part of the section which relates to attendance on a person on a journey. As to Act XIII of 1859 we are of opinion that the contract for the bringing and letting of carts whether at the place where the bargain is made or elsewhere at a specified rate for the journey is not a contract for the employing of an artificer, workman, or labourer, within the meaning of the Act. We may refer on this point to the case of *Queen* v. *Razeba bin Amrutrai* decided by this Court about the year 1865 and quoted in the note to Act XIII of 1859 in the Acts and Regulations applicable to the Bombay Presidency commonly called West's Code. A similar view appears to have been held by the HIGH COURT OF MADRAS on the 13th July 1877.

For the reasons above stated we reject the application.

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6 October 1887. WEST & BIRDWOOD, JJ.

Queen-Empress v. Bapuda.*

Criminal Procedure Code (Act X of 1882), Secs. 403, 253, 349—Discharge—Acquittal—Magistrate.

There is nothing to prevent a Magistrate after he has once discharged an accused under Section 253 of the Code of Criminal Procedure Code from inquiring again into the case against him. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous inquiry, just as before. But all Magistrates, and especially the one who formerly discharged the accused, are bound to exercise due discretion, to take that discharge into account, and to avoid any such oppresive proceedings as may either expose them to punishment under section 219 or section 220, Indian Penal Code, or to a civil action on the part of the accused.

When proceedings are sent to a Magistrate under section 349 of the Code of Criminal Procedure, the whole case is opened up for him to deal with it according to his discretion.

IN this case on fresh evidence being procured, an accused person Bapuda, who had previously been discharged under section 253 of the Criminal Procedure Code by the Second Class Magistrate of Mehmedabad was again placed before the same Magistrate on the same charge of theft, by the police, with the usual police report. The Second Class Magistrate having made a fresh inquiry and recorded the further evidence sent the case to the District Magistrate for a severe sentence then he could himself inflict, and the District Magistrate of Kaira, Mr. Baines, in his turn, committed the accused to the Sessions Court under section 348, Code of Criminal Procedure, because he considered him an habitual offender.

The Sessions Judge of Ahmedabad in making the reference to the High Court observed:—"the reference seems to me to be unnecessary, but I have doubts whether my own opinion ought to stand in the way because the case is pending before the Joint Sessions Judge who has adjourned it pending

**Criminal Ruling 40 of 1887. Criminal Reference No. 109 of 1887.*

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the result of the reference, and who is apparently not bound by the opinion which I have already expressed that there is no sufficient ground for asking the High Court to quash the committal.

"The Joint Sessions Judge, however, considers, agreeing with the District Magistrate of Kaira, that an accused person once discharged under section 253 of the Criminal Procedure Code cannot be rearrested by the Police or tried by the Magistrate who discharged him unless and until the said Magistrate has been set in motion by superior competent authority under Chapter XXXII of the said Code.

"There is in the first place an obvious distinction between a second prosecution before the same Magistrate on the same evidence and a fresh prosecution on further evidence.

"In the former case the Police officer and the Magistrate may each in turn be looked on as becoming *functus officio*, the Police Officer when he has made his investigation under Chapter 14 and sent the accused with a Police report to the Magistrate (section 170) and the Magistrate when he has made the inquiry authorised by section 191 and passed an order of discharge under section 253. Whether it does or does not follow from this that the Magistrate ought not to or cannot legally re-exercise on the same evidence the jurisdiction given by section 191 of the Criminal Procedure Code, it has been decided by the CALCUTTA HIGH COURT that he cannot of his own motion revive on the same evidence the proceedings which ended in his own order of discharge.

"*Empress* v. *Donnelly* (1) because the Code (then as now) provided for a Magistrate in such cases being again set in motion by superior authority. Mr. Justice *Prinsep*, who was one of the Judges who decided that case concurred in the decision, (though he did not assent to the grounds on which it was based), because several decisions of that Court restrict the power of a Magistrate " to revive a case after he has passed an order of discharge under section 215 (corresponding with section 253 of the present Code) to cases in which there may be some fresh evidence forthcoming."

"Now in the latter category, that is, where fresh evidence is forthcoming, neither the Police officer who made the first investigation nor the Magistrate who passed the order of discharge has become *functus officio*. The Police officer would be neglecting his obvious duty if he did not make the further police investigation necessiated by the discovery of further evidence, and the Magistrate cannot point to any previous adjudication as a ground for refusing to take the fresh evidence with, if necessary, the old evidence now placed in a new light. The powers of the Police and the Magistrate are the same with respect to the new evidence as they were

(1) I. L R. 2 Cal., 405.

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with respect to the old. The previous order of discharge need not be set aside because it is no bar to a fresh prosecution (section 403, Criminal Procedure Code). The new prosecution on further evidence is not a revival of the earlier proceedings, but is a separate proceeding altogether. If there is any fresh evidence forth-coming which was not before the Court when the first inquiry was held, then there is no necessity to revive the previous proceedings at all and the Magistrate can proceed without any reference." See *Markby*, J. in *Empress* v. *Donnelly* (2).

"Moreover that a Magistrate can of his own motion reopen a prosecution when futher evidence is procurable his previous order of discharge notwithstanding was repeatedly ruled under the old Codes by the CALCUTTA HIGH COURT.

"*Empress* v. *Donnelly* (3) *Harisingh* v. *Danish Mahomed* (4); *Ramroy Moozamdar* (5); *Queen* v. *Tilkoo* (6); *Jint Sahoo* v. *Bheekon Roy* (7); and there does not appear to be anything in the present Criminal Procedure Code and especially in section 403 to lessen the force of those decisions."

JUDGMENT.—The Joint Sessions Judge was justified in this case in laying the question of the sufficiency of the commitment before the Sessions Judge but the ruling of the latter should have been accepted as conclusive. The case being then sent to the Joint Sessions Judge for trial under section 193, Criminal Procedure Code, he should have proceeded to try it.

The reference from the Joint Sessions Judge should have been dealt with by the Sessions Judge by way of judicial order recorded in Court as part of the proceedings in the case rather than by correspondence.

There is nothing to prevent a Magistrate after he has discharged an accused under section 253, Criminal Procedure Code, from inquiring again into the case against him. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous inquiry just as before. But all Magistrates and especially the one who formerly discharged the accused are bound to exercise due discretion, to take that discharge into account and to avoid any such oppressive proceedings as may either expose them to punishment under section 219 or 220, Indian Penal Code, or to a civil action on the part of the accused. A case arising on fresh evidence will generally be best dealt with by the Magistrate already familiar with the facts previously proved. He will, of course, deal discreetly with an instance of a revived

(2) I. L. R. 2 Cal., p. 411. (3) I. L. R. 2 Cal., 405. (4) 20 W. R., 46.
(5) 14 W. R., 65. (6) 8 W. R., 61. (7) 18 W. R., 39.

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prosecution where there is a room to suspect that any crooked paractices have been resorted to but his authority to inquire and try is not affected by the previous abortive inquiry.

When proceedings are sent to a Magistrate, under section 349, the the whole case is opened up for him to deal with it according to his discretion—*Queen-Empress* v. *Havia* (1). In the present instance he committed it for trial. He had authority to commit and, as he had such authority, his exercise of it covered prior irregularities of procedure not affecting his legal capacity to deal with the case.

There is no ground for interference by this Court with the committal.

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17 November 1887. NANABHAI & BIRDWOOD, JJ.

Queen-Empress v. Basappa. Queen-Empress v. Mallkappa. Queen-Empress v. Murgappa. Queen-Empress v. Yellappa. Queen-Empress v. Shivappa.*

Criminal Procedure Code (Act X of 1860), Sec. 423—Conviction—Sentence—Appeal—Penal Code (Act XLV of 1860), Secs. 323, 147.

The accused were convicted by a Second Class Magistrate under section 323, Indian Penal Code. On appeal, the appellate Court confirmed the conviction under section 323, Indian Penal Code, and also convicted the accused of an offence under section 147, of the Code, for which they were not tried by the Second Class Magistrate:—

Held, that as the accused were not tried for an offence under section 147 of the Indian Penal Code, the Appellate Court could not legally convict them of it.

THE accused were convicted by the Second Class Magistrate of Bankapur of an offence under section 323 of the Indian Penal Code, and was sentenced to pay a fine of Rs. 10. On appeal, the First Class Magistrate altered the conviction by adding section 147, Indian Penal Code, but confirmed the sentence. The Sessions Judge remarked: "The Appellate Court can alter the finding, but it appears doubtful whether it is competent to add a charge and convict appellant of a graver offence."

ORDER.—As the accused Basapa was not tried for an offence against section 147, Indian Penal Code, the Appellate Court could not legally convict him of it. The Court reverses so much of the First Class Magistrate's order in appeal as alters the conviction recorded by the Second Class Magistrate.

The same order in the cases of the other appellants.

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20 November 1887. NANABHAI & BIRDWOOD, JJ.

Queen-Empress v. Totaram.*

Criminal Procedure Code (Act X of 1882), Sec. 488—Maintenance—Order—Adultery.

Adultery subsequent to an order for maintenance disentitles a wife to claim a continuance of the maintenance and entitles the husband to apply for a cancellation of the order.

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(1) I. L. R., 10 Bom., 195.

**Criminal Ruling* 41 *of* 1887. Criminal Reviews Nos. 285, 293, 294, 295 and 296 of 1887.

**Criminal Ruling* 42 *of* 1887. Criminal Application for Revision No. 199 of 1887.

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ORDER.—An order was made by the First Class Magistrate on the 19th August, 1886, directing the petitioner under section 488, Criminal Procedure Code, to allow his wife Radhi maintenance at the rate of Rs. 5 per mensem. On the 20th June, 1887, he applied to the Magistrate to cancel this order on the ground, *inter alia*, of subsequent adultery by Radhi, who, he alleged, was then 7 months gone in pregnancy, and he offered to give evidence of the fact naming his witnesses. Under these circumstances, we are of opinion that, the Magistrate was wrong in declining to enquire into the case on the ground that it was not pretended that she was at the moment living in adultery. We think that adultery subsequent to an order for maintenance disentitles a wife to claim a continuance of the maintenance and entitles the husband to apply for a cancellation of the order. We accordingly reverse the Magistrate's order and direct him to inquire into, and dispose of, the petitioner's application on its merit. We are informed on affidavit that Radhi was actually delivered of a child on the 17th July 1887. If such is the fact, it will facilitate the decision as to the alleged adultery.

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8 December 1887. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Solomon.†

Penal Code (Act XLV of 1860), Sec. 491—Cook—Leaving service suddenly during illness of complainant's wife.

Section 491 of Indian Penal Code does not apply to a person who is engaged only as an ordinary cook to a family and is not bound by a contract to attend on or to supply the wants of any helpless person.

THE District Magistrate of Belgaum in referring the case to the High Court stated: "The accused, no doubt, formally pleaded guilty to the charge; yet the evidence shows, in my opinion, that the conviction cannot be sustained. The complainant engaged the accused as an ordinary cook; and, though the complainant's wife was seriously ill, yet it does not appear that a contract, as contemplated in section 491, Indian Penal Code, was entered into by the accused. The accused's statement, under examination, is apparently correct. He left the complainant's service for a good reason. His own child was ill. He left in the morning; he sent in the evening another cook to do his work. There were, apparently, other persons on the premises or else procurable without much trouble who could cook for the complainant's wife."

ORDER.—The Court reverses the conviction and sentence.

The accused was engaged as an ordinary cook to a family and was not bound by contract to attend on or supply the wants of any helpless person. Section 491, Indian Penal Code, cannot, therefore, apply to this case. The

†*Criminal Ruling 43 of 1887.* Criminal Reference No.132 of 1887.

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conviction is illegal and must be set aside. The Magistrate should be informed that the medical certificate referred to in para 2 of his judgment should not have been used as evidence.

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14 December 1887. BIRDWOOD & PARSONS, JJ

Queen-Empress v. Mulchand.*

District Municipal Act (Bom. Act VI of 1873), Sec. 82—Cattle—Straying—Magistrate—Criminal Procedure Code (Act X of 1882), Sec. 191—Cognizance.

Section 82 of the Bombay District Municipal Act does not deprive a Magistrate of the power conferred by Section 191 of the Code of Criminal Procedure, of taking cognizance of an offence upon complaint, or upon a Police report, or upon information &c, to a Police officer of the power conferred by section 28 of the Bombay Act VII of 1867.

THE petitioner's cattle were taken to the pond by the Police, as they were staying along a public road without a keeper. The petitioner was also charged by the Police in respect of the aforesaid occurence under Section 64 of the Bombay District Municipal Act 1873. In his application to the High Court the petitioner contended that the police had no authority to proceed against persons offending against the provisions of the Bombay District Municipal Act.

PER CURIAM:—We are of opinion that section 82 of the Bombay District Municipal Act VI of 1873 deprives neither a Magistrate of the power, conferred by section 191 of the Code of Criminal Procedure of taking cognizance of an offence created by the Act upon complaint or upon a police report or upon information &c., nor a Police officer of the power, conferred by section 23 of the Bombay District Police Act VII of 1867, of laying information of such an offence before a Magistrate. If it had been intended so to limit the powers of Magistrates and Police officers, the intention would have been clearly expressed in the Act. Such language would have been used, as we find for instance, in sections 196, 198 and 199 of the Code of Criminal Procedure and section 26 of Bombay Act V of 1873 and section 29 of Act XI of 1878. We look upon section 82 of Bombay Act VI of 1873 as merely enabling a Municipality to direct a prosecution for offences against the Act, and not as depriving police officers or Courts of any authority or jurisdiction conferred on them by any other law. Nor again can clause 2 of section 87 of the Act have any such effect.

We cannot hold that there was no proper trial in the present case. The accused ought, under section 244 of the Criminal Procedure Code, to have had his witnesses in attendance. Ample time was allowed for that purpose; and if a summons was necessary to procure the attendance of any witness, it should have been applied for before the date fixed for the hearing. We cannot say that the Magistrate exercised his discretion wrongly

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**Criminal Ruling* 44 *of* 1887. Criminal Application for Revision No. 249 of 1887.

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in refusing the adjournment asked for at the trial. There was sufficient evidence adduced before him to support the conviction, which we, therefore, uphold. We think, however, that the fine was excessive under the circumstances of the case, and reduce it to Rs. 5.

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15 December 1887. BIRDWOOD & PARSONS, JJ.

Ahmednagar District Magistrate's Letter No. 6914.*

Regulation 12 *of* 1827, *Sec.* 19, *cl.* 1—*District Magistrate—Ferry approaches—Order prohibiting bathing or washing of clothes—Order illegal.*

The District Magistrate of Ahmednager having issued a notice caused it to be put up in a conspicuous place at Newasa, prohibiting the washing of clothes on, and batting from, the masonry pavements of the ferry approaches at that place, or the landings of the said ferry:—

Held, that the rule made by the Magistrate was not one which could be legally made under section 19, clause 1 ,of Regulation 12 of 1827.

READ letter from the District Magistrate of Ahmednagar No. 6914 dated 30th November 1887, forwarding, for the information of the High Court, a copy of a notice which he has caused to be put up in a conspicuous place at Newasa prohibiting washing clothes on and bathing from the masonry pavements of the ferry approaches at that place or the landings of the said ferry.

ORDER.—It appears to the Court that the rule made by the Magistrate is not one which can be legally made, under clause 1 of section 19 of Regulation 12 of 1827. The Court, therefore, forbids it.

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15 December 1887. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Shankarlal.†

Stamp Act (I of 1879), *Secs.* 3 (17), 61—*Receipt—Pledge—Receipt in a book.*

Certain ornaments were pledged by the accused to his creditor. They were given back by the creditor and were sold by the accused; and the proceeds were paid by him to the creditor, and the debt due by the accused was thus satisfied. A memorandum of the circumstance was made in the creditor's book and signed by the accused. The accused was subsequently charged with, and convicted of, an offence under section 61 of the Indian Stamp Act, 1879 :—

Held, reversing the conviction, that although in the memorandum the receipt of the ornaments was acknowledged, it was not a receipt within the definition contained in clause 17 of section 3 of Act I of 1879, as the ornaments were not by it acknowledged to have been received in "satisfaction of a debt."

PER CURIAM.—In this case, certain ornaments were pledged by the accused to his creditor. They were given back by the creditor and were sold by the accused; and the proceeds were paid by him to the creditor and the debt due by the accused was thus satisfied. A memorandum of the circumstance was made in the creditor's book and signed by the accused. Though in this memorandum the receipt of the ornaments is

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**Criminal Ruling* 45 *of* 1887.

†*Criminal Ruling* 46 *of* 1887. Criminal Application for Revision No. 275 of 1887.

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acknowledged, it is not a "receipt" within the definition contained in clause (17) of section 3 of Act I of 1879, as the ornaments are not by it acknowledged to have been received in "satisfaction of a debt." The conviction and sentence are, therefore, reversed.

1888.

12 January 1888. BIRDWOOD, & PARSONS, JJ.

Queen-Empress v. Narsu.*

Penal Code (Act XLV of 1860), *Sec.* 426—*Mischief—Cattle, allowing to stray.*

The allowing of a buffalo to stray without a keeper does not constitute the offence of mischief.

To support a conviction under section 426, Indian Penal Code, it must be proved that there was an intention to cause wrongful loss or damage, or to cause damage by wilfully turning an animal into an enclosure, or at least that the accused was present and able to restrain the animal from causing damage and did not restrain it from so doing.

IN this case the accused was convicted of mischief under section 426, Indian Penal Code, in that he let loose his buffallo, knowing that it was likely to cause damage, which entered complainant's garden and broke down two porches of bamboo frame-work and also destroyed a great number of plants, causing thereby wrongful loss and damage to the complainant.

PER CURIAM.—The conviction and sentence are reversed. On the finding recorded by the Magistrate, the accused can be held to have been guilty only of carelessness in allowing his buffalo to stray without a keeper. This does not constitute the offence of mischief under the Indian Penal Code. Before there can be a conviction under section 426, in a case of this kind, the prosecution must show that there was an intention to cause wrongful loss or damage, *Emp.* v. *Bai Baiya* (1), or a causing of damage by wilfully turning an animal into an enclosure, *Emp.* v. *Sheik Raja* (2), or at least that the accused was present and able to restrain an animal from causing damage and did not restrain it from so doing, *Emp.* v. *Vitu* (3). The proper remedy open to the complainant in this case would have been under the Cattle Trespass Act.

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12 January 1888. BIRDWOOD & PARSONS, JJ.

In re Gordhandas.†

Criminal Procedure Code (Act X of 1882), *Sec.* 147—*Tangible immovable property—Magistrate—Privacy—Right of entry upon the land of another.*

The right to privacy is not a right in the assertion of which a person can be justified in entering upon the premises of another and closing the windows and doors; nor is it a right "to prevent the doing of anything in or upon any tangible immovable property" within the meaning of section 147 of the Code of Criminal Procedure.

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* Criminal Review No. 1 of 1888.

(1) I. L. R. 7 Bom. 126. (2) I. L. 9 Bom. 173. (3) Cr. R. 5 of 1887; *ante* p. 318.

†*Criminal Ruling* 24 *of* 1887. Criminal application for Revision No. 297 of 1887.

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PER CURIAM.—His right to privacy, which the opponent said had been infringed by the applicant opening certain windows and doors in the wall of his house from which he could look out and survey the opponent's premises, is not a right in the assertion of which the opponent would be justified in entering upon the applicant's premises and closing the windows and doors. It is not a right to "prevent the doing of anything in or upon any tangible immovable property" within the meaning of section 147 of the Code of Criminal Procedure, as held by the Magistrate. The opponent's remedy was clearly by civil suit and injunction. The Magistrate thinks that a breach of the peace would be the consequence of his refusal to interfere under section 147; but that seems extremely doubtful. If there is any fear of the opponent trespassing on the applicant's property and there causing a breach of the peace, the Magistrate can proceed under Chapter VIII part B of the Code. His order of the 21st September 1887, prohibiting the applicant from putting up certain doors and windows in his house, is reversed.

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19 January 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sheik Mohidin.*

Criminal Procedure Code (Act X of 1882), Sec. 435—District Magistrate—Cognizance—Reference—High Court.

A District Magistrate has no jurisdiction to take cognizance of the conviction and sentence passed on an accused person, who has not appealed to him, except by reporting it to the High Court.

IN this case Mohidin and Ibrahim were convicted jointly by the Second Class Magistrate of Sirsi of the offence of personating a public servant (section 170, Indian Penal Code) and of extortion (section 384, Indian Penal Code). From this conviction the accused appealed to the District Magistrate of Kanara. The District Magistrate purporting to act under section 435 of the Criminal Procedure Code directed the Sub-Divisional Magistrate to try the accused Mohidin (and not the accused Ibrahim only) on a charge of robbery, under section 392 of the Indian Penal Code. The Sub-Divisional Magistrate inquired into the case and committed both the accused to the Court of Sessions at Kanara.

The Sessions Judge of Kanara being of opinion that the procedure, adopted by the District Magistrate was irregular, made this reference to the High Court observing.—

"I have the honour to submit that the order passed by the District Magistrate is illegal so far as it relates to the accused Mohidin. The Distric, Magistrate was not competent to reverse the Second Class Magistrate's finding and sentence, and order the accused to be retried, under section 423 (b), because the accused Mohidin was not an appellant.

**Criminal Ruling* 1 *of* 1888. Criminal Reference No. 2 of 1888.

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"The District Magistrate could not order his retrial under section 436 because the offence of Robbery under section 392, Indian Penal Code, is not exclusively triable by the Court of Session, and because the accused was not discharged. Nor could he act under Section 437 because the complaint against the accused had not been dismissed under section 203, nor had the accused been discharged.

"The only course open to the District Magistrate was to report the case to the High Court, under section 438, for orders.

" As the accused Mohidin has already been convicted on the same facts with which he is now charged, and as the District Magistrate's order, reversing such conviction, appears to be illegal, I cannot try him until such previous coviction has been legally set aside. I, therefore, request that the Honourable High Court will either (1) set aside the order of the District Magistrate reversing the original conviction and sentence on the accused Mohidin, or (2) set aside the original conviction and sentence and direct this Court to proceed with his trial or pass such other order in the case as to their Lordships shall seem fit."

PER CURIAM.—The order of the District Magistrate, dated the 16th November, 1887, in the case of the accused Mohidin is altogether illegal. The accused was convicted under sections 170 and 384 of the Indian Penal Code by the Magistrate 2nd Class, and made no appeal to the District Magistrate, who, however, when dealing with the appeal of Ibrahim, who was convicted in the same case with Mohidin and of the same offences, was of opinion that the two accused were guilty of an offence under section 392 of the Indian Penal Code. He, therefore, on the appeal of Ibrahim, set aside the convictions and sentences recorded against both the accused and ordering the retrial of Ibrahim, took cognizance, as he says, also of the case of Mohidin, and transferred it under section 192 of the Code of Criminal Procedure to the sub-divisional Magistrate, who has committed it to the Court of Session. The District Magistrate had no jurisdiction to reverse the conviction and sentence in the case of Mohidin, or to take cognizance of the case against him, except by reporting it to the High Court. His order is not justified by any provision of the Code of Criminal Procedure and must, with the proceedings taken *thereunder*, upto and inclusive of the order of commitment, be set aside. If the District Magistrate thinks any further proceedings necessary, he should act according to law.

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2 February 1888. BAYLEY, AG. C. J., BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bhikaji Hari.*

Evidence Act (I of 1872), Sec. 132—Accused—Previous statements—Criminating answer of witness—Admissibility.

Where an accused person has made a statement on oath, voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge.

BIRDWOOD, J.—The conviction of the appellants rests upon the depositions made by them in an execution proceeding in which they admitted their attestations of the deed of sale which is proved by the evidence in the present case to be a forgery. In their examinations, in the present case, they deny their attestations; and if their depositions in the former case are excluded from consideration, there is nothing to show that they attested the deed of sale. The Sessions Judge, relying on the decision of the majority of the Judges who composed the Full Bench in the case of the *Queen* v. *Gopal Dass and another* (1) decided by the MADRAS HIGH COURT on the 14th February 1881, has admitted the depositions. I concur, however, in the opinion of the two Judges (*Kervan* and *Mutusami Iyer* JJ.) who dissented from that decision. I think that section 132 of the Evidence Act, read with section 14 of Act X of 1873, compels a witness to answer criminating questions, and that he is protected by the proviso to section 132 from a criminal prosecution for any offence of which he criminates himself directly or indirectly by his answer except a prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from answering a criminating question and his request is refused that he is, in my opinion, "compelled to give" the answer within the meaning of the proviso. The compulsion is operative whether he asks to be excused or gives the answer without so asking. I would, therefore, acquit the appellants. But as Mr. Justice *Parsons* does not concur in this opinion, the case must be laid before another Judge under section 429 of the Code of Criminal Procedure.

PARSONS, J.—I agree with the opinion expressed by the majority of the Judges in the case of the *Queen* v. *Gopal Dass* (1) and would admit the evidence. Reading section 132 of the Evidence Act as a whole, I can come to no other conclusion than that the Legislature has by it made a clear distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer and has given him a protection in the latter of these cases only. If protection was to be allowed, in every case in which a witness gives an answer, the words "be compelled to" in the proviso are quite superfluous. The insertion

*Criminal Ruling 2 of 1888. Criminal Appeals Nos. 174 and 180 of 1887. (1) I. L. R., 3 Mad., 271.

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of these words clearly shows to my mind that protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving and which then he has been compelled by the Court to give. (*Field's* Law of Evidence p. 646, 4th Edition). In the present case, both the accused were examined in the Court of the Subordinate Judge on behalf of Sarasvati and Kesheo, and they freely and voluntarily there gave evidence to the effect that they had attested the deed on which Sarasvati and Kesheo there relied. This deed was held to be a forgery, Sarasvati and Kesheo were prosecuted and convicted of the forgery, and the accused were tried along with them and convicted on a charge of abetment of that forgery and their answers in the Court of Subordinate Judge were admitted in evidence against them. I am of opinion that these answers being purely voluntarily answers and not answers which they were, in any way, compelled to give can be proved against them in the present trial. As they are proved, I would dismiss their appeals.

BAYLEY, Acting C. J.—For the reasons given by Sir *Charles Turner*, C. J., in the case reported in *Queen-Emp.* v. *Gopaldass* (1) I think that the evidence is admissible, and I concur with Mr. Justice *Parsons* in dismissing the appeals.

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2 February 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ramaji.*

Forest Act (Act VII of 1878), Sec. 55—Forest produce—Property of Government—Magistrate—Order.

When the forest produce, in respect of which an offence is committed is found to be the property of Government, the only order which the Magistrate can legally make regarding it under section 55 of the Indian Forest Act, is that it should be taken charge of by a Forest Officer. An order for its sale and the payment of a reward to the informer from its proceeds is therefore illegal.

ORDER.—The forest produce in respect of which the offence was committed having been found to be the property of Government, the only orders which the Magistrate could legally make regarding it, under section 55 of Indian Forest Act (1878), was that it should be taken charge of by a Forest Officer. The Magistrate's order directing its sale is illegal and is reversed.

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10 February 1888. BIRDWOOD & PARSONS, JJ

Queen-Empress v. Chandri.†

Cantonements Act (Bom. Act III of 1867), Chap. III—Rule 71—Public place—Lock Hospital.

A lock hospital is not a public place within the meaning of Rule 71 of the Cantonements Rules.

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(1) I. L. R., 3 Mad., 271. **Criminal Ruling 3 of 1888.* Criminal Reference No. 7 of 1888.
†*Criminal Ruling 4 of 1888.* Criminal Review No. 22 of 1888.

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IN this case the accused was convicted by the Cantonement Magistrate of Poona, with being drunk and riotous 'on a public road' in that she was drunk and riotous in a public place, *viz.*, Lock Hospital, Poona Rule 71, Chapter III of the Rules passed under Bombay Act III of 1867.

ORDER.—A Lock Hospital is not a public place within the meaning of Rule 71 of the Rules under Chapter III of Bombay Act III of 1867, under which the accused was convicted. The conviction and sentence are, therefore, reversed. It should be pointed out to the Cantonment Magistrate that the description of the offence in Col. 7 of his Return is incorrect—the accused not having been charged with being drunk on a public road.

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16 February 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sadia.*

Criminal Procedure Code (Act X of 1882), Sec. 240—Public Prosecutor—Withdrawal of charge.

The permission to withdraw one of several charges against an accused person, allowed by section 240 of the Code of Criminal Procedure, only applies to charges against the same accused in the same case and not to separate charges of distinct offences in different cases.

ORDER.—The accused was convicted by the Sessions Judge in case No. 34 of his calendar and sentenced to three years' rigorous imprisonment. Thereupon, the Public Prosecutor, with the consent of the Court, withdrew the charge in the present case and the Sessions Judge quotes section 240, Criminal Procedure Code, as authority for his order. But it is clear from the language of section 240 and its position in Chapter XIX of the Code, that it was intended to apply only to a joinder of charges in the same case, and not to separate charges of distinct offences tried separately. The order of the Sessions Judge in the present case is, therefore, reversed as illegal. He should proceed with the case according to law.

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23 February 1888. BIRDWOOD & PARSONS, JJ.

Letter from the District Magistrate of Ahmedabad.†

Regulation XII of 1827, Section 19 (6)—District Magistrate—Notification—Health and comfort—Religious feelings.

The District Magistrate of Ahmedabad issued the following notice under section 19 (6) of Regulation XII of 1827:—"whereas the Munsar tank is held sacred by the Hindu community and Gusaria Tank is much used by the people whose houses surround it and whereas fishing in these tanks is likely to hurt the religious feelings of the Hindus, who resort to them for worship and for bathing, notice is hereby given that no one shall fish in the aforesaid tanks:"—

Held, that such a notice could not be issued under the section.

PER CURIAM.—The District Magistrate of Ahmedabad forwards a copy of a notice issued by him under section 19, clause 6, of Regulation XII of 1827 to the following effect:—"Whereas the Munsar tank is held sacred by

**Criminal Ruling 5 of 1888. Criminal Review No. 17 of 1888. †Inward No. 96 of 1888.*

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the Hindu community and the Gusaria tank is much used by the people whose houses surround it and whereas fishing in these tanks is likely to hurt the religious feelings of the Hindus who resort to them for worship and for bathing, notice is hereby given that no one shall fish in the aforesaid tanks." We do not think that such a rule can legally be instituted by the District Magistrate under clause 1 of the above-mentioned section. In the first place, the expressed object of the rule is, not to ensure the "benefit and comfort" of the public, but to prevent hurt being caused to the religious feelings of a section of the public, *viz.*, those members of the Hindu community who may resort to the tanks for worship and bathing. In the next place, the rule does not show that the tanks in question are places of public resort, for they cannot be said to be so merely because the one is held sacred by the Hindu community and the other is much used by the people whose houses surround it. Assuming, however, that the tanks are places of public resort, a prohibition to fish in the tanks is not a regulation of "the manner in which they are to be used." If the tanks and the fish therein are public property and if the public have the right to fish in the tanks, the order of the District Magistrate would not regulate the manner in which that right is to be exercised but would deprive the public of that right altogether. We, therefore, forbid the notice.

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8 March 1888. BIRDWOOD & PARSONS, JJ.

In re Karunaram.*

District Municipal Act (Bom. Act VI of 1873), Secs. 51, 74—Conviction—Appeal—District Magistrate.

A Magistrate on the complaint of a Municipality that the accused had, without its permission, occupied land belonging to it, dealt with the case as a Magistrate and convicted the accused under section 51 of the District Municipal Act and sentenced him to a penalty under section 74 of the Act:—

Held, that the District Magistrate should hear an appeal made by the accused to him and that if the conviction did not properly fall under section 51 of the Act, that was a ground for reversing it and not for refusing to entertain the appeal.

IN this case the Honorary Second Class Magistrate of Broach directed that a sum of Rs. 15-3-0 be recovered from the applicant on account of his having occupied a certain piece of Municipal land by placing building materials thereon without the permission of the Municipality.

The applicant appealed to the District Magistrate of Broach, but the Magistrate rejected the appeal, remarking "The Magistrate's order should, it would seem, have been passed under section 74 of the Act and against an order under that section there lies no appeal under section 407 of the Criminal Procedure Code."

The applicant, thereupon, applied to the High Court.

**Criminal Ruling 6 of 1888. Criminal Application for Revision No. 6 of 1888.*

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Mr. *Manekshah J. Talyarkhan*, for the applicant.

ORDER.—As the second class Magistrate has dealt with the case as a Magistrate and convicted the accused under section 51 of Bombay Act VI of 1873 and sentenced him to a penalty under section 74, the District Magistrate should not have refused to hear the appeal from the conviction and sentence. If the conviction does not properly fall under Section 51, that was a ground for reversing it, not for refusing to entertain the appeal. The District Magistrate's order is reversed and he should proceed according to law.

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15 March 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ragba.*

Court fee—Judgment—Warrant case—Appeal.

In an appeal from a conviction in a warrant case, it is not necessary to affix the court fee stamp on the copy of judgment appealed against.

ORDER.—The Magistrate First Class rejected the appeal before him, because the copy of the judgment appealed from was not, in his opinion, "stamped as required by law." But by clause (3) of Government Notification No. 532 of the 26th January, 1886, (Government Gazette 1886 p. 84), the court-fee is remitted on the copy of the judgment in a warrant case, when given under section 371 Criminal Procedure Code. The Magistrate's order rejecting the appeal is, therefore, reversed; and he is directed to hear and dispose of it, according to law.

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15 March 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ramchandra.†

Public Conveyances Act (Bom. Act XVI of 1883), Secs. 7, 9, 21—Criminal Procedure Code (Act X of 1882), Sec. 29—Magistrate—Jurisdiction.

The first paragraph of section 29 of the Code of Criminal Procedure, read with section 21 of the Public Conveyances Act, 1861, gives all Magistrates jurisdiction to try offences against sections 7 and 9 of the latter Act.

ORDER.—Reading the first para of Section 29 of the Code of Criminal Procedure with Section 21 of Act XVI of 1861, we think that all Magistrates have jurisdiction to try offences against sections 7 and 9 of the Act. In the present case, however, the conviction is bad, as the Act does not apply to the carriage in question which is one not ordinarily used for a journey of a greater distance than 20 miles. We reverse the conviction and sentence and leave it to the District Magistrate to take such proceedings as may be necessary against either of the accused for cruelty to the pony.

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*Criminal Review No. 322 of 1887.

†*Criminal Ruling 7 of 1888.* Criminal Reference No. 23 of 1888.

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28 March 1888. BIRDWOOD & PARSONS, JJ.

In re Hari Purushotam.*

Criminal Procedure Code (Act X of 1882), Sec. 203—Complaint—Dismissal—Hearing.

A complainant should be afforded an opportunity of being heard before any final order is passed on his complaint.

IN this case the petitioner lodged a complaint before the District Magistrate of Ratnagiri against the Police Patel of the village of Narvan and five others for misappropriating a large log of teak that had been cast on the shore. The District Magistrate sent the complaint to the Second Class Magistrate of Guhagar for inquiry. The complainant, thereupon, applied to the District Magistrate to the effect that the inquiry should be entrusted to another Magistrate; but the District Magistrate returned the application with an endorsement that he saw no reason to transfer the case and that the complainant could appeal against the decision of the Second Class Magistrate if he was dissatisfied with it. On the report of the Second Class Magistrate having been received, the District Magistrate without giving any notice to the complainant, or without examining him or taking his evidence, dismissed the complaint as false.

The complainant, thereupon, applied to the High Court.

Mr. *Daji Abaji Khare*, for the applicant.

ORDER.—We reverse the District Magistrate's order dismissing the complaint, and direct him to give the complainant the necessary opportunity of being heard.

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28 March 1888. BIRDWOOD & PARSONS, JJ.

In re Ahmed Saheb.*

Criminal Procedure Code (Act X of 1882), Sec. 517—Magistrate—Property—Disposal.

A Magistrate is justified by section 523 of the Code of Criminal Procedure in making an order to deliver the property to the complainant where the property is alleged to be stolen and its seizure by the Police is reported to the Magistrate.

THE First Class Magistrate of Thana passed an order on the 8th July 1887, without taking any evidence, directing that certain rice found and seized in the possession of Ahmed Saheb on a charge of theft, should be delivered to Masum Bibi, complainant.

The Sessions Judge, in making this reference to the High Court, remarked:—"Finally on the 7th July 1887, the Magistrate passed an order which I submit is illegal, as it was made without any evidence being taken by the Magistrate, and without the accused's witnesses being even examined by the chief constable: the order was to the following effect:—'The offence of theft does not appear to have been committed and the case should

*Criminal Ruling 12 of 1888. Criminal Application for Revision No. 305 of 1887. Criminal Reference No. 30 of 1888.

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be struck of the register of offences. It is a dispute between relatives. The rice was in complainant's house and accused was told not to remove it; nevertheless he appears to have removed the rice; the rice should, therefore, be given to the complainant'. The rice were accordingly delivered to Masumbibi on the 28th July, 1887...

"The present pleader for Ahmed Saheb has cited the cases of *Annapurnabai* (I. L. R., 1 Bom., 630) and a recent decision of the CALCUTTA HIGH COURT (I. L. R., 14 Cal., 834). The Bombay case was under the Procedure Code of 1872, and in the Calcutta case the order had been passed under Section 517 and the Court did not refer to section 523. I think the order under reference might have been passed under section 523 had the Magistrate first taken the evidence of complainant and accused, but that the section did not empower him to take property out of the possession of the accused and deliver it to the complainant without taking evidence as to their respective claims."

ORDER.—As the property was alleged to be stolen and its seizure by the Police was reported to the Magistrate, the order for its delivery to the complainant was, we think, legal under section 523 of the Code of Criminal Procedure *Queen Empress* v. *Joti* (1). No enquiry seems to have been necessary in this case, as there was no question as to the rice having been taken from the complainant's possession. It was, therefore, rightly restored to her possession. The Magistrate's order does not conclude the rights of any person, *Queen Empress* v. *Thribhovan* (2).

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5 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sagan.*

Penal Code (Act XLV of 1860), Sec 186—Public servant—Obstruction—Municipal servant—Pegs and strings fixed in road—Bona fide dispute of the road—Pulling up pegs.

A Municipal servant cannot be considered to be discharging a public function in putting down pegs and strings, in order to mark out a road, unless the road is public property vested in the Municipality.

A person between whom and the Municipality there is a *bona fide* dispute as to the ownership of the road, commits no offence, under section 186 of the Indian Penal Code, if he pulls up the pegs and cuts the strings in the assertion of his right.

PER CURIAM:—Unless the road on which pegs were put by the complainant, who is a servant of the Municipality, is a Municipal road, the complaint cannot be said to have been discharging a public function in putting down the pegs and tying strings to them in order to mark out the road. If he was not discharging a public function, the act of the accused in pulling up the pegs and cutting the strings was not an offence against section 186, Indian Penal Code. It is clear from the Sessions

(1) I. L. R. 8 Bom., 338 (2) I. L R. 9 Bom., 131.

* *Criminal Ruling* 13 *of* 1888. Criminal Application for Revision No. 28 of 1888.

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Judge's Judgment in appeal that there is a *bona fide* dispute between the accused and the Municipality as to the ownership of the road. This dispute the Sessions Judge says, has been going on for years. The mere decision of a majority of the Municipal Commissioners that the road was Municipal property cannot be regarded as a settlement of the dispute binding on the accused. As there is no finding then by the Sessions Judge that the road in question is public property, vested in the Municipality, and as the dispute regarding it is still unsettled by any competent Court, we reverse the conviction and sentence and direct the fines, if paid, to be refunded.

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5 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Kasturbhai.*

Criminal Procedure Code (Act X of 1882), Sec. 423—Appeal Court—Conviction reversed—Retrial.

When an appellate Court reverses a conviction and sentence it can, under section 423 of the Code of Criminal Procedure, order the appellant to be retried by a specified Court of competent jurisdiction.

ORDER.—When an appellate Court reverses a conviction and sentence it can, under section 423, Criminal Procedure Code, order the appellant to be retried by a Court of competent jurisdiction subordinate to such appellate Court. There is nothing in the section which prevents the specification of the subordinate Court by the Appellate Court.

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5 April 1888. BIRDWOOD & PARSONS JJ.

Queen-Empress v. Hiri.†

Cantonement Act (Bom Act III of 1867), Sec: 11—Cantonement Rules—Rule 39—Milk—Adulteration—Water—Noxious as drink—Cheating.

The mere admixture of water with milk, not being ordinarily sufficient to render it noxious as drink, cannot be punished as an offence of adulterating milk by mixing water with it so as to render it noxious as drink as contemplated by Rule 39 of the rules; but such cases (that is, cases in which there is no proof that the adulteration is noxious), when penal, are generally so on account of their involving the offence of cheating and should be dealt with under section 420 of the Indian Penal Code

IN this case Col. Doig the Cantonement Magistrate of Malegam found that the accused had adulterated milk by mixing water with it and made it noxious as drink intending to sell the same. He, therefore, under rule 39 Chapter III of the rules under section 11 of Bombay Act III of 1867, convicted her of the offence of adulterating drink and thereby making it noxious to health and sentenced her to pay a fine of annas 8. The fine has been paid. The District Magistrate of Nasik in making reference to the

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* Criminal Review No. 59 of 1888.

† *Criminal Ruling* 14 *of* 1888. Criminal Reference No. 32 of 1888.

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High Court observed: "I consider the conviction as bad in law. Mixing water with milk does not make it noxious as drink and is therefore no offence under the Penal Laws. The conviction and sentence must, therefore, be reversed."

ORDER—Conviction and sentence reversed for the reasons stated by the District Magistrate.

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12 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Krishna.*

Criminal Procedure Code (Act X of 1882), Sec. 233—Appeal—Alternative conviction—Penal Code (Act XLV of 1860), Secs. 379, 411.

The accused was convicted of the offence of dishonestly receiving stolen property knowing it to be stolen, under section 411 of the Indian Penal Code; and the Appellate Court altered the conviction to one under either section 379 or section 411 of the Code:—

Held, that the alternative conviction in appeal was illegal, the accused not having been charged with theft, and having had no opportunity of meeting such a charge.

IN this case Krishna was convicted of an offence, under section 411 Indian Penal Code with dishonestly receiving stolen property knowing it to be stolen and was sentenced by the Second Class Magistrate of Barsi to suffer rigorous imprisonment for six months. On appeal, the First Class Magistrate of Sholapur altered the conviction to one under sections 379 and 411 of the Indian Penal Code, in the alternative, and confirmed the sentence.

ORDER.—The Court varies the order in appeal by reversing so much of it as alters the conviction recorded by the Second Class Magistrate to one in the alternative under section 379, Indian Penal Code, and thus restores the original conviction recorded by the Second Class Magistrate.

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12 April 1888. BIRDWOOD & PARSONS, JJ.

In re Bai Kashi.†

Criminal Procedure Code (Act X of 1882), Sec. 202—Complaint—Magistrate.

It is the duty of a Magistrate, on a complaint being presented to him, to examine the complainant and then either to issue process or make an order under section 202 of the Criminal Procedure Code.

ONE Bai Kashi applied to the Sessions Judge of Surat stating that she had been severely beaten on the 21st February last by certain persons whom she named: that she presented a complaint on the 24th February to the First Class Magistrate Mr. Darasha Dosabhai: but that officer rejected her application without examining her or making any enquiry. The Magistrates' order ran as follows "Power to investigate your com-

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*Criminal Ruling 16 of 1888. Criminal Appeal No. 75 of 1888.

†Criminal Ruling 17 of 1888. Criminal Reference No 25 of 1888.

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plaint belongs to the Police: therefore you are advised according to the ruling of the High Court to make your complaint there."

The Sessions Judge of Surat in making reference to the High Court observed: "I believe that the above order is illegal. Bai Kashi's complaint embodied facts which constituted offences within the cognizance of Mr. Darasha Dosabhai, First Class Magistrate, and it was therefore his duty to examine the complainant on oath and either issue a process or proceed under section 202, Criminal Procedure Code. I do not think that there is any rule in the Procedure Code which authorises a Magistrate to say that the Police may take cognizance of a complaint and therefore he will not do so. I therefore recommend that the order of the Magistrate on Bai Kashi's complaint of the 24th February last be cancelled and that the District Magistrate be directed either by himself or by a Magistrate subordinate to him to make further inquiry into the complaint and to dispose of it according to Law. I also venture to suggest that Mr. Darasha be desired to adhere to the Law of Procedure in future. As Bai Kashi's complaint was not dismissed under section 203 nor has any accused person been discharged, it has not been in my power to proceed under section 437 and therefore I have been obliged to refer this matter to the High Court."

ORDER.—The Magistrate's order was distinctly illegal. It was his duty, as pointed out by the Sessions Judge, to have examined the complainant and then either to have issued process or made an order under section 202 of the Code of Criminal Procedure. In the order actually made, the Magistrate tells the complainant that power to investigate her complaint "belongs to the Police;" "therefore," he adds "you are advised according to the Ruling of the High Court to make your complaint there."

The ruling on which the Magistrate seems to rely, *viz*, the High Court's Resolution No. 225 of 18th February 1870 had no bearing on the case before him. His order is reversed and he is directed to deal with the complaint according to law.

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12 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Phakeera.†

Criminal Procedure Code, (Act X of 1882), Sec. 235—Separate charges—Distinct offences—Separate sentences.

When the accused is tried at one trial on two separate charges for two distinct offences, and convictions are recorded on both charges, separate sentences ought to be passed.

IN this case the accused was convicted of the offence under section 454, Indian Penal Code, with house-breaking by day in order to commit theft

† *Criminal Ruling.*, 18 *of* 1888. Criminal Review No. 74 of 1888.

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in that he unlocked the door of a house of the complainant and entered into it in order to commit theft and of an offence under section 380, Indian Penal Code, of theft in a building and was sentenced by a Magistrate to suffer rigorous imprisonment for six months.

ORDER.—As there were separate charges for two distnict offences and convictions were recorded on both charges, separate sentences ought to have been passed for each offence—*Queen-Empress* v. *Vazir Jan* (1). The Court alters the sentence to one of three months' rigorous imprisonment on each conviction; the sentences to commence the one after the expiration of the other.

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6 April 1888. NANABHAI, BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Uma. Queen-Empress v. Balaji.*

Confession—Co-accused—Admissibility of—Indian Evidence Act (I of 1872), Sec. 30.

The confession of one co-accused, where he does not substantially implicate himself to the same extent as he implicates the other co-accused, is not admissible in evidence against the latter.

Confessions made by accused persons at a joint-trial cannot he treated as the evidence of accomplices against one another.

A confession must be taken as a whole and considered along with the admitted facts of the case, and the accused must be judged by his whole conduct.

NANABHAI HARIDAS, J.—We are of opinion that the conviction against Uma *kom* Krishna is correct. Her confession to her mother, her confession before the committing Magistrate, and her statement before the Court of Sessions, leave no doubt upon our minds that she is guilty of the offence of murder. We must, therefore, dismiss her appeal. As regards the case of Babaji *bin* Sathu we feel some difficulty. We differ in our opinion as to the force of the evidence against him. My own opinion is that the evidence is not sufficient for convicting him on the charge of murder. His statement in the Court of the committing Magistrate does not amount to a confession of murder, though it does amount to a confession of the two other charges framed against him under sections 201 and 212 respectively of the Indian Penal Code. The statement of Uma, which goes against him does not appear to me to be sufficient to convict him of the offence of murder, especially having regard to what she states in the Court of Sessions when pleading to the charge and afterwards in her examination at the close of the trial; and there is no other evidence that he either committed, or assisted in, the murder of the child. I would accordingly reverse the conviction on that charge, and convict him on the other two charges, sentencing him to seven years' transportation under sections 59 and 201,

(1) I. L. R. 10 All., 586.

**Criminal Ruling* 19 *of* 1888. Criminal Appeals Nos. 196 of 1887 and 11 of 1888.

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and to five years' rigorous imprisonment under section 212, Indian Penal Code. My brother *Parsons*, however, thinks otherwise. He is for upholding the conviction, so we shall refer the case under section 429, Criminal Procedure Code, to another Judge, the Chief Justice.

PARSONS, J.—In this case Uma and Babaji have been convicted by the Sessions Judge of Satara of the murder of the child of the former and have appealed to this Court. The chief evidence against them consists of their own confessions to the First Class Magistrate. These confessions, though retracted in the Sessions Court and said to have been made under police tuition and compulsion, are proved to have been voluntarily made and we agree that each is admissible in evidence against the person who made it. It appears from them as well as from other evidence in the case that Uma had a child about one year old, that in consequence of quarrels with her husband she left his house, that her own relations also would not keep her, that taking her child she went to the field of the second accused with whom she had been criminally intimate for some two years past. That she met him there and that they agreed to go away together. As to what happened after that, each of the accused gives a different account. Uma says "Babaji said he would kill the child as it was a hindrance to our travelling, and he took the child from me (in another place she says I gave it to him) and twisted its neck and killed it in my presence. Babaji and I then hid its body in the crop in his field and he took me and kept me in his hut till Deva came and told Babaji that I was wanted." Babaji says "I advised Uma not to kill the child but she said that she was tired of it as it was a hindrance to her journey, so saying she killed the child in my presence. I and Uma took the body to the crop where we hid it and I then kept Uma with me for three days till Deva came and told me Uma was wanted." Now it is clear on the interpretation of section 30 of the Evidence Act that the confession of Uma is not admissible in evidence against Babaji since in it she does not substantially implicate herself to the same extent as she implicates Babaji. The Sessions Jndge admits this, but he considers that the confession is admissible as the evidence of an accomplice. Uma, however, never gave evidence as an accomplice and the admission into evidence of the confession by the Sessions Judge is the more strange since he has rightly held that the statement of Babaji is not admissible in evidence against Uma.

In point of fact neither are accomplices giving evidence, but both are accused persons, who have made confessions in which each has sought to implicate the other to his or her own exculpation. Such a confession would be evidence only against the person who made it. Rejecting then the confession of each of the accused entirely in considering the case

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against the other, it has to be seen 1st whether Uma is guilty of murder, 2nd whether Babaji is guilty of murder. With regard to Uma, I concur. Her case is very clear. There is not only her confession that she allowed Babaji to kill the child (indeed in one place she says that she actually gave the child to him for him to kill), but there is also the evidence of her mother and others to whom she stated that she and Babaji had killed the child. With regard to Babaji, the case is, in my opinion, equally clear. It is true there is only his confession to implicate him in the crime. In it, however, he admits that he heard Uma say that she was going to kill the child as it was a hindrance to the journey she was about to make with him. He further admits that he saw her killing it and that he did nothing to prevent her and he admits that after the murder he with her concealed the body and harboured her for several days. Such a confession is to my mind proof positive of guilt. He says he advised her not to kill the child. But this is not proved, and is, in my opinion, false; for can it for an instant be supposed that the mother would have killed the child if he had really advised her not to do so or had offered to take the child with them? Can it even be presumed that the mother alone would have had the heart or the strength to kill her child? It is impossible for me to hold that Babaji is entitled to be acquitted of the murder, because in his confession he does not admit that he actually killed the child or say in so many express words that he abetted Uma in the killing. I cannot allow my own common sense to be bound by any such restrictions. I must take the confession as a whole and I must also consider that confession along with the admitted facts of the case and I must judge the accused by his whole conduct. When this is done, there remains no doubt in my mind, that he did abet the murder of this child, if he did not actually kill the child himself. My opinion therefore is that the conviction for murder is good and that the sentence should stand. As, however, I differ from my learned colleague on the point as to whether the confession of Babaji proves that he is guilty of murder, the case must go to a third Judge. If that Judge is of opinion that the cofession does not justify a conviction for murder, then, I concur, with my learned colleague in altering the conviction for murder under section 302 of the Indian Penal Code to convictions under sections 201 and 212 of the Indian Penal Code and the sentence of transportation for life to a sentence of transportation for seven years and a sentence of rigorous imprisonment for five years respectively, the latter sentence to commence on the expiration of the former.

BIRDWOOD, J.—This case has been referred to me by the Chief Justice. I am of opinion that, though the appellant Babaji says in his confession that he advised Uma not to kill the child, there can be little doubt that

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that statement is false. Any such advice, if given in earnest, the accused Babaji could at once, by the use of moderate force, have compelled Uma to adopt. But he did no such thing. On the contrary, though by his own admission he must have known well that Uma was going to kill the child, he stood by while she killed it and he helped her to dispose of the dead body and harboured her for several days. The facts admitted by him justify to my mind only one inference and that is that Babaji was acting in concert with Uma and that he was equally with her guilty of murder. I think that the Court is quite at liberty to disregard, while considering the case as against Babaji, any self-exculpatory statement contained in his confession which it disbelieves. I, therefore, concur in the opinion expressed by Mr. Justice *Parsons*. The appeal of Babaji must be dismissed.

ORDER.—The appeal of Babaji *bin* Sathu* is dismissed according to the opinion of the majority of the Court (for the reasons stated by the Hon'ble Mr. Justice *Birdwood*).

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19 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Govinda.*

District Municipal Act (Bom. Act VI of 1873), Sec. 72—Bye Law—Birth or death—Parent—Guardian—Servant.

The duty of giving information to the Municipality about the birth of a child is imposed on the parent or guardian of a child, or in the case of the death, illness or inability of the parent or guardian, on the occupant of the house in which the child is born, and not on the servant of uch occupant.

ORDER—As the duty of giving information to the Municipality as to the birth of a child is imposed in the first place on the parent or guardian of the child or in the case of the death, illness, or inability of the parent, or guardian, or the occupier, of the house in which the child is born, the conviction of the accused, who was merely a servant of the occupier, was illegal.

The Court, therefore, reverses the conviction and sentence and the order as to court-fees and directs the fine and court-fees if levied to be refunded.

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19 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Nanesaheb.†

Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Repayment of the sum offered for bribery.

A Magistrate, acting under section 545 of the Code of Criminal Procedure, cannot, in awarding compensation out of the fine imposed upon the accused, order the payment of the sum to the complainant which he might have given to the accused for bribing others.

**Criminal Ruling* 20 of 1888. Criminal Reference No. 38 of 1888.
†*Criminal Ruling* 21 of 1888. Criminal Review No. 82 of 1888.

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THE accused was charged under section 162, Indian Penal Code, of taking gratification in order by corrupt or illegal means to induce a public servant, in that he accepted Rs. 95 from the mother of the complainant for the Patel and others in order, by corrupt means, to induce the Patel to release the complainant who was arrested on a supposed charge of burning some stacks. The First Class Magistrate of Kalladgi sentenced the accused to rigorous imprisonment for one month and to a fine of Rs. 250 and directed that out of the fine Rs. 105 to be paid to the mother of the complainant, Rs. 95 being the sum paid by her to the accused and Rs. 10 being the cost of prosecution.

ORDER.—The Court reverses the Magistrate's order, directing that Rs. 95, the amount of the bribe paid by Adiveva, should be repaid to her, such order being opposed to clause (6) of section 545 of the Code of Criminal Procedure.

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19 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Girdharlal.*

Sanction—Application, granting of—Sub-Judge—Indian Penal Code (Act XLV of 1860)—Obtaining a fraudulant decree.

Before granting a sanction for prosecution for an offence under section 210 of the Indian Penal Code, the Subordinate Judge ought to satisfy himself whether there was a *prima facie* case against the accused that he had committed the offence.

PER CURIAM.—The application made to the Sub-Judge for sanction to prosecute the applicant under section 210 of the Indian Penal Code contains no allegation that the applicant obtained a decree against Jodhaji for a sum not due or for a larger sum than was due. Fraud is alleged only on the ground that the applicant, knowing that the Collector was manager of Jodhaji's estate under Act XXXV of 1858, sued Jodhaji without making the Collector a party to the suit. In granting sanction, under section 195 of the Code of Criminal Procedure, the Sub-Judge nowhere, in the reasons for his order, says that the claim was a false claim or takes into consideration the question whether a prosecution under section 210 of the Indian Penal Code would probably be successful or not. He merely says that he sees no objection to his granting the sanction applied for by the Collector. The District Judge has declined to revoke the sanction. The Sub-Judge, before granting the application, ought to have satisfied himself whether there was a *prima-facie* case against the applicant that he had committed the offence punishable under section 210 of the Indian Penal Code. No evidence is pointed out to us upon which it can be found that there was a *prima-facie* case against him. We, therefore, reverse the orders of the Courts below.

**Criminal Ruling* 22 *of* 1888. Criminal Application for RevisionNo. 43 of 1888.

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26 April 1888. BIRDWOOD & PARSONS, JJ.

Queen Empress v. Gema.*

Criminal Procedure Code (Act X of 1882), Sec. 191—Opium Act (I of 1878), Sec. 3—Magistrate—Jurisdiction.

A Second Class Magistrate cannot refuse to take up a case of importing opium into British India without a license, although empowered, under section 191, Criminal Procedure Code, and section 3 of the Opium-Act, to take cognizance of the offence and try the case, merely on the ground that the gravity of the offence required severer punishment than he was competent to inflict.

IN this case the accused imported from Malwa one maund and 27 seers of opium into the limits of Dohad without a license to do so. The accused were sent up to the Second Class Magistrate of Dohad by order of the District Police Inspector. On arrival of the accused, the Second Class Magistrate refused to entertain them saying the case was beyond his powers. The case was thereupon tried by the First Class Magistrate of Dohad.

On the matter coming to its notice, the High Court requested the District Magistrate to "report whether the Magistrate Second Class to whom the accused were first forwarded by the Police was empowered under Section 191, Criminal Procedure Code, to take cognizance of the offence upon a police report and also under section 3 of Act I of 1876 to try the case." The District Magistrate reported in the affirmative.

ORDER:—The First Class Magistrate seems to have acted illegally. The Court is of opinion that the Second Class Magistrate acted illegally in refusing to take up the case. The record and proceeding to be returned with the above remarks.

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26 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Babaji.†

Workman's Breach of Contract Act (XIII of 1859), Sec. 2—Magistrate—Order.

The Magistrate can, under section 2 of the Workman's Breach of Contract Act, only order a person to perform the work undetraken; he cannot then, also order that in default the workman should suffer a sentence.

THE accused was charged, under section 2 of Act XIII of 1859, with breach of contract as a labourer, in that he having received an advance of Rs. 11-2-0 from complainant in consideration of work to be performed as a labourer which he undertook to perform wilfully neglected to perform the same. The First Class Magistrate of Poona ordered the accused to perform the work undertaken by him within three months or in default to undergo rigorous imprisonment for twenty days.

ORDER.—The Court alters the order of the Magistrate First Class by directing that the accused shall perform or get performed the work, on account of which he received an advance, according to the terms of his

*Criminal Ruling 23 of 1888. Criminal Review No. 36 of 1888.

†Criminal Ruling., 24 of 1888. Criminal Review No. 88 of 1888.

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contract, such being the only order as to the performance of the work which could be legally passed under section 2 of Act XIII of 1859. The Magistrate's order for the imprisonment of the accused is also illegal.—See *Reg* v. *Jom bin Balu* (1).

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26 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Maneklal.*

Jurisdiction—British India—Political Agency—District Magistrate.

A District Magistrate cannot legally dispose of a criminal case at a place not in British India.

THE petitioner was a public servant at Godhra in the Panch Mahals; the acts alleged against him were said to have been committed in the Panch Mahals. The District Magistrate of Panch Mahals tried the petitioner at Pandu, in the Rewa Kantha Agency (beyond the limits of Panch Mahals), for offences, falling under sections 161 and 420 of the Indian Penal Code, and sentenced him to undergo rigorous imprisonment for three months.

The petitioner applied to the High Court contending, *inter alia*, that the trial and conviction, having taken place without the Panch Mahals District, were illegal and without authority.

Mr. *Gokaldas K. Parekh*, for the accused.

ORDER:—The District Magistrate should be informed that he could not legally dispose of the case at a place not in British India.

As, however, the application has been withdrawn, the Court makes no order in the case.

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26 April 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Mhadnack.†

Penal Code (Act XLV of 1860), Section 508—Divine displeasure—Offence.

Where the accused voluntarily attempts to cause a person to omit to do what he was legally entitled to do by attempting to induce the latter to believe that he would otherwise be rendered by an act of the accused an object of divine displeasure, the accused commits the offence under section 508 of the Indian Penal Code.

THE complainant Mahomed was the Police Patel of Punderi. Under the standing orders he was bound to send monthly returns of births and deaths occurring in the village, to the Mahalkary. The accused, a Mhar of the village, was bound by Government Rules to convey these returns to the Mahalkary's office, for which work he was allowed remuneration. On the 5th August 1887, the Police Patel told him to take the returns for the preceding month to Mandanghad where the Mahalkary's

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**Criminal Ruling* 25 *of* 1888. Criminal Application for Revision No. 66 of 1888.

†Criminal Reference No. 45 of 1888. (1) 4 B. H. C. R. 37; 6 M. H. C. R. App. 24.

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office was located. The accused declined to do so saying that he had other business to attend to: but the Police Patel insisted on his doing the business first. The accused then lifted up a stone and struck one blow on his own hand with it exclaiming that the wrath of God (citing the name of gods) would rest on the Patel after which he went away. In consequence of this the complainant was put in fear of the divine displeasure.

ORDER.—As the accused voluntarily attempted to cause the Patel to omit to do what he was legally entitled to do, *viz.*, to send him with certain returns to a certain place, by attempting to induce the Patel to believe that he would be rendered by the act of the accused an object of divine displeasure if he did the thing which it was the object of the accused to cause him to omit to do, this act of the accused was an offence against section 508, Indian Penal Code, and the conviction appears to be legal.

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3 May 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ravji.*

Penal Code (Act XLV of 1860), Sec. 186—Survey officer—Forbidding to measure lands in a particular manner.

To forbid a survey measurer to measure land in a particular manner, without using or threatening to use force to prevent him from doing so, does not amount to the offence of voluntarily obstructing a public servant in the discharge of his public functions.

IN this case the accused, the cultivators of Monje Tirwandi, obstructed one Hari Shiwaji, a measurer from the Survey Department, to measure lands, saying that the measurement of the lands should be made in a particular manner different in direction from that in which he was doing as might be suitable for them to cultivate the lands. The Second Class Magistrate of Malsiras convicted them of an offence under section 186, Indian Penal Code.

The District Magistrate of Sholapur being of opinion that no offence was brought home to the accused made this reference to the High Court stating: "All that the accused persons seem to admit is that when the measurer was measuring certain land in a particular manner, they forbade him to do so. It does not appear that they either used force or threatened to use force to prevent him."

ORDER.—The Court reverses the conviction and sentence as the words attributed by the complainant to the accused do not amount to an obstruction of a public servant in the discharge of his public functions and directs the fine, if levied, to be refunded.

**Criminal Ruling* 27 *of* 1888. Criminal Reference No. 49 of 1888.

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3 May 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Narsidas.*

Opium Act (I of 1878), Section. 9 (e)—Cartman—Opium.

One Vaghaji hired the accused with his cart to carry cumin-seed from Ranapur into British India. Illicit opium was found concealed in the cumin-seed, and Vaghaji and the accused were both convicted of an offence under section 9 (*e*) of the Opium Act:—

Held, that in the absence of evidence that the accused knew that Vaghaji was carrying opium in his cart, his conviction could not stand.

IN this case the accused were convicted under section 9 of the Opium Act of illegally importing opium without a license in that the accused imported opium weighing 39 seers from Ranapur in Bengal Presidency to Dohad without a pass. The accused Narsidas was sentenced to rigorous imprisonment for one year and a fine of Rs. 300 and the accused Vaghaji was sentenced to rigorous imprisonment for one month.

ORDER.—The Court reduces the sentence of imprisonment in the case of accused Narsidas *alias* Chhagan Harjivan to six months. The Court reverses the conviction and sentence recorded against accused Vaghaji Bapuji as there is nothing to show that he knew that the accused No. 1 was carrying opium in his cart.

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3 May 1888. BIRDWOOD & PARSONS, JJ.

In re Jeysang.†

Criminal Procedure Code (Act X of 1882), Sec. 133—Magistrate—Order—Bona fide dispute.

Where there is a *bona fide* dispute between a private individual and Government as to the right to the ground on which an encroachment is alleged to have been made by the former by building a wall, a Magistrate should not proceed under section 133 until that dispute is settled.

THE Sessions Judge of Surat in making the reference to the High Court observed: " Mr. Robertson some time last year received information that one Jesung Madhavsang had encroached on Government ground near his house by building a wall thereon: and he issued orders to Mamlatdar on the subject. Mr. Umedram, having succeeded Mr. Robertson as Magistrate, First Class, Bardoli, made a conditional order on 29th June 1887 under section 133, Criminal Procedure Code, the time for appearance fixed by the order being one month. This order was not served until the 12th July 1887. On the 29th July, Jesang sent an application to the Mamlatdar, who was the Magistrate before whom he was directed to appear. In that application he said that he was sick and therefore unable to appear but that the ground was his own as would be seen if a jury were appointed. This application was rejected because it was on a stamp of one anna instead of eight annas. Jesung thereupon on the 6th August presented a fresh ap-

*Criminal Ruling, 28 of 1888. Criminal Review No. 108 of 1888.

†Criminal Ruling 29 of 1888. Criminal Reference No. 47 of 1888.

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plication on a properly stamped paper claiming a jury. No order appears to have been passed on this application and on the 13 September the papers were transferred from Mr. Umedram to Mr. Robertson, who had resumed charge of the Taluka. This officer appears to have made no further enquiry but on the 19th November 1887 he made absolute the order of the 29 June and gave notice of the fact to Jesang under section 140, Criminal Procedure Code. No steps however were taken to enforce the order by Mr. Robertson. The proceedings in the case were in January 1888 transferred to Mr. Dadabhai, who had been appointed to exercise the powers of a Magistrate, First Class, at Bardoli, and on the 13th February 1888, Mr. Dadabhai issued a second order, a repetition of that dated the 19th November 1887, to the effect that the conditional order of the 29th June 1887 was made absolute. I am of opinion that Mr. Robertson's order of 19th November 1887 and Mr. Dadabhai's order of 13th February 1887 cannot be maintained because they were passed without evidence. It appears from the proceedings that the obstruction complained of was not an obstruction which in any way interfered with the ordinary rights of the public: it was an alleged encroach ment on ground which the revenue authorities claimed to belong to the state but which Jesang asserted was his own property. The question to be decided was whether the ground belonged to the State or to Jesang who had built the wall thereon, which was a question for a Civil Court. Jesang had distinctly disputed the assertion that the ground belonged to Government and this point ought to have been cleared up before he could properly be required to remove his wall, *Basurudin* v. *Baharali* (1); *Askarmia* v. *Subdarmia* (2), and *Lalmia* v. *Nazir Khalashi* (3). I have therefore the honour to suggest that the orders of Mr. Robertson of the 19th November 1887 and Mr. Dadabhai of the 13th February 1888 be cancelled and that the Magistrate having jurisdiction be now directed to take snch evidence as may be necessary and to pass an order according to law."

ORDER.—As there was a *bona fide* dispute as to the right to the ground on which the mill was built, the Magistrate should not have proceeded under section 133 of the Code of Criminel Procedure until that dispute was settled. *Basaruddin* v. *Baharali* (1) and *Askarmia* v. *Sabdarmia* (2).

The Court, therefore, reverses the order of the Magistrate First Class.

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3 May 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Dagdu.*

Village Police Act (Bom. Act VIII of 1867), Section 16 (5)—Milk-bush—River—Refuse—Filth.

Milk-bush put in a river for the purpose of catching fish is not refuse or filth within the meaning of section 16, clause 5 of the Village Police Act.

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(1) I. L. R. 11 Cal. 8. (2) I. L. R. 12 Cal. 137. (3) I. L. R. 12 Cal. 696.

*Criminal Ruling 30 of 1888. Criminal Reference No. 51 of 1888.

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THE accused Dagdu placed prickly pears in a river to catch fish and thereby spoilt the water of the river for drinking. There were wells of drinkable water in the village and the river was not set apart for drinking purposes under section 16 of the Bombay Act VIII of 1867. The Police Patel, upon these facts, sentenced the accused to pay a fine of annas eight.

The District Magistrate of Nasik, in making this reference to the High Court, observed: "The sentence passed appears illegal as the act of the accused does not fall under any of the clauses of section 16 of the Act."

ORDER.—The conviction and sentence are reversed as the milk-bush put by the accused in the river to catch fish was not refuse or filth within the meaning of section 11, clause 5, of Bombay Act VIII of 1867 and directs that the fine, if paid, be refunded.

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3 May 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sakharam.†

Workman's Breach of Contract Act (XIII of 1859), Sec. 2—Advance, repayment of—Sentence in default.

A Magistrate ordering an artificer, workman or labourer to repay the money advanced, or any part thereof, or to perform or get performed the work according to the terms of the contract under section 2 of the Workman's Breach of Contract Act, cannot, at the same time, sentence him to imprisonment in case he should fail to comply with the order. Such a sentence cannot be passed until the failure is proved to have occurred.

THE accused was found to have committed breach of contract as a workman in that the accused having received an advance of Rs. 70-4-6 from the complainant in consideration of work to be done as a brass-founder which he undertook to perform, wilfully neglected to perform the same. The First Class Magistrate of Poona ordered the accused to perform the work he undertook in accordance with the terms of his contract or in default to undergo six weeks' imprisonment with hard labour.

ORDER.—The Court reverses the order of imprisonment in default as it could not legally be made till the artificer, workman, or labourer had failed to comply with the order made under the section.

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3 May 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Tulsiram.*

Penal Code (Act XLV of 1860), Sections 99, 186—Public Officer—Survey officer—Collector's order ultra vires—Mamlatdar—Possessory suit—Mamlatdar's Courts Act (Bom. Act III of 1876).

A Mamlatdar cannot, in the execution of the decree passed in a possessory suit, refer the matter to the Collector in case of difficulty in executing it. A survey officer deputed by the Collector to attend to the execution, is not a public servant in the discharge of his public

†*Criminal Ruling* 31 *of* 1888. Criminal Review No. 116 of 1888.

**Criminal Ruling* 33 *of* 1888. Criminal Application for Revision No. 10 of 1888.

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functions, and persons obstructing him cannot be convicted of an offence under section 186 Indian Penal Code.

Section 99 of the Indian Penal Code does not shield an officer whose act is altogther illegal.

PER CURIAM.—The accused in this case have been convicted of voluntarily obstructing a public servant in the discharge of his public functions. They obstructed a surveyor who was sent by the Collector to measure off some land in the possession of the accused and to give possession of it to the decree-holder in a suit brought against the accused in the Mamlatdar's Court under Bombay Act III of 1876. The Mamlatdar had found some difficulty in executing the decree in the manner contemplated in the Act, as the village officers had reported that there was no land corresponding to the boundaries specified in the plaint and that the parties were joint owners and in joint occupation of the land in suit. The decree-holder had sued for a certain specific portion of land, not for partition. Indeed he could not have brought a suit for partition in the Mamlatdar's Court, nor could the Mamlatdar have decreed partition. In the difficulty in which the Mamlatdar found himself, he asked for advice and instructions from the Collector, who sent for the papers in the case and issued an order to the Surveyor to execute the decree. That order was one which the Collector had no authority to issue. He was not asked by the Mamlatdar to execute his decree. Indeed the Mamlatdar could not legally have asked him to do so. The surveyor, acting under the Collector's orders, was not, therefore, discharging a public function ; and the act of the accused could not have been an offence against section 186 of the Penal Code. It is argued by the Government Pleader that the surveyor was protected by the first paragraph of section 99 of the Code, and that there was no right of private defence against any act done by him in good faith under colour of his office. But that was not so ; for the protection given by that section to a public officer, who, acting in good faith under colour of his office, does an act not causing the apprehension of death or of griveous hurt, which may not be strictly justifiable in law, does not extend to an officer whose act is altogether illegal. Nor was the surveyor protected by the second paragraph of section 99, for, though he was acting by the direction of the Collector, still the Collector's order was so entirely *ultra vires* as to leave no room for the operation of the section. We must, therefore, reverse the conviction and sentence recorded against the accused and direct that the fines to which they have been sentenced be refunded.

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15 May 1888. NANABHAI & PARSONS, JJ.

Queen-Empress v. Rupaya.*

Criminal Procedure Code (Act X of 1882), cSec. 347—Magistrate—Committal—Sessions Court.

The accused threw his wife down and deliberately kicked her several times, thus inflicting injuries which caused her death. The Magistrate, First Class, convicted him of voluntarily causing hurt, and sentenced him to five minutes' simple imprisonment:—

***Held*, that in such a case, where death is caused by violence, the accused ought not to have been finally dealt with by the Magistrate, but should have been committed to the Court of Sessions on charges of culpable homicide and voluntarily causing grievous hurt.**

THE accused in this case returned home one day at noon and found his wife, Bhagi, absent, who had gone to her mother who lived at a village six miles distant. The accused followed her later in the day and found her outside the house. The witnesses saw Bhagi lying on the ground and the accused kicking her with his bare feet: they carried her in a senseless condition to her mother's house where she died on the day following. The accused himself said that he came home from work at noon and found his wife absent; that he was hungry and got angry and went to his wife's mother's house, that he saw his wife outside the house, caught her by the hands and told her to come home, that she shoved him and that he kicked her.

Upon these facts, the First Class Magistrate of Thana charged the accused with voluntarily causing hurt and sentenced him under section 323, Indian Penal Code, to undergo five minutes' simple imprisonment.

The District Magistrate of Thana referred the case for the orders of the High Court, observing:—"In his reasons for finding the Magistrate has stated his conclusion that the deceased died in consequence of the kicks she received, but that "the amount of hurt intended was evidently only simple hurt," and that the "accused had very great cause for provocation and took the only way of correcting his wife possible among people of his class." He further remarks that neither the accused nor any one else could have known that she had a bad spleen.

The assumption of the Magistrate that the deceased had a diseased spleen is apparently based on what he considers to be the general probability of the case. If this assumption is correct and death was caused by injuries which would not otherwise have been likely to have a fatal result, the charge of hurt instead of culpable homicide is no doubt proper. But even if the offence disclosed the hurt only, the sentence inflicted is very inadequate. The opinion which the Magistrate appears to hold that the only way a man of accused's class has of correcting his wife is to treat her in the way the accused is shown by the evidence to have treated the de-

**Criminal Ruling 33 of 1888, Criminal Reference No. 34 of 1888.*

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ceased, will not, I feel sure, be endorsed by the High Court. The trying Magistrate has also, it appears to me, taken an exaggerated view of the provocation given by the deceased. The only evidence bearing on this point is the statement of the accused that he was hungry when he returned home and presumably found no meal ready for him. There is nothing apparently to support the inference of the Magistrate that the deceased had been prohibited from going to her mother's house, or that she had refused to return when ordered to do so.

It, will, however be seen that there is no evidence to support the assumption of a diseased spleen. The Magistrate has indeed neglected to take the only evidence available on this point, *viz.*, that of the medical officer who conducted the *post mortem* examination of the body of the deceased. The certificate of the Assistant Surgeon, Kalyan, attached to the papers of the Police inquiry sets forth that the cause of death was rupture of the spleen from external violence, but is silent at to whether the spleen was in a diseased condition or not.

Before disposing of the case by inflicting a nominal punishment on a charge of simple hurt, the Magistrate ought in any case to have examined the medical officer on this point. If his evidence had shown that the deceased's spleen was not diseased, the presumption would naturally have arisen that the injuries inflicted were such as were likely to have caused death even if not intended to cause death, and in that case it would have been the duty of the Magistrate to have committed the accused for trial by the Court of Session on a charge of culpable homicide.

PER CURIAM.—The Magistrate (E. McCallum, Esquire) convicted the accused of voluntarily causing hurt under section 323 of the Penal Code and sentenced him to five minutes' simple imprisonment. The facts of the case, however, show that the accused threw his wife down and deliberately kicked her several times, on her body, thus inflicting injuries which caused her death.

We think that such a case ought not to have been finally dealt with by the Magistrate in the way in which it has been. His remarks as to the accused taking the only way of correcting his wife possible among people of his class are unsound and out of place. We reverse the conviction and sentence and order the accused to be committed to the Court of Sessions for trial on charges of culpable homicide and voluntarily causing grievous hurt.

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21 May 1888. NANABHAI & PARSONS, JJ.

Queen-Empress v. Rama.*

Criminal Procedure Code (Act X of 1882), Sec. 35—Concurrent sentences—Transportation.

A direction that several sentences of transportation passed on an accused person on a

* *Criminal Ruling 34 of* 1888. Criminal Review No. 51 of 1888.

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conviction of two or more distinct offences at the same trial, should be concurrent, is illegal, being contrary to the provisions of section 35 of the Criminal Procedure Code.

ORDER.—The Court reverses the direction of the Sessions Judge of Thana that the three sentences of ten years' transporation passed on each of the accused 1 to 3 and the three sentences of seven years' transportation passed on each of the accused 4 to 9 should be executed concurrently. Such a direction is illegal as being contrary to the provisions of section 35 of the Criminal Procedure Code.

The Court confirms the sentences of transportation for ten years and seven years respectively passed on the accused for the 1st offence but it alters the sentences passed on the accused for the 2nd and 3rd offences to sentences of a month's rigorous imprisonment in each case and directs that each sentence shall take effect on the expiration of the preceding one.

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21 May 1888. NANABHAI & PARSONS, JJ.

Queen-Empress v. Sambhaji.*

Criminal Procedure Code (Act X of 1882), Secs. 514, 515—First Class Magistrate—District Magistrate—Appeals.

A First Class Magistrate, not being a District Magistrate, has no jurisdiction under section 515, Criminal Procedure Code, to hear an appeal against an order of a Second Class Magistrate under section 514 of the Code.

THE accused were found to have committed a breach of security bond under section 514, Criminal Procedure Code, and were ordered by the Second Class Magistrate of Parner to pay the whole amount of the bond. An appeal, having been preferred, was dismissed under section 423 of the Code by the First Class Magistrate of Ahmednagar.

ORDER.—The Court reverses the appellate proceedings of the Magistrate First Class and directs that the appeal be sent for disposal to the District Magistrate, who alone has jurisdiction, under section 515, Criminal Procedure Code, to hear and dispose of it.

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21 May 1888. NANABHAI & PARSONS, JJ.

Queen-Empress v. Bana.†

Criminal Procedure Code (Act X of 1882), Secs. 421, 422—Appeal—Notice.

It is not competent to an Appellate Court to reject an appeal summarily, under, section 421 of the Criminal Procedure Code, without giving the notices required by section 422.

THE accused were convicted of an offence under section 411, Indian Penal Code, and were sentenced by Rao Saheb Narsilal Rewadas, Second Class Magistrate of Viramgam, to suffer rigorous imprisonment for three months. The First Class Magistrate Mr. M. C. Gibb on appeal reduced the sentence to one of rigorous imprisonment for two months and fourteen days and a fine of Rs. 10 each.

**Criminal Ruling* 35 *of* 1888. Criminal Review No. 140 of 1888.

†Criminal Review No. 119 of 1888.

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ORDER.—The appeal record shows that the Appellate Court rejected the appeal summarily, acting under section 421, Criminal Procedure Code, without giving the notices required by section 422. It was not therefore competent to alter the nature of the sentence: see *Imperatrix* v. *Govindrao Babajirao Uchatkar*, (1) Criminal Ruling 16 September 1886.

The Court, therefore, reverses so much of the order of the Appellate Court as does more than reject the appeal.

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21 May 1888. NANABHAI & PARSONS, JJ.

Queen-Empress v. Rama*.

District Police Act (Bom. Act VI of 1867), Secs. 28, 29—Warning—Going along a road—Advice.

The warning or advice given by the Police to certain persons not to go alone on a particular road, as the country was believed to be infested with dacoits, is not an order as can be legally passed, under section 28 of the Bombay District Police Act, and its non-compliance is not punishable under section 29 of the Act.

THE accused were ordered by the First Class Head Constable at Ambegaon not to go along the road from Wada to Ghoda by themselves as the country was believed to be infested by dacoits and there was danger of small parties being attacked. They were directed to wait until several people went together. The accused, two in number, did not attend to the order but went on. The Magistrate, upon these facts, found them guilty of an offence punishable under section 29 of Act VII of 1867 for not obeying an order of the Police given to keep order on the public roads under section 28.

The District Magistrate of Poona in making the reference to the High Court remarked: "The accused appear to me to have committed no offence the order of the Head Constable being only really advice for their own safety and not an order of a nature the Police were competent to give, as the accused going along a public road would scarcely be said to endanger order, because there was a probability of their being attacked."

ORDER.—The warning or advice given by the Police to the applicants that they should not go alone on the road from Wada to Ghoda as the country was believed to be infested with dacoits cannot be held to be an order, still less such an order as could legally be passed, under section 28 of the Bombay District Police Act, 1867, non-compliance with which would be punishable under section 29. The convictions and sentences are reversed and fines, if paid, ordered to be refunded.

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(1) Cr. R. 53 of 1886; *vide ante* p. 304. *Criminal Reference No. 53 of 1888.

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14 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Nurodin.*

Penal Code (Act XLV of 1860), Secs. 265, 415, 417—Fraudulent measure—Cheating.

The accused who sold liquor, measuring it with a glass which was not a prescribed measure, and of which they fraudulently misrepresented the capacity, were convicted of the offence of fraudulent use of a false measure under section 265, Indian Penal Code:—

Held, that they would more appropriately have been tried for the offence of cheating.

THE accused were convicted of the offences of fraudulent use of a false measure under section 265, Indian Penal Code, and of sale of liquor without a permit under section 43 (*g*) of the Bombay Abkari Act, in that they with an intention to defraud sold to one Mahomed liquor of annas five saying that it was of six annas with a glass which was not a prescribed measure and which contained less liquor than it was represented to do, and the accused persons sold liquor without a permit.

ORDER.—Record and proceeding to be returned with the remarks that the accused would more appropriately have been tried for the offence of cheating. The Court, however, does not interfere, as the accused does not appear to have been prejudiced.

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14 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sarwel.†

Criminal Procedure Code (Act X of 1882), Sec. 271—Offence charged not proved—Conviction—Practice.

A charge of murder on which the accused was tried, was not proved, but the Court convicted her of the offence of concealment of birth which it considered was admitted by her in her examination by the Court:—

Held, that such conviction was illegal, and that a charge of concealment of birth should have been framed and the accused tried thereon.

THE accused was charged with murder in that the accused intentionally caused the death of her new-born illegitimate child by throwing it. The Sessions Judge, by whom she was tried, found her not guilty on the charge of murder, but held her guilty on her own plea of the offence of concealing the birth of her illegitimate child by secretly disposing of its dead body, under section 318, Indian Penal Code, and duly sentenced her.

ORDER.—The Sessions Judge has convicted the accused on her alleged plea of guilty, but we can find no such plea on the record, nor indeed any charge of the offence of which the Sessions Judge says the accused pleaded guilty. She has in effect been convicted of an offence for which she has not been tried. The Court, therefore, reverses the conviction and sentence, and directs the accused to be tried by the Court of Sessions on a charge under section 318, Indian Penal Code.

**Criminal Ruling 36 of 1888. Criminal Review No. 179 of 1888.*

†Criminal Ruling 37 of 1888. Criminal Review No. 146 of 1888.

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14 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Mahadu.*

Criminal Procedure Code (Act X of 1882), Sec. 349—Magistrate—Submission—Conviction—Opinion.

A Magistrate of the Second or Third Class, in submitting his proceedings to another Magistrate for a severer punishment than he can himself inflict, is required to record his opinion only but cannot legally convict the accused. It is the duty of the Magistrate to whom a case is so referred to pass judgment according to law.

ORDER.—The Second Class Magistrate ought to have recorded an opinion only in this case. The conviction recorded by him is illegal. The Subdivisional Magistrate ought himself to have passed judgment under section 349, Criminal Procedure Code. The Court, therefore, reverses the conviction and subsequent proceedings and directs the Second Class Magistrate, after recording his opinion, to proceed according to law.

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14 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Keru.†

Indian Penal Code (Act XLV of 1860), Secs. 425—Property—Meaning—Easement.

The word "property" in section 425, Indian Penal Code, means some tangible property capable of being forcibly destroyed, but does not include an easement.

ORDER.—The point for determination in this case is whether the accused with intent to cause wrongful loss or damage to the complainant caused the destruction of the stairs in question. The Magistrate would seem to have been of opinion that the accused was the owner of the stairs but that the complainant had the right to use them as he finds that the accused levelled his old and new premises so as to destroy the easement which the complainant had acquired over the staircase. Assuming that such an easement existed it is difficult to see how it can be considered to be "property" within the meaning of section 425, Indian Penal Code. Some tangible property capable of being forcibly destroyed must there be meant. In the present case, however, the existence of the easement is disputed and the accused in pulling down the stairs seems to have been only exercising a *bona-fide* right of ownership which would not be an offence in his case, The conviction and sentence are therefore reversed.

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18 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bhikaji.††

Penal Code (Act XLV of 1860), Sec. 499—Defamation—Caste—Headman—Notice—Imputation of adultery—Good faith.

The headmen of a caste issued a notice to a member of that caste, intimating that a complaint had been received by the caste that his daughter had committed adultery with a

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**Criminal Ruling 38 of 1888. Criminal application for Revision No. 107 of 1888.*

†Criminal application for Revision No. 69 of 1888.

††*Criminal Ruling 39 of 1888.* Criminal Application for Revision No. 68 of 1888.

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certain person, and requiring him to appear before the caste with his daughter in order to clear her character :—

***Held*, that the notice could not furnish the basis of a charge of defamation, as it contained no imputation by the persons who signed it against the daughter, and was clearly issued in good faith, on information received by them, with a view to such an enquiry as it was competent to the caste to make.**

PER CURIAM.—The letter of the 11th August, 1887, written by the accused Nos. 1 and 2 to the members of their caste, contains no imputation whatever against the complainant Kanbai. It only charges two men, Sonu and Ladu, with improper conduct ; and it must have been on some information other than that contained in that letter that the other accused persons, who are the headmen of their caste, issued the notice of the 24th September 1887, to the complainant's father, intimating that a complaint had been received by the caste that his daughter Kanbai had committed adultery with Sonu, and that he should, therefore, appear before the caste, to clear her character, and being his daughter with him.

The notice contains no imputation by the persons who signed it against Kanbai's character. It was clearly issued in good faith, on information received by those persons, with a view to such an inquiry as it was apparently competent to the caste to make. It cannot, therefore, any more than the letter of the 11th August, 1887, furnish the basis of a charge of dafaming Kanbai. We, therefore, reverse the convictions and sentences recorded in this case, and direct that the fines, if paid, be refunded. We also reverse the orders for compensation.

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21 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Fula Bhana.*

Penal Code (Act XLV of 1860), Secs. 21 (2), 223—Rakha—Public servant—Negligently allowing a person to escape from custody.

A watchman in the Kaira Collectorate, who does the work of *rakha*, though not borne on the village records as a village servant, and receives a portion of the emoluments assigned as remuneration for the services of a *rakha*, is a person in actual possession of the situation of a public servant within the meaning of explanation 2 of section 21 of the Indian Penal Code and is, therefore, punishable under section 223 of the Code if he negligently allows any persons lawfully given into his custody to escape.

ORDER.—The accused cannot perhaps be held to be a person who holds an office by virtue of which he is empowered to place or keep a person in confinement, but he appears to be in actual possession of the situation of a public servant within the meaning of explanation 2 of section 21 of the Indian Penal Code. He does the work of a *rakha* and receives a portion of the emoluments. He is, therefore, a public servant.

Record and proceeding to be returned with the above remark.

***Criminal Ruling 40 of 1888. Criminal Reference No. 87 of 1888.**

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21 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Issup.*

Penal Code (Act XLV of 1860), Secs. 410, 411—Stolen property, receiving of—Erroneously believing it to be stolen.

A person receiving property, which is not stolen property as defined in section 410 of the Indian Penal Code, is not guilty of an offence under section 411 of the Code, although, at the time of receiving it, he erroneously believes it to be stolen.

ORDER.—The Magistrate is entirely wrong in his view of the law, when he says that even if the property was not stolen property, the accused was guilty because they received it believing it to be stolen.

No offence can be committed against section 411, Indian Penal Code, in respect of property which is not stolen property within the definition contained in section 410. As, however, there is evidence on the record to support a finding that the property found with the accused was stolen from the complainant, and, as the possession was recent, the Court does not interfere with the convictions and sentences.

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21 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Oodaji.†

Penal Code (Act XLV of 1860), Sec. 21—Public Servant—Convict Warder.

A convict warder is not a public servant within the meaning of section 21 of the Indian Penal Code.

THE accused, convict warders, were convicted of criminal breach of trust by a public servant under section 409, Indian Penal Code, in that they dishonestly misappropriated some old gold and silver coins of the value of Rs. 150 found by one of the prisoners working under their supervision and entrusted to them in their capacity as public servants.

ORDER.—As their is nothing on the record to show that the accused, who are merely described as convicted warders, are public servants within the definition of section 21, Indian Penal Code, the Court alters the conviction to one under section 406, Indian Penal Code, leaving the sentence untouched.

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25 June 1888. BIRDWOOD & PARSONS, JJ.

Letter from the Panch Mahals Collector.††

Police Regulation (II of 1827), Sec. 19 (1)—Magistrate—Rules—Dharamshala—Bona fide dispute.

Section 19 (1) of the Police Regulation 1827 relates only to places, the right of the public to which is not disputed. A Magistrate has, therefore, no authority to institute rules with regard to a *dharamshala* when there is a *bona fide* dispute as to it ownership.

THE Court resumed consideration of a letter, No. 911, dated 10th April 1888, from the District Magistrate of the Panch Mahals forwarding

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**Criminal Ruling* 41 *of* 1888. Criminal Review No. 180 of 1888.

†Criminal Review No. 158 of 1888. ††*Criminal Ruling* 42 *of* 1888. Inward No. 628 of 1888.

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under clause 6 of section 19 of Regulation 12 of 1827, a copy of a notice issued to the *punch* of the Nima Mahajans of Jhalod, Taluka Jhalod, ordering them to keep open the *dharamshala* at Jhalod for the general use of the public.

ORDER.—It appears to us that section 19, clause 1, of Regulation 12 of 1827, relates only to places, the right of the public to which is not disputed. In the present case it is clear that there is a *bona-fide* dispute as to the ownership of the *dharamshala* in question. We must, therefore, forbid the rule.

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25 June 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ganpat.†

Penal Code (Act XLV of 1860), Secs. 441, 447—Shed, erection of, on another's land—Intention—Improper gain—Annoyance.

The erection of shed on another person's land is not an offence under section 447 of the Indian Penal Code, unless it be done with such intent as is set out in section 441 of the Code. An intention to annoy, which must be distinguished from an intention to obtain improper gain, does not follow necessarily from an intention to obtain land unlawfully, but must be made out by some independent evidence.

PER CURIAM:—We must accept the finding of the Magistrate that the accused erected a shed on the complainant's land. This act, however, would not be an offence under section 447 of the Penal Code, unless it was done with such intent as is set out in section 441. The Magistrate says that the intention of the accused was to obtain the complainant's land by means of *vahivat* and that consequently he meant to annoy the complainant. We do not think, however, that the intention to annoy follows necessarily from the intention to obtain the land unlawfully. In his commentary on section 441, Mr. *Mayne* refers to the distinction between an act which is unlawful and an act which is an offence and points out that mere entry upon land with intention to do that which the civil law will prevent or punish does not constitute criminal trespass. We concur in his opinion that the intent which the law would infer from cultivating another man's land would be merely an intent to procure improper gain for one-self and that a further intent to annoy would have to be made out by something like evidence. In this case, the intention to procure gain may be presumed from the act of the accused, but we cannot presume from it the further intention to annoy, and there is no evidence which shows that there was any such intention. We must, therefore, reverse the conviction and sentence.

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†*Criminal Ruling* 43 *of* 1888. Criminal Application for Revision No. 104 of 1888.

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5 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Hari.* Queen-Empress v. Bhika.*

Criminal Procedure Code (Act X of 1882), Sec. 397—Sessions Judge—Transportation—Convict undergoing imprisonment.

Where a Sessions Judge, in ignorance that the accused is already undergoing a sentence of imprisonment, sentences him to transportation of life, it is subsequently open to him to further order that the sentence of transportation shall take effect immediately.

THE Sessions Judge of Nasik in making this reference stated:—"These men were tried by me for dacoity and were sentenced on December 10, 1887, to ten years' transportation. They had been already convicted by the Chief of Jauhar, but through an oversight I made no mention of this conviction in the sentence passed by me. The District Magistrate has written saying that an application has been made for the delivery of the prisoners to the Jauhar State in order that they may undergo the sentence passed upon them by the Chief of Jauhar. Under section 397, Criminal Procedure Code, the Court may direct a sentence of transportation to commence immediately, but having regard to section 369, Criminal Procedure Code, I doubt whether I can now alter my order by directing that the sentence of transportation shall commence from the day on which it was passed or from the expiration of the sentence passed by the Chief of Jauhar."

ORDER.—In ignorance that the accused was already undergoing a sentence of imprisonment, the Sessions Judge, when sentencing him to transportation dated and signed the warrant. If the Sessions Judge makes no further order under the proviso to section 397, Code of Criminal Procedure, the sentence of transportation passed by him will commence at the expiration of the previous sentence of imprisonment. The Sessions Judge now wishes apparently to direct that the sentence of transportation shall take effect immediately, that is, he wishes to add a direction such as is contemplated in the proviso to section 397. We think it is open to him to do so. We observe that the CALCUTTA HIGH COURT is of the same opinion, (3 W. R. Cr. Letters 16).

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5 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Motidas.†

Criminal Procedure Code (Act X of 1882), Sec. 253—Magistrate—Warrant-case—Non-compoundable offence—Withdrawal of complaint—Discharge.

The order of a Magistrate in a warrant-case permitting the withdrawal of a complaint of a non-compoundable offence is equivalent to an order of discharge under section 253, Criminal Procedure Code.

**Criminal Ruling* 45 *of* 1888. Criminal Reference No 92 of 1888.

†*Criminal Ruling* 47 *of* 1888. Criminal Reference No. 96 of 1888.

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IN this case a complaint was lodged under the latter part of section 506, Indian Penal Code, before the First Class Magistrate of Khandesh, but it was allowed to be withdrawn under section 248 of the Code of Criminal Procedure.

The District Magistrate being of opinion that the procedure adopted by the First Class Magistrate was irregular, referred the case to the High Court, remarking:—"The Magistrate First Class in submitting the papers reported that although the offence was not compoundable, he had permitted the complaint to be withdrawn under the authority of the High Court Ruling (*Reg* v. *Vithoba* (1)). I referred to the ruling quoted above and the case of *Imperatrix* v. *Dewama* (2) alluded to in that case, in which a charge had been brought against Dewama of house-breaking. The Magistrate First Class, as the parties had come to an agreement, dismissed the case. On the papers coming before the High Court, it was held that the Magistrate meant to discharge the accused under section 215, Criminal Procedure Code (section 253 of the present Criminal Procedure Code), and the High Court further held that this section was useful in many cases where a strict application of the criminal law was undesirable. I presume that in the Criminal Ruling referred to above, the High Court meant that in cases coming under the latter part of section 506, Indian Penal Code, though he could not allow the offence to be compounded, might discharge the accused.

"The case under reference is a warrant case, and in following the spirit of the High Court ruling above referred to the Magistrate ought to have discharged the accused under section 253, Criminal Procedure Code."

ORDER.—Following the ruling in *Imp.* v. *Dewama* (2) we hold that the order of the Magistrate permitting the withdrawal of the complaint is equivalent to an order of discharge under section 253, Criminal Procedure Code, and it is unnecessary for us to interfere with that order.

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5 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lakshman.†

Penal Code (Act XLV of 1860), Sec. 499—Defamation—Complainant—Right to complain.

The complainant prosecuted the accused persons for defaming his sister-in-law:—

Held, that, as there was no imputation made against the complainant, there was no defamation of his within the definition contained in section 499, Indian Penal Code, and that his sister-in-law, being the person defamed, ought herself to have made the complaint.

JUDGMENT:—No imputation was made by the accused against the complainant. The accused, therefore, was not guilty of defaming him within the definition contained in section 499 of the Indian Penal Code. The per-

(1) Cr. R., 20 of 1887; *vide ante* p. 330. (2) I. L. R., 1 Bom., 64.

†*Criminal Ruling* 48 *of* 1888. Criminal Review No. 216 of 1888.

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son defamed was the complainant's sister-in-law and under the Ruling in *Imp.* v. *Kustantin John de Souza*, (1) decided on the 3rd March 1887, it was she herself who should have made the complaint. The conviction and sentence are, therefore, reversed.

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5 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Fakirgavda.*

Penal Code (Act XLV of 1861), Sec 441—Criminal trespass—Encroachment—Public Road—Land Revenue Code (Bom. Act V of 1879), Sec. 37.

Under section 37 of the Bombay Land Revenue Code, all public roads are the property of Government and must be taken to be in the possession of the local Government officers on behalf of Government. Hence, a person who encroaches on such a road is guilty of criminal trespass, if the encroachment is made with such intent as is contemplated in section 441 of the Indian Penal Code.

IN this case the facts were that one Fakirgowda had encroached on a public road by building a wall on it. The Third Class Magistrate made a *panchnama*, and he found that the accused had encroached upon a public road. The next day, the patel of the village was examined on solemn affirmation by the Third Class Magistrate and corroborated the fact of the encroachment. The Third Class Magistrate then proceeded to try Fakirgowda and found him guilty of trespass under section 447 of the Penal Code. The accused pleaded not guilty and stated that he had built the wall under the impression that the ground enclosed was his.

The District Magistrate of Dharwar, in referring the case to the High Court, observed "I am respectfully of opinion that no offence had been committed: The offence of trespass can only be committed with respect to land in the possession of some person or persons and cannot be held applicable to waste lands or public roads. If criminal action was to be taken it should have been under Chapter X of the Criminal Procedure Code."

PER CURIAM:—Under section 37 of Bombay Act V of 1879 all public roads are the property of Government, and it must be taken that the public road encroached upon by the accused was in the possession of the local Government officers on behalf of Government. The judgment of the Magistrate Third Class, however, contains no finding as to the accused's intent. In the absence of any finding that he encroached on the land with such intent as is contemplated in section 441 of the Indian Penal Code, the Court reverses the conviction and sentence and directs that the fine, if paid, be refunded.

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(1) Cr. R. 14 of 1887; *vide ante* p. 327.

**Criminal Ruling* 49 *of* 1888. Criminal Reference No. 90 of 1888.

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12 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Phakeera.*

Railways Act (IV of 1879), Sec. 46—Endangering the safety of persons travelling upon the railway.

A person who fails to remove a stone from a rail is not guilty of negligently doing an act which is likely to endanger the safety of persons travelling upon the Railway, under section 46 of Act IV of 1879, unless it be proved that he was legally bound to remove it.

PER CURIAM—The conviction of the accused under section 46 of Act IV of 1879 is, we think, bad in law; for the Magistrate finds him guilty of negligently doing an act which was likely to endanger the safety of persons travelling upon the Railway, while at the same time he finds it not proved that it was the accused who placed the stone near the rail and so endangered the safety of such persons. What the Magistrate really held was that the accused was guilty because he failed to remove the stone. But for such omission he would only be liable to conviction under the section if he was "legally bound" to remove it. On that point the Magistrate records no judicial finding. He merely remarks that it was the accused's duty to remove the stone, but we cannot find any evidence in the case to justify even that remark. We reverse the conviction and sentence.

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12 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sangappa.†

District Police Act (Bom. Act VII of 1867), Secs. 27, 29.

A Police Superintendent cannot, under section 27 of the Bombay District Police Act, 1867, legally make an order forbidding sticks to be carried by persons attending a certain *jatra* (fair), Hence, a person who, in contravention of such an order, carries a stick at the *jatra*, is not guilty of an offence under section 29 of the Act.

PER CURIAM.—The Police Superintendent issued an order, professedly under section 27 of Bombay Act VII of 1867, prohibiting all persons attending the *jatra* at Bagalkot from carrying sticks or arms from the 29th June to the 3rd July. The accused was convicted of carrying a cane on the 30th June. The conviction would be good under section 29 of the Act, if the Superintendent's order was issued under section 27; but we cannot regard it as so issued, for the section merely authorizes the Superintendent to direct the conduct of all assemblies and processions on the public roads or in the public streets or thorough-fares and to prescribe the routes by which and the times at which such procession may pass. The order forbidding sticks to be carried by the persons attending the *jatra* was not an order which could legally be issued under section 27 and cannot, therefore, be regarded as an order issued under it. We, therefore, reverse the conviction and sentence and direct that the fine, if paid, be restored.

**Criminal Ruling 50 of 1888.* Criminal Review No. 231 of 1888.

†*Criminal Ruling 51 of 1888.* Criminal Application for Revision No. 134 of 1888.

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18 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Shivraya.*

Criminal Procedure Code (Act X of 1882), Secs. 123, 128—Security for good behaviour—Order of imprisonment in anticipation.

An order for the imprisonment of an accused person, made in anticipation of his failing to give security under section 118 of the Criminal Procedure Code, is illegal, being opposed to section 123 of the Code.

ORDER.—The Magistrate's order should have been made under section 118 of the Code of Criminal Procedure, which does not authorize the award of imprisonment in anticipation of the accused failing to give security. The Court reverses the award of imprisonment; and leaves it to the Magistrate to proceed under section 123 of the Code, if necessary.

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18 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Jamsetji.†

Penal Code (Act XLV of 1860), Secs. 406, 24—Criminal breach of trust—Dishonestly—Contract not to adulterate with water—Adulteration—Selling at the rate of the unadulterated liquor—Profit appropriated by servant.

The servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it he was to receive a certain quantity for himself and he was to account for the remainder to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he mixed water with the liquor, and, having thus increased its amount, sold it at the same rate per gallon as was chargeable for unadulterated liquor, and appropriated the profit thus made to his own use :—

Held, that, having thus gained by unlawful means money to which he was not legally entitled, he acted dishonestly within the meaning of section 24 of the Penal Code and was guilty of the offence of criminal breach of trust, under section 496 of the Code.

ORDER.—The accused, being the servant of a liquor contractor, was entrusted with a certain quality of liquor by his master, to sell. For selling the liquor, he received a certain quantity of it for himself. For the remainder he was to account to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract, he mixed water with the liquor and, so increasing its amount, sold the increased amount at the same rate per gallon as was chargeable for unadulterated liquor. The profit thus made he misappropriated to his own use. He thus gained by unlawful means money to which he was not legally entitled. He did so, therefore, 'dishonestly' within the meaning of the Indian Penal Code. His conduct falls also within the definition of criminal breach of trust in section 406 of the Code. The Court does not, therefore, interfere.

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*Criminal Ruling 52 of 1888. Criminal Review No. 247 of 1888.

†Criminal Ruling 53 of 1888. Criminal Reference No. 81 of 1888.

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26 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Gopal.*

Abkari Act (Bom. Act V of 1878), Sec. 45 (c)—Breach of the conditions of license—Licensee—Servant.

Under section 45 (c) of the Bombay Abkari Act, the servants of a holder of a license granted under the Act cannot be made liable for breach of the conditions of the license.

ORDER.—As the accused Nos. 2 and 3 are not holders of a license, permit, or pass, granted under Bombay Act V of 1878, the convictions and sentences passed against them under section 45 (c) of the Act are reversed as illegal (see Criminal Ruling August 6th 1885 (1)). The fines, if paid, to be restored.

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26 July 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bawaji.†

District Municipal Act (Bom. Act VI of 1873), Secs. 69, 74—Nuisance.

An order cannot be made under section 74 (2) of the Bombay District Municipal Act, 1873, in respect of a possible future continuance of the offence for which an accused person has been punished under clause (i) of the section. In respect of any such continuance of the offence, a fresh precaution is necessary.

THE accused was charged with an offence under section 69 of Act VI of 1873 (Bombay) and was convicted and sentenced to pay a fine of Rs. 5. The Magistrate further ordered that if the accused continued to use the place as a tannery from the day following the conviction, he should pay eight annas per day till the continuance ceased to exist.

ORDER.—The Court reverses as illegal the order for which the Magistrate quotes clause 2 of section 74 of Bombay Act VI of 1873 as authority, inasmuch as an order cannot be made under that clause in respect of a possible future continuance of the offence for which an accused person has been punished under clause 1 of the section. In respect of any such continuance of the offence, a fresh prosecution would be necessary.

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2 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bali.††

Penal Code (Act XLV of 1860), Secs. 304A, 279, 289—Rash driving.

Where the accused is alleged to have been negligent either in rashly driving or in leaving his bullocks to go along the road intended and a child is run over by the bullocks and killed, he ought to be tried under sections 304A, 289, and 279 of the Indian Penal Code.

PER CURIAM.—It is impossible from the Magistrate's summary judgment to ascertain on what found facts he convicted the accused under section 279 of the Indian Penal Code. The conviction, therefore, seems bad. As the accused is alleged to have been negligent either in rashly

*Criminal Ruling 54 of 1888. Criminal Review No. 266 of 1888. (1) *Ante* p. 214. *Q. E.* v. *Gafur.*

†*Criminal Ruling* 55 *of* 1888. Criminal Review No. 250 of 1888.

††Criminal Review No. 176 of 1888.

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driving or in leaving his bullocks to go along the road intended, and as a child was run over by the bullocks and killed, the accused ought, we think, to have been tried under sections 304A and 289 of the Indian Penal Code as well as under section 279. We, therefore, reverse the conviction and sentence and order the accused to be retried on charges under sections 304A, 279 and 289 of the Indian Penal Code. If the fine has been paid, it must be refunded.

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2 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Limba.*

Court Fees Act (VII of 1870), Sec. 31—Criminal Procedure Code (Act X of 1882), Sec. 545—Charge of non-cognizable offence—Conviction of cognizable offence—Payment of court-fees to complainant—Compensation.

When a person accused of a non cognizable offence, is convicted of a cognizable one, the Court cannot legally direct him to pay the expenses incurred by the complainant under section 31 of the Indian Court Fees Act, as that section applies only to cases where the accused has been convicted of a non-cognizable offence. The expenses so incurred can, however, be awarded to the complainant as compensation under section 545 of the Code of Criminal Procedure.

ORDER.—The accused having been convicted of a cognizable offence, the Court reverses as illegal the order of the Magistrate directing him to pay the expenses incurred by the complainant under the Court Fees Act. Section 31 of that Act applies only to cases where the accused has been convicted of a non-cognizable offence. The Court, however, orders that from the fine, if levied, a sum equal to the complainant's expenses under the Court Fees' Act be paid to him as compensation under section 545 of the Code of Criminal Procedure.

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2 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lakshman.†

District Municipal Act (Bom. Act VI of 1873), Sec. 67 (2)—Meat—Permission or license.

A person selling meat not in a public market but at his house without permission or license from the Municipality, cannot be punished under section 67 (2) of the Bombay District Municipal Act.

THE accused was convicted, under section 57, clause 2, of the Bombay District Municipal Act VI of 1873, for selling meat at his house without permission or license from the Municipality and sentenced to pay a fine of Rs. 5.

The District Magistrate of Thana, in referring this case, observed: "I consider that the conviction and sentence are illegal as the accused sold the meat at his own house and not in a public market and consequently section 67, clause 2, obviously does not apply to the case."

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*Criminal Ruling 56 of 1888. Criminal Review No. 275 of 1888.

†Criminal Ruling 57 of 1888. Criminal Reference No. 103 of 1888.

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ORDER.—For the reasons stated by the District Magistrate the Court reverses the conviction and sentence and directs the fine, if paid, to be restored.

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9 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Gambhirmal.*

Cantonement Rule 7—Compound dirty—Offence.

The mere finding that the compound of a house, of which the accused is the landlord, was kept in a dirty state, is not sufficient to support a conviction under Rule 7. To justify a conviction under the rule, it must be found that the accused, being the owner or occupier of the house, had allowed dirt, filth, refuse, rubbish, or noxious, or offensive matter, to be kept for more than 24 hours on the ground attached to and occupied with the house.

PER CURIAM.—The mere finding that the compound of the house of which the accused is the landlord was kept in a dirty state is not sufficient to support a conviction under No. 7 of the Cantonement Rules. To justify a conviction under the rule, the Magistrate ought to have found that the accused, being the owner or occupier of a house, allowed dirt, filth, refuse, rubbish, or noxious, or offensive matter, to be kept for more than 24 hours in the ground attached to and occupied with the house. This the Magistrate has not found. We, therefore, reverse the conviction and sentence and direct the fine, if paid, to be restored.

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9 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Budhya.†

Penal Code (Act XLV of 1860), Secs. 304A, 325—Voluntarily causing grievous hurt—Causing death by negligence.

The accused struck at a man with whom he was quarrelling with a wooden rolling pin; the blow missed its aim and falling on the head of a child caused its instant death. The Magistrate convicted the accused of voluntarily causing hurt:—

Held, the accused should have been convicted of an offence under section 304A of the Indian Penal Code.

IN this case the accused struck at a man with whom he was quarrelling with a wooden rolling pin; the blow missed its object and falling on the head of a child of two years old fractured its skull causing instant death. The Magistrate found the accused guilty of voluntarily causing hurt and sentenced him to six months' imprisonment.

The District Magistrate of Poona, in making the reference, remarked: "The Magistrate's decision is probably correct and the punishment awarded is in my opinion sufficient; there was no intention to kill or to cause any injury likely to cause death, but I am doubtful whether, when

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**Criminal Ruling* 58 *of* 1888. Criminal Review No. 291 of 1888.

†Criminal Reference No. 93 of 1888.

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death is the direct result of a blow, the Magistrate should not commit for culpable homicide instead of deciding the doubtful point himself."

ORDER.—The Court alters the conviction to one under section 304A, Indian Penal Code, and enhances the sentence to one year's rigorous imprisonment.

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9 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bhiwa.*

District Municipal Act (Bom. Act VI of 1873), Sec. 66—Slaughter-house.

A person who kills a goat in his own house for his own consumption cannot be said to use the place as a slaughter-house within the meaning of section 66 of the Bombay District Municipal Act.

JUDGMENT:—We do not think that a person who kills a goat in his own house for his own consumption can be said to use a place as a slaughter-house within the meaning of section 66 of the Bombay Municipal Act. The word 'place' in that section has been held not to include a house *In re Raja* (1); and the term 'slaughter-house' clearly means a place used generally for the express purpose of slaughtering animals. We, therefore, reverse the conviction and sentence and direct that the fines, if levied, be restored.

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20 August 1888. NANABHAI & BIRDWOOD, JJ.

Queen-Empress v. Fateh Mahomed.†

District Municipal Act (Bom. Act VI of 1873), Sec. 61—River—Washing dirty clothes.

A person cannot be convicted under section 61 of the Bombay District Municipal Act, on account of his wife's having washed some dirty clothes in a river, without finding (1) that the river in question was a stream, &c., belonging to the Municipality, or (2) that the accused caused the clothes to be washed by his wife in such stream, and where it appeared that he had simply told his wife to wash the clothes, without saying where they were to be washed.

ORDER.—The Magistrate has convicted the accused under section 61 of Bombay Act VI of 1873 because his wife washed some dirty clothes in a part of the river at Malegaon in which such washing was forbidden. The conviction is bad (1) because the Magistrate has not found that the river in question is a "stream . . . belonging to the Municipality," and (2) because he has not found that the accused "caused" the clothes "to be washed" by his wife in such stream. He seems to have simply told his wife to wash the clothes without saying where they were to be washed. The conviction and sentence are, therefore, reversed and the fine, if paid, should be refunded.

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(1) I. L. R. 9 Bom., 272. *Criminal Review No. 298 of 1888.
†*Criminal Ruling 59 of* 1888. Criminal Review No. 314 of 1888.

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22 August 1888. NANABHAI & BIRDWOOD, JJ.

Queen-Empress v. Chand.*

Evidence Act (I of 1872), Sec. 30—Accomplice, evidence—Confession of co-accused—Corroborration.

Four accused, B, C, M and T being committed for trial on a charge of murder, B was made an approver, and M and T pleaded guilty; and the trial thereupon proceeded against C alone :—

Held, that the statements of M and T could not be used against C to corroborate the evidence of the accomplice B; and that as M and T pleaded guilty, and as the trial proceeded against C alone, he was not being tried together with them and section 30 of the Evidence Act had no application to their statements.

PER CURIAM.—We are of opinion that the case *Imperatrix* v. *Bayaji* (1) has no bearing on the present case. It was not intended to modify the ruling in *Reg.* v. *Malapa* (2) which so far as we are aware, has been uniformly followed by the High Court. The statements of the two co-accused persons could not, under the ruling in Malapa's case, be used as against the accused Chand to corroborate the evidence of the accomplice. The case therefore rests really on the evidence of the accomplice. And it would be unsafe to convict the accused Chand on the evidence of the accomplice uncorroborated by the evidence of any independent witnesses. Again in the present case the two co-accused persons pleaded guilty; and, thereupon, as the Sessions Judge says in his judgment, the trial proceeded against the accused Chand alone. He and they were not, therefore, being tried together; and section 30 of the Evidence Act has no application to the statements of the two co-accused persons. Their statements, therefore, go out of the case. We acquit the accused Chand of the murder of which he has been convicted under section 302, Indian Penal Code; and direct that he should be set at liberty.

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30 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ranchore.†

Penal Code (Act XLV of 1860), Sec. 95—Theft—Property worth 3 pies.

Section 95 of the Indian Penal Code is not applicable to a case where the accused is charged with the offence of theft, in respect of 3 pies worth of dung-cakes and mangoes.

THE accused in this case was convicted of theft in that he dishonestly took away from the field of the complainant dung-cakes worth pie 1 and mangoes worth pies 3 in all worth 4 pies, without consent. The Magistrate applying section 95 of the Indian Penal Code decided that no offence was committed.

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*Criminal Ruling 60 of 1888. Confirmation case No. 11 of 1888. (1) *Ante* p. 311.
(2) 10 B. H. C. R., 196 †*Criminal Ruling* 61 *of* 1888. Criminal Review No. 348 of 1888.

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ORDER.—Record and proceeding to be returned with the remark that in the opinion of this Court section 95, Indian Penal Code, was wrongly applied by the Magistrate to this case.

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30 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Irowa. Queen-Empress v. Basapa.*

Murder—Child murder—Newly born child.

Where the murder of a newly born child is deliberately committed in cold blood, the murder is as serious an offence in the eye of the law as that of a grown up person and deserves to be as severely punished.

ORDER.—The Court rejects the appeals. The Sessions Judge should be informed that the High Court does not concur in his remark that "infanticide is now never held to be a crime, to be punished so severely as the murder of an older human being, arrived at adult age or even years of understanding." In cases where a woman has, immediately after giving birth to a child, destroyed it, while in a frenzied state of mind, in which she could not calmly realize the full gravity of her offence, a sentence of transportation for life is generally considered sufficient; and sometimes the sentence is reduced by the Local Government. But when the evidence shows that the murder of a newly born child has been deliberately committed in cold blood, then such a murder is as serious an offence in the eye of the law as that of a grown up person and deserves to be as severely punished.

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30 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bapu Naran.†

Penal Code (Act XLV of 1860), Secs. 193, 72—Police investigation—Magisterial trial—False evidence—Alternative charge—Non-admissibility of statement made before the Police.

The accused was charged in the alternative with having given false evidence either before the Chief Constable in a Police investigation or before a Magistrate in a criminal trial:—

Held, (1) that the statement made to the Chief Constable by the accused, and reduced by him to writing, was not admissible in evidence against the accused; the only evidence as to such statement that would be admissible for the purposes of such a case as the present being the oral testimony of the Constable, who could, however, refresh his memory by referring to the statement reduced by him to writing:

(2) That oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under section 91 of the Evidence Act. The deposition itself ought to have been put in, and the proceedings in the case in which it was taken, ought also to have been put in to show the nature of the proceeding in which the evidence was given.

JUDGMENT.—The accused is charged in the alternative with having given false evidence either before the Chief Constable in a Police investigation or before the Magistrate First Class in a criminal trial. If the

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*Criminal Appeals Nos. 119 and 120 of 1888.

†*Criminal Ruling* 62 *of* 1888. Criminal Review No. 359 of 1888.

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statement before the Police Constable is false then the offence committed by the accused is one punishable under the latter part of section 193, Indian Penal Code. If the statement made at the trial is false the offence is punishable under the first part of section 193. As the two statements do not fall under the same Enactment, a charge in the alternative is bad in law. The alleged offences being distinct, there must be separate charges as required by section 233 of the Code of Criminal Procedure: see *Queen-Empress* v. *Ramji* (1), and *In re Chandising* (2). There is no evidence to prove either offence, but the two statements are so contradictory that one of them must be false and the provisions of section 72, Indian Penal Code, would, therefore, apply to the case and justify a conviction in the alternative. The accused does not appear to have been prejudiced by the irregularity in the charge; and we cannot interfere.

It should be pointed out to the Magistrate that he should not have allowed the Chief Constable to produce in evidence against the accused the statement made to him by the accused and reduced by him to writing. The only evidence as to such statement that would be admissible for the purposes of such a case as the present would be the oral testimony of the Constable, who could, however, refresh his memory by referring to the statement reduced by him to writing. On the other hand, oral evidence of the contents of the accused's deposition at the trial before the Magistrate First Class was inadmissible under section 91 of the Evidence Act. The deposition itself ought to have been put in, and the proceedings in the case in which it was taken ought also to have been put in, to show the nature of the proceedings in which the evidence was given.

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30 August 1888 BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Tippana.*

District Municipal Act (Bom. Act VI of 1873), Sec. 33—Rebuilding—Wall—Rebuilding on old foundations—Notice—Municipality.

A person who, without giving notice to the Municipality, merely re-erects on the same foundation a part of a wall, which has fallen down, does not contravene the provisions of section 33 of the Bombay District Municipal Act, as he does not, by so re-erecting it, begin to erect any building or to alter externally or to add to any existing building within the meaning of that section.

IN this case the wall of a back yard of a house in the town of Dharwar having fallen down the owner proceeded to rebuild it on the old foundation without giving notice to the Municipality under section 33 of the District Municipal Act, 1873. A servant of the Municipality laid a complaint before the Bench of Magistrates, but the accused was acquitted.

(1) I. L. R., 10 Bom., 124. (2) I. L. R., 14 Cal., 395.

*Criminal Ruling 62 of 1888. Criminal Reference No. 126 of 1888.

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The District Magistrate of Dharwar, in referring the case to the High Court, observed:—"The next question is whether under section 33 of the Act, a person intending to rebuild a wall that has fallen down, is bound to give notice to the Municipality. I think he is clearly so bound."

ORDER.--Assuming, but without deciding, that the word "building," as used in section 33 of Bombay Act VI of 1873, includes a compound wall, we are of opinion that a person who, without giving notice to the Municipality, merely re-erects on the same foundation a part of a wall which has fallen down, does not contravene the provisions of the section, as he does not, by so re-erecting it, "begin to erect any building or to alter externally or add to any existing building" within the meaning of section 33.

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30 August 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Kissan Malhari.*

Criminal Procedure Code (Act X of 1882), Secs. 244, 250—Penal Code (Act XLV of 1860), Secs. 147, 160—Assault—Affray—Magistrate—Conviction—Complainant.

The complainant charged some persons with assault. The Magistrate, after taking the evidence, acting under section 250 of the Code of Criminal Procedure, and without altering the previous charge or framing a new one, convicted the accused and also the complainant under section 160 of the Indian Penal Code:—

Held, that the conviction of the complainant was illegal and that separate proceedings ought to have been taken against him.

IN this case one Kisan Malhari, on the 2nd June 1888, made a complaint in writing to the Chief Constable of A Division of Poona City charging 31 persons with having assaulted and dispersed his marriage procession and requesting that they should be dealt with according to law.

The Police sent up to the City Magistrate 11 persons charged under section 147, Indian Penal Code. The case was referred by the City Magistrate to Rao Bahadur Khanderao Vishwanath Raste, an Honorary First Class Magistrate of Poona, who, after taking all the evidence for the complainant on 20th June, framed a charge against the 11 persons under section 147, Indian Penal Code, and after taking the evidence for the defence, on 25th June, acting under section 250, Criminal Procedure Code, and without altering the previous charge or framing any new one, convicted all the accused persons and also the complainant, under section 160, Indian Penal Code, and sentenced each to a fine of Rs. 2 which has been paid.

The Sessions Judge of Poona in making the reference to the High Court observed: "The reasons for this procedure as stated by the Magistrate are as follows:—

**Criminal Ruling 64 of 1888. Criminal Reference No. 124 of 1888.*

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This case was sent up by the Police, under section 147, Indian Penal Code. The inquiry showing that an affray only had been committed in which the complainant took part. I, therefore, tried the case under section 160, Indian Penal Code, and convicted the complainant as well as the accused after hearing the evidence for the prosecution and defence.

After hearing the witnesses for the defence in the riot case, I came to the conclusion that both the complainant and the accused are guilty of committing affray under section 160, Indian Penal Code. I, thereupon, told the complainant's pleader, who was sitting close to the complainant, that I intended to try his case under section 160, Indian Penal Code, and I told the accused the same thing. Both parties said that they wish to rely on the evidence that had been already recorded. Thereupon, without taking any further evidence, I summarily convicted both the accused and the complainant under section 160, Indian Penal Code.

The 11 accused persons have not made any application to this Court, and looking at the provisions of section 246, Criminal Procedure Code, I see no reason to interfere ; but the original complainant, who was convicted by the Magistrate under section 160, Indian Penal Code, has applied to me to report the case to the High Court under section 435.

Having regard to the provisions of section 244, Criminal Procedure Code, I am of opinion that the conviction of the complainant was illegal and should be quashed.

ORDER.—The Court reverses the conviction of the complainant as illegal. Separate proceedings ought to have been taken against him, if necessary. The fine, if paid, to be restored.

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5 September 1888. BIRDWOOD & PARSONS, JJ.

In re **Umarbhai.***

Penal Code (Act XLV of 1860), Sec. 193—Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction—Notice—Service, time for.

Where a Judge issues a notice to the accused to show cause why his prosecution under section 193, Indian Penal Code, should not be sanctioned, he must allow sufficient time for the notice to be served upon the accused and should not grant the sanction before the notice has been served.

IN this case the Assistant Sessions Judge of Ahmedabad ordered on the 16th April, 1888, a notice to be sent to the applicant to show cause on the 19th April, 1888, why they should not be prosecuted for perjury. The notice was served on the 22nd ; but on the 19th the Assistant Sessions Judge disposed of the matter by ordering the sanction to be granted.

Mr. *Inverarity*, with Mr. *Shamrao Vithal*, for the petitioner.

Mr. *G. S. Rao* and Mr. *Chimanlal H. Setalvad*, for the opponent.

**Criminal Ruling* 65 *of* 1888. Criminal Application for Revision No. 223 of 1888.

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ORDER.—The Court reverses the order of the Assistant Sessions Judge and directs that he should dispose of the matter after giving to the applicant a proper notice.

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6 September 1888 BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Tukaram.*

Penal Code (Act XLV of 1860), Secs. 71, 170, 171—Wearing a false garb—False personation—Separate sentences.

Where an accused person is convicted of wearing the garb of a Police Constable, under section 171 of the Indian Penal Code, and of personating by means of such garb a Police Constable, and, as such, ordering a person to be kept in custody, under section 171 of the Code; only one sentence ought to be passed on him under the provisions of section 71 of the Code.

THE accused was charged firstly of an offence under section 170, Indian Penal Code, of personating a public servant in that the accused falsely personating a Police Naik went to see a fair held in a village, told the Patel there that he had come to investigate a case, took certain articles from him as a public servant, and in such assumed character ordered two women to be kept in custody; and secondly, of an offence under section 171, Indian Penal Code, of wearing garb used by a public servant with fraudulent intent, in that he wore a Police Constable's coat while attending a fair with the intention that he might be considered to be a Police Constable. The Third Class Magistrate of Muddebihal sentenced the accused to suffer one month's rigorous imprisonment.

ORDER.—The Magistrate to be informed that under section 71, Indian Penal Code, a single sentence only ought to have been passed in the case.

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12 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Krishnaji.†

Penal Code (Act XLV of 1860), Sec. 218—Public servant—False entry—Intention of obtaining money—Knowledge that no offence was committed.

To support a conviction under section 218 of the Indian Penal Code it is necessary to prove that the accused believed, or had reason to believe, that the person concerned had committed an offence, though it was not necessary to prove that such an offence had, as a matter of fact, been committed.

Hence, where a public servant, whose duty it is to make entries in a cattle pound register, makes a false entry, knowing that a person has committed no offence, and with the intention only of obtaining money from him, the public servant cannot be convicted under section 218 of the Indian Penal Code.

PER CURIAM.—The accused has been convicted under section 218 of the Indian Penal Code. He is a public servant whose duty it is to write entries in a cattler register, and is found to have made a false entry in register with a certain intent. The question in this appeal is whether that intent was to save the complainant Shamshudin from legal punish-

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* *Criminal Ruling* 67 *of* 1888. Criminal Review No. 366 of 1888.

† *Criminal Ruling* 68 *of* 1888. Criminal Appeal No. 141 of 1888.

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ment for the offence of dishonestly receiving a stolen mare. If that was not his intent, the conviction cannot be sustained. It is not necessary in order to support the conviction to prove that Shamshudin was, as a matter of fact, guilty of an offence : *Reg* v. *Hurbut Surma* (1). Assuming that the facts as to the making of the false entry have been correctly found, the accused would be guilty of an offence under section 218 if he believed or had reason to believe that Shamshudin had committed an offence against section 411, and if his object in framing the false record, was to save Shamshudin from legal punishment : *Imp.* v. *Amirudin* (2). It is clear on the evidence that the accused never for a moment believed that Shamshudin was guilty of any offence at all. On the contrary, he knew that he was innocent ; and he deliberately worked upon the fears of Shamshudin, in order to obtain from him a bribe, or the promise of a bribe as a reward for saving him from a position which he had been brought by the accused to believe was a perilous one for himself. Shamshudin may have thought that criminal proceedings would be taken against himself. But the accused never seems to have had any such fear ; for he knew that Shamshudin had openly and honestly purchased the mare. This, so far as we can understand, the Sessions Judge's finding as to the accused's intent, represents his view of the case, and it is the view suggested by a consideration of Shamshudin's evidence. Thus the accused's intention was not to screen Shamshudin from legal punishment ; but to obtain money for himself. That being so, he has not committed an offence under section 218 of the Penal Code. We, therefore, reverse the conviction and sentence and order the fine, if paid, to be refunded. For an attempt to obtain a bribe, the accused was not tried ; and we express no opinion on the evidence as to any such attempt. If further proceedings are deemed necessary in respect of that accusation, they can be taken.

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13 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Gopal.*

Abkari Act (Bom. Act V of 1878). Sec. 45 (c)—Breach of the condition of the license—Licensee—Servant—Liability.

Under section 45 (*c*) of the Bombay Abkari Act, the servant of a holder of a license, granted under the Act, cannot be made liable for breach of the conditions of the license.

ORDER.—The conviction and sentence recorded against accused No. 2 Vithu is reversed, and the fine, if paid, is ordered to be refunded as he is not a holder of a license and his conviction under section 45 (*c*) of Bombay

(1) 8 Cal. W. R., Cr., 68. (2) I. L. R., 3 Cal., 412.

**Criminal Ruling* 69 *of* 1888. Criminal Review No. 219 of 1888.

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Act V of 1878 is illegal. The Magistrate is requested to be more careful in preparing his monthly return.

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13 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Maina.*

Penal Code (Act XLV of 1860), Sec. 186—Public servant—Obstruction—Mamlatdar's Karkoon—Warrant—Attachment of moveable property—Chaining a door from within.

A person, who chains from within the door of his house on the approach of a Karkoon charged with the execution of a warrant issued by the Mamlatdar for the attachment of his moveable property, is acting within his rights and is not guilty of an offence under section 186 of the Indian Penal Code.

ORDER.—In chaining the outer-door of her dwelling house from within when the taluka karkun came to execute the Mamlatdar's warrant for attaching her husband's moveable property, the accused was acting within her rights and cannot be held to have voluntarily obstructed a public servant in the discharge of his public functions. The conviction and sentence are, therefore, reversed, and the fine, if levied, ordered to be restored.

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13 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Valav.†

Criminal Procedure Code (Act X of 1882), Sec. 438—Sessions Judge—Criminal returns—Ordering further enquiry—Reference—High Court.

A Sessions Judge who, on examining the monthly criminal return of a Magistrate, sends for the record and proceedings in a case in which an accused person has been convicted, cannot legally order any further inquiry to be made. If he thinks that any further inquiry is necessary, he must report the matter to the High Court, which alone has the power to order such inquiry to be made in such a case.

ORDER.—Record and proceedings to be returned with these remarks;—

The Sessions Judge had no power to order the further enquiry in this case. The enquiry which was made on his order does not show that the accused was wrongly convicted. The Court declines to interfere.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Govind Narayan.††

Criminal Procedure Code (Act XLV of 1882), Sec. 545—Compensation—Offences other than those charged—Compensation for offences of which the accused is acquitted.

Section 545 of the Criminal Procedure Code does not empower a Court to award compensation for alleged offences other than those which form the subject of enquiry in the case in which the order is made, still less for offences of which the accused has been acquitted.

ORDER.—There appears to be no evidence on the record that the accused forged the *hundi*. We, therefore, reverse the conviction under

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**Criminal Ruling* 70 *of* 1888. Criminal Review No. 388 *of* 1888.

†*Criminal Ruling* 71 *of* 1888. Criminal Reference No. 131 of 1888.

††*Criminal Ruling* 72 *of* 1888. Criminal Appeal No. 129 of 1888. Criminal Review No. 316 of 1888.

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the first charge. We confirm the convictions on the other two charges and we maintain the sentence, but we direct that one half thereof shall be the punishment for each offence, and that one sentence shall take effect on the expiration of the other. As the accused was convicted of three distinct offences, the Sessions Judge ought to have passed separate and consecutive sentences for those offences. The order of compensation appears to us to be illegal as it stands. Under section 545, Criminal Procedure Code, a Court can grant compensation for the injury caused by the offence committed. This, however, would not give power to a Court to grant compensation for other alleged injuries, still less for injuries caused by other offences of cheating of which the accused has been acquitted. We, therefore, amend the order by reducing the amount of compensation awarded to the complainant to Rs. 394, as that sum represents the whole of the loss suffered by the complainant in respect of the offences of forgery and cheating, which formed the subject of enquiry in the present case.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lalu.*

Criminal Procedure Code (Act X of 1882), Secs. 118, 123—Magistrate—Security for good behaviour—Imprisonment in anticipation of default.

An order for the imprisonment of an accused person made in anticipation of his failing to give security under section 118 of the Code of Criminal Procedure is illegal, being opposed to section 123 of the Code.

IN this case the Magistrate "ordered that Lala Pema do execute a bond in the sum of Rs. 200 (personal recognizance of Rs. 100 and one surety of Rs. 100) to be of good behaviour for a period of six months. This is to be executed after the expiry of the sentence in case No. 21. In case the security be not furnished Lala should suffer rigorous imprisonment for six months or until he gave security up to a limit of six months."

ORDER.—The order for the imprisonment of the accused made in anticipation of his default to give security under section 118, Criminal Procedure Code, is opposed to section 123 and is, therefore, reversed.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Hiralal.†

Criminal Procedure Code (Act X of 1882), Secs. 118, 123—Security—Order—Imprisonment in anticipation of default.

It is not competent to a Magistrate to pass an order for the imprisonment of the accused made in anticipation of his default to give security under section 118 of the Code of Criminal Procedure.

**Criminal Ruling 73 of 1888. Criminal Review No. 391 of 1888.*

†Criminal Review No. 390 of 1888.

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IN this case the Magistrate passed the following order:—"That Hiralal do on expiry of the sentence of four months' rigorous imprisonment furnish security himself Rs. 100 and one surety Rs. 100, to be of good behaviour for a term of six months from the date of release. In case the security be not furnished Hiralal to suffer rigorous imprisonment until he furnishes that security upto a limit of six months."

ORDER.—The order for the imprisonment of the accused made in anticipation of his default to give security under section 118, Criminal Procedure Code, is opposed to section 123 and is, therefore, reversed.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Pascoe.*

Practice—Magistrate—Conviction for two offences—Single sentence—Imprisonment and fine—Appellate Court—Reversal of conviction of one offence—Retaining the imprisonment and refunding the fine.

Where a Magistrate, on conviction of an accused person of two offences (for which separate sentences ought to have been passed) passes a single sentence, combining imprisonment and fine, it is not open to an Appellate Court, on reversing the conviction for one offence, to treat the sentence of fine, as the punishment for one offence and the sentence of imprisonment as the punishment for the other (no such distinction having been made by the trying Magistrate) and to retain the full sentence of imprisonment.

THE accused was charged with illegally manufacturing liquor or using a still and keeping toddy in excess of the authorized quantity, under section 43 (*c* and *f*) and section 45 of the Bombay Abkari Act, and was sentenced by the Second Class Magistrate of Malwan to rigorous imprisonment for one month and to pay a fine of Rs. 10. On appeal, the District Magistrate of Ratnagari confirmed the conviction under section 43, but reversed the one under section 45, and ordered the fine to be refunded.

ORDER.—As the sentence has expired, the Court does not interfere. The record and proceeding to be returned with the remark that the District Magistrate was not justified in supposing that the sentence of imprisonment passed by the Magistrate Second Class was for one offence and the sentence of fine for the other, no such distinction having been made by the Magistrate Second Class, who ought to have passed separate sentences.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Nagya.†

Criminal Procedure Code (Act X of 1882), Sec. 250—Compensation—Order—Appeal.

The Code of Criminal Procedure makes no provision for an appeal against an order passed under section 250 of the Code.

**Criminal Ruling* 74 *of* 1888. Criminal Review No. 408 of 1888

†*Criminal Ruling* 75 *of* 1888. Criminal Reference No. 135 of 1888.

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ONE Nagya *bin* Ningya brought a complaint before an Honorary Magistrate Third Class, under section 334 of the Indian Penal Code, against three individuals. The Magistrate acquitted the accused and as he was of opinion that the complaint was frivolous or vexatious, he directed compensation to be given to the accused. On appeal, however, the First Class Magistrate with Appellate Powers set aside the order of the Honorary Magistrate and ordered the fine to be refunded.

The District Magistrate of Dharwar in referring the case to the High Court, remarked :—"The question is whether an appeal lies in such a case, Section 404, Criminal Procedure Code, lays down that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Nowhere in the Code or in any other law, so far as I am aware, is any provision made for an appeal against an order passed under section 250, Criminal Procedure Code."

ORDER.—The Code of Criminal Procedure makes no provision for an appeal against an order passed under section 250. The order of the Magistrate First Class, reversing on appeal the order of the Honorary Magistrate Third Class made under that section, is therefore reversed.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Malhari*.

Criminal Procedure Code (Act X of 1882), Sec. 271—Sessions Judge—Murder—Prima facie case—Accused's statement—Plea of guilty—Trial—Conviction and sentence.

When there is a clear *prima facie* case of murder, a Sessions Judge cannot legally, without trying the case, accept a statement made by the accused, who is charged with the offence of murder, as sufficient to establish his plea of guilty of the offence of culpable homicide not amounting to murder on the ground of grave and sudden provocation, and convict and sentence him accordingly for such offence on his own plea.

JUDGMENT.—The accused in this case pleaded guilty to having committed the offences of culpable homicide not amounting to murder by causing the death of his wife and of voluntarily causing hurt with a dangerous weapon by striking Hari several blows with a sickle. The Sessions Judge, accepting the plea, sentenced him to periods of five years' and one year's rigorous imprisonment respectively, for the two offences. It is clear that the plea would not have been accepted and these sentences would not have been passed unless the Sessions Judge had taken into consideration the statement made by the accused and held that it proved grave and sudden provocation. It was not, however, open to the Sessions Judge to act on that statement without trying the case. A clear *prima facie* case of murder cannot be treated as one of culpable homicide not amounting to

**Criminal Ruling 76 of 1888. Criminal Review No. 326 of 1888.*

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murder unless a plea of grave and sudden provocation set up by the accused is proved by him. There was no proof of grave and sudden provocation adduced before the Court of Session, and indeed there appears to be no such proof in the present case; for the statement of the accused himself is not to the effect that he caught his wife in any act of adultery or that she gave him any grave and sudden provocation by her conduct on the night of her murder. Moreover, the truth of that statement is a matter which should be tried and determined by the Court with the aid of assessors. Again the intention of the accused in striking Hari over the head and shoulders with his sickle has not been sufficiently considered by the Sessions Judge. We, therefore, reverse the convictions and sentences passed in this case and direct that the accused be retried on charges under sections 302 and 304 of the Penal Code for causing the death of his wife and under sections 307 and 308 and 324 of the Penal Code for attempting to cause the death of Hari or else causing him hurt.

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20 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lakshman.*

Penal Code (Act XLV of 1860), Secs. 399, 420—Murder—Culpable homicide—Grievous hurt.

Where it is clear that the act by which the death of the accused's wife was caused was so imminently dangerous that the accused must be presumed to have known that it would, in all probability, cause death or such bodily injury as was likely to cause death, then unless he can meet this presumption, his offence will be culpable homicide, and it would be murder, unless he can bring it under one of the exceptions mentioned in section 300, Indian Penal Code.

PER CURIAM:—The accused in this case was committed for trial on charges of murder and culpable homicide not amounting to murder. The Sessions Judge found him guilty of the minor offence included in these charges, *viz.*, voluntarily causing hurt by a dangerous weapon, and sentenced him, under section 326, Indian Penal Code, to two years' rigorous imprisonment.

We are of opinion that the finding and sentence are improper and that we must interfere in the exercise of our revisional jurisdiction. The accused killed his wife by stabbing her in the body with a knife. The medical evidence shows that the wound passed through the liver and omentum and entered the kidney; and that death resulted from this wound "owing to hemorrhage from the lacerated liver and the punctured kidney and also the punctured omentum." It is clear, therefore, that the act by which the death of the accused's wife was caused was so imminently dangerous that the accused must be presumed to have known that it

*Criminal Review No. 233 of 1888.

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would, in all probability, cause death or such bodily injury as was likely to cause death and that unless he can meet this presumption, his offence would certainly be culpable homicide; and it would be murder, unless the accused can bring it under one of the exceptions mentioned in section 300 of the Penal Code. The Sessions Judge finds that the accused had no justification for his use of a knife, that he used the knife to stab with, and that he must have known that it was a sharp instrument and that he must have voluntarily caused the hurt, when he stabbed his wife with the knife. On these findings, the conviction of voluntarily causing hurt is erroneous and improper and clearly does not satisfy the justice of the case. We reverse the conviction and sentence and order that the accused be retried on the charges on which he was committed for trial.

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27 September 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Alibhai.*

Penal Code (Act XLV of 1860), Sec. 183—Bailiff—Refusal to hand over money from a pocket to a bailiff.

The mere refusal by an accused person to hand over to a bailiff money alleged to be in his pocket is not a resistance to the taking of that money within the meaning of section 183 of the Indian Penal Code.

PER CURIAM:—The mere refusal by the accused to hand over to the bailiff the money which was alleged to be in his pocket does not, we think, amount to a resistance to the taking of property within the meaning of section 183 of the Penal Code. No offence can apparently be committed against that section until the public servant who is resisted has begun to take the property. In the present case, the bailiff does not appear to have made any attempt to take the money from the accused. From the brief statement of reasons recorded by the Magistrate for his finding, it is not clear that he did more than make a demand for the money or that the accused offered any resistance beyond saying that the bailiff was not legally entitled to take the money and that he would not give it to him. We, therefore, reverse the conviction and sentence.

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27 September 1888 BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Hari Khusal.†

District Municipal Act (Bom. Act VI of 1873), Sec. 53 (1)—Cattle—Members of family.

Cattle are not members of a family or household within the meaning of section 53 (1) of the Bombay District Municipal Act and a person cannot, therefore, be convicted of an offence, under clause 2 of that section, for having tied his bullocks near the drain in front of his house so as to allow their dung &c. to drop there.

**Criminal Ruling* 78 *of* 1888. Criminal Review No. 430 of 1888.

†*Criminal Ruling* 77 *of* 1888. Criminal Review No. 362 of 1888.

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THE accused was charged with an offence under section 53 (1) of the Bombay District Municipal Act in that he tied his bullock near the street gutter so that the dropping fell into the street gutter.

ORDER.—The accused's cattle are not members of his family or household within the meaning of clause 1 of section 53 of Bombay Act VI of 1873. The conviction and sentence are, therefore, reversed and the fine, if paid, to be refunded.

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4 October 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Raghu.*

Practice—Conviction—Plea—Trial.

The accused was committed to the Court of Sessions on charge of culpable homicide not amounting to murder and pleaded guilty to that charge, but the Sessions Judge, instead of convicting him on his plea convicted him, having regard to the evidence recorded before the Committing Magistrate, of causing grievous hurt:—

Held, that as the Sessions Judge did not convict on the plea, he ought to have tried the case. It was illegal to convict the accused of an offence of which he did not plead guilty and for which he was not tried.

PER CURIAM.—The accused pleaded guilty to the charge of culpable homicide not amounting to murder. The Sessions Judge did not convict the accused on his plea, but, having regard to the evidence recorded before the Committing Magitrate, convicted him of causing grievous hurt. As the Sessions Judge did not convict on the plea, it was his duty to try the case. It was illegal to convict the accused of an offence of which he did not plead guilty and for which he was not tried. The conviction and sentence are reversed; and the Court directs the trial of the accused on the charge on which he was committed.

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8 October 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v Maruti.†

Cantonment Act (Act III of 1880), Sec. 22—Bombay Municipal Act (Bom. Act III of 1872) Sec. 226—Government—Cantonement Taxation Regulation.

Section 22 of the Cantonements Act, 1880, does not empower the Government to extend section 226 of the Bombay Municipal Act, 1872, to a Cantonement. A Cantonement Taxation Regulation, reproducing section 226 of the Municipal Act, is, therefore, invalid.

PER CURIAM:—The accused, a milk-seller, in the Deolali Cantonement, has been fined eight annas by the Cantonement Magistrate for using a place in the camp as a stable for his animals, without taking a license from the Cantonement Magistrate, under section 30 of the Taxation Rules made by Government, under section 22 of the Cantonement Act III of 1880. Rule 30 of the Taxation Rules is published in Notification No. 135 of the 6th March 1882 at page 177 of the Government Gazette for 1882; and repro-

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*Criminal Ruling 79 of 1888. Criminal Review No. 334 of 1888.

†Criminal Ruling 80 of 1888. Criminal Review No. 393 of 1888.

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duces the provisions of section 226 of the Bombay Municipal Act of 1872 (Bombay Act III of 1872). Section 71 of the Cantonement Act of 1880 empowers the Government to impose by Notification in any Cantonement any tax which under any enactment in force at the date of such Notification, can be imposed in any Municipality within the territories administered by the Government. In the Notification No. 134 of the 4th March 1882, published at page 169 of the Government Gazette for 1882 and issued under section 21 of the Cantonement Act, license fees for the use of places in the Deolali Cantonement by or for horses, buffaloes, or other animals which are let out on hire or sold or the produce of which is made an article of trade, are treated as taxes. It is doubtful whether they can be rightly so treated for the Bombay Municipal Act of 1872, of which the penal provisions contained in section 226 are, as we have said, incorporated in the Notification No. 135, makes a clear distinction between taxes and license-fees. The whole subject of Municipal taxation by the imposition of rates, taxes, tolls and other imports is dealt with in Part IV of the Municipal Act; whereas the subject of licensing stables &c. is dealt with in Chapter VI, which refers to "general conservancy." But even if a license-fee can be regarded as a tax, all that section 22 of the Cantonement Act empowers the Government to do is to apply, by Notification, to Cantonements or adopt to Cantonements, the provisions of any enactment or rules inforce at the date of the Notification for the 'assessment and recovery" of any tax in any Municipality within the territories administered by the Government. Now section 226 of the Municipal Act cannot be regarded as an enactment for the assessment or recovery of license-fees for stables. It merely imposes a penalty for the use of stables without a license. The recovery of taxes is a matter dealt with in section 125 and the following sections of the Municipal Act. The penalty which may be imposed under section 226 cannot be regarded as a tax to be recovered under the Act, even though a license-fee were regarded as a tax. We must hold, therefore, that section 22 of the Cantonement Act does not empower the Government to extend section 226 of the Municipal Act to the Deolali Cantonement. Section 30 of the District Taxation Rules, contained in Notification No. 135 of the 4th March, 1882, must be held to be invalid, its extension to the Cantonement having been *ultra vires* of the Local Government. We, therefore, reverse the conviction and sentence and direct that the fine, if paid, be refunded.

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11 October 1888. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Jhina.*

Public Conveyances Act (Bom. Act VI of 1863), Sec. 4—Licenses—Weight, maximum.

Section 4 of the Bombay Public Conveyances Act does not require that licenses granted under the Act shall contain any particulars as to the weight of goods to be carried in a public conveyance.

PER CURIAM.—Section 4 of Bombay Act VI of 1863 does not provide that any licenses granted under the Act shall contain any particulars as to the weight of goods to be carried in any public conveyance, nor does the license granted to the accused Jhina Narsi contain any such particulars. The conviction and sentence are, therefore, reversed.

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30 October 1888. SCOTT & JARDINE, JJ.

Queen-Empress v. Janki.†

Abkari Act (Bom. Act V of 1878), Section 43—Sell—Interpretation.

The word "sell" in section 43 of the Bombay Abkari Act must be interpreted strictly and not confused with exchange.

PER CURIAM:—We are of opinion that in section 43 the word "sell" should be interpreted strictly and not confused with exchange. The distinction is drawn in the Indian Contract Act and the Transfer of Property Act and the act of selling must be a transfer of property for a price in money. As the Abkari Act is a penal statute, the meaning of the word ought not to be strained against the subject. The conviction and sentence for selling without a license must, therefore, be quashed and the fine returned. As regards the charge of removing toddy, the Court requires further information from the trying Magistrate as to the existence of any rule or order made in pursuance of section 43 of the Act which made the act of the accused unlawful.

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15 November 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Dadu.††

Abkari Act (Bom. Act V of 1878), Sec. 43 (c)—Ganja plant—Cultivation.

Mere cultivation of *ganja* plants is not a process of manufacturing intoxicating drugs within the meaning of section 43 (c) of the Bombay Abkari Act, 1878.

FOUR *ganja* plants were found growing in the accused's field, and on being informed of this the Abkari Inspector took the plants and the accused to Magistrate for trial, merely on the ground that the plants appeared to him to have been specially cared for. The accused having shown no cause, why he should not be convicted, the Magistrate found him guilty of the offence under section 43 of the Abkari Act.

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*Criminal Ruling 81 of 1888. Criminal Review No. 336 of 1888.

†Criminal Review No. 470 of 1888.

††Criminal Ruling of 1888. Criminal Reference No. 150 of 1888.

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The District Magistrate of Ratnagri, referred this case to the High Court, observing: "Mere cultivation of Ganja plants is not a process of manufacture and hence the act does not amount to any offence under the Abkari Act. This view is supported by the High Court's decision in the case of *Reg.* v. *Narayan*, published in the 1st half yearly statement of cases decided upto the 30th July, 1883. The Magistrate's decision is therefore wrong in law."

ORDER.—For the reasons stated by the District Magistrate, the Court reverses the conviction and sentence and directs the fine, if paid, to be refunded.

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15 November 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Ramji.*

Abkari Act (Bom. Act V of 1878), Sec. 45 (c)—Breach of the conditions of the license—Licensee—Servant—Liability.

Under section 45 (c) of the Bombay Akbari Act the servants of a holder of a license granted under the Act cannot be made liable for breach of the conditions of the license.

THE accused No. 1 Ramji and No. 2 Sakharam were convicted under section 45 (c) of the Bombay Abkari Act, 1878, and sentenced to pay a fine of Rs. 2 each. The Abkari Inspector, while inspecting the country liquor shop at Deorukh, on 6th July 1888, found that the accused failed to maintain the prescribed stocks of toddy spirits of the strengths of 60° U. P. and 25° U. P. in accordance with clause 11 of the license and thus committed an Act in breach of its conditions punishable under section 45 (c) of the Act.

The District Magistrate of Ratnagiri in referring the case to the High Court, remarked: "The accused No. 2 Sakharam Tukaji Talokar is however not the holder of the license issued for manufacturing and selling toddy spirit in the Ratnagiri and Sanghmeshwur Talukas but is a mere servant of the licensee accused No. 1 Ramji and in convicting and sentencing him the Magistrate has acted *ultra vires*."

ORDER.—For the reasons stated by the District Magistrate the Court reverses the conviction and sentence in the case of accused Sakharam and directs the fine, if paid, to be refunded.

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28 November 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Mutaya.†

Penal Code (Act XLV of 1860), Sec. 411—Receiving stolen property.

The circumstance that a person "knew that the property was not his own and yet claimed it before the Magistrate in his depositions in the former case" is not sufficient to warrant his conviction under section 411 of the Indian Penal.

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*Criminal Ruling of 1888. Criminal Reference No. 157 of 1888.

†Criminal application for Revision No. 402 of 1888.

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PER CURIAM:—The circumstance that the applicant "knew that the property was not his own and yet claimed it before the Magistrate in his depositions in the former case" is not sufficient, as held by the Sessions Judge, to warrant his conviction by the Magistrate on a charge under section 411 of the Indian Penal Code, of dishonestly retaining stolen property, knowing it to be stolen. Before convicting the applicant, the Magistrate ought to have found that the property was "stolen property" within the definition contained in section 410. The theory of the prosecution was that the property had been stolen by Ramlingam. That being so, it was incumbent on the prosecution to prove the theft strictly. The Magistrate, however, says that when the present complainant accused Ramlingam of the theft, it did not appear, from the preliminary enquiry made through the Police, that there was sufficient evidence to proceed against Ramlingam, though there was room for strong suspicion against him. There is no evidence in the case on which we could find that the property was ever stolen at all from the deceased Ramchandra, who is found by the Courts below to have been its last owner. We, therefore, reverse the conviction and sentence recorded against the appellant Mutaya *bin* Vaidgalingam and direct that he be set at liberty.

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29 November 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Narayen.*

Penal Code (Act XLV of 1860), Sec. 35—Previous convictions—Separate sentences.

A separate sentence cannot legally be passed against an accused person on account of previous convictions recorded against him, though the Court can use the same for the purpose of awarding to the accused a severer sentence for the offence of which he is convicted than it would otherwise do.

IN this case the Sessions Judge of Kanara found the accused guilty of house-breaking with intent to commit theft and sentenced him to eighteen months rigorous imprisonment, and also found him guilty of theft in a dwelling house and sentenced him to another rigorous imprisonment for 18 months; he further ordered that "having been twice previously convicted of offences defined in Chapter XVII of the said Code and punishable with imprisonment for three years or upwards, that he is liable to double the amount of imprisonment to which he would otherwise have been liable, and the Court directs that he suffer three years further rigorous imprisonment."

ORDER.—The Court alters the three sentences passed in this case to two sentences in the following manner: One of three years rigorous imprisonment under section 454, Indian Penal Code, and one of three years

*Criminal Ruling 84 of 1888. Criminal Appeal No. 183 of 1888.

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rigorous imprisonment under section 380, Indian Penal Code, the sentences to commence the one after the expiration of the other.

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29 November 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Bhau.*

Workman's Breach of contract (Act XIII of 1859), Sec. 2—Advance—Repayment—Fixed time.

It is not competent to a Magistrate, under section 2 of the Workman's Breach of contract Act, to fix a time within which the money advanced is to be repaid.

IN this case the First Class Magistrate of Haveli convicted the accused, under section 2 of Act XIII of 1859, and sentenced him to repay to the complainant in terms of his contract Rs. 22-4-0 within one month from the date of the order.

ORDER.—The Court reverses so much of the order as fixes a time within which the money advanced is to be repaid.

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29 November 1888 BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Savaldas.†

Penal Code (Act XLV of 1860), Sec. 401—Dacoits—Habitual offenders.

To justify a conviction, under section 401 of the Indian Penal Code, it is not sufficient to prove that certain persons have been convicted of a theft and that other persons charged with them have lived or associated with them; but it is necessary to prove not merely association but that the gang of persons have been associated for the purpose of habitually committing theft or robbery; and that habit must be proved by an aggregrate of acts.

BIRDWOOD, J:—Of the 22 accused persons convicted by the Sessions Judge under section 401, Indian Penal Code, five have been previously convicted of offences punishable under Chapter XVII of the Code. As regards the remaining 17 accused persons the Sessions Judge remarks that "if it can be shown that these men were habitual associators of the five convicted men and that they were here at the time or at any time during the prevalence of" certain thefts. committed in Bijapur about 4 or 5 years ago, the perpetrators of which could not be discovered, and "which" the Judge proceeds "have ceased entirely since the leaders were arrested, all that is wanted will have been proved and the evidence of association is all that is required." But this view is not in accordance with the law. To justify a conviction under section 401, Indian Penal Code, it is not sufficient to prove that certain persons have been convicted of a theft and that the other persons charged with them have lived or associated with them. It is necessary to prove, not merely association, but that the gang of persons have been associated for the purpose of habitually committing theft or robbery; and that habit

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*Criminal Ruling 85 of 1888. Criminal Review No. 490 of 1888.

†Criminal Appeal No. 163 of 1888.

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must be proved by an aggregate of acts (*Reg.* v. *Sriram*). It might not be necessary, as remarked by Mr. *Mayne* in his commentary, to prove such acts with the same accuracy as if each was the subject of a charge of theft. Still some proof of such acts is necessary, and in the present case such proof is entirely wanting as regards the accused Nos. 1-17. Evidence adduced for the purpose of showing that the accused lived in the same *math* or that some of them went together to a shop to buy sweetmeats or they went together to a well, may perhaps prove association for certain purposes; but that is not sufficient for a conviction under section 40 of the Indian Penal Code. No doubt, there are some suspicious circumstances in this case pointing strongly against the accused, who, while living in the Taj Bami *Math*, dressed "by day in a *langoti* and ashes and by night like hunters of antelopes". But some of them also used to bring gold and silver ornaments to the *math* and sell them. But the accused cannot be convicted on suspicion merely. Certain specific acts distinctly incriminating them should have been proved. The evidence actually recorded is very vague. The witnesses should have been much more closely questioned as to the time and place of the several occurrences and incidents which they describe. We reverse the conviction and sentence recorded against accused Nos. 1-17 and direct that they be set at liberty.

As regards accused Nos. 18-22, we direct that evidence be taken to identify them as the persons who made the confessions before the 2nd Class Magistrate which have been recorded against them. The evidence to be certified within three weeks.

JARDINE, J.—The evidence of the witnesses has been recorded in too summary a manner. The prisoners being undefended, the Joint Sessions Judge might well have put questions to the witnesses in order to test the accuracy of their statements as to their identification of the prisoners and about their habits and acts. Witnesses 8, 11, 13, 14, 15 and 16 spoke to having seen some of the prisoners, but no questions appear to have been put, either by the pleader for the Crown or by the Joint Sessions Judge, to ascertain the month or year when the witnesses saw the prisoners. Witnesses 15 and 16 say some of the prisoners came to their shops but they do not say they came together or for any unusual purpose. The statements of witnesses 17 and 18 as to the prisoners going to the well near the *math* are quite consistent with the theory of the prisoners being like other Bairagies. The same remark applies to the statements of the two police men, witnesses 26 and 27. The four Badak witnesses called by the prosecution to depose to the occupations and habits of the prisoners do not say they are robbers. The Joint Sessions Judge misstates the evidence in saying that the letters A B and C were addressed

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by the convicts in the Jail. The Joint Sessions Judge's examination of the Jailor on this matter is far too summary and not as careful and full as that of the committing Magistrate. No implements, such as professional thieves use, were found in possession of Mr. *Branson's* clients, the prisoners 1 to 17. Now although these prisoners belong to a tribe, the members of which may as a rule be thieves, I do not think it would be safe even after considering the evidence of witness No. 8 to affirm convictions under section 401 of the Penal Code, which are based on this evidence which is vague in itself and vaguely recorded. I would, therefore, acquit prisoners 1 to 17.

The evidence against prisoners 18 to 22 contains confessions which the Joint Sessions Judge treats as made by them in another case. But there is no evidence showing that the prisoners are the people who made these confessions and the descriptions of prisoners 18, 19, 20, 21 and 22 in this trial differ, and in some points materially, from the description given of themselves by the persons who confessed as regards caste and residence. The case must be remanded in order that the Joint Sessions Judge may take evidence as to the identity of the person who made each of these five confessions.

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3 December 1888. BIRDWOOD & JARDINE, JJ.

In re **Karunashanker.***

District Municipal Act (Bom. Act VI of 1873), *Secs.* 84, 82, *Bombay Act II of* 1884, *Sec.* 49 (i)—*Arrears of tax—Failure to pay—Magistrate.*

The effect of the amendment af Section 84 of the Bombay District Municipal Act 1873, by section 49 (*i*) of the Bombay Act II of 1884, being to make a failure to pay arrears of taxes an offence under the Act, an information laid before a Magistrate by the Municipality for such prosecution is a prosecution for an offence under the Act, even though the Municipality ask only for the arrears due and not that a penalty should be inflicted; and such information must therefore be laid within three months next after the date when the taxes were due and not paid.

BIRDWOOD, J.—The effect of the amendment of section 84 of the Bombay Municipal Act (Bombay Act VI of 1873), enacted by section 49 Cl. (*i*) Bombay Act II of 1884, is to make a failure to pay arrears of taxes an offence under the Act; for the amended section authorises, not only the recovery of arrears of taxes by a summary proceeding before a Magistrate under the Code of Criminal Procedure, but also the imposition by the Magistrate of a penalty, not exceeding one fourth of the arrears. A person liable to a penalty is clearly one regarded by the Act as an offender against its provisions. When the Municipality therefore ordered an information to be laid before a Bench of Magistrates, under section 84, in respect of the taxes due by the opponent, it instituted a prosecution for an offence under the Act even though the Municipality asked only for

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**Criminal Ruling* 86 *of* 1888. Criminal Application for Revision No. 214 of 1888.

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the arrears due and not that a penalty should be inflicted. The information was, therefore, subject to the provisions of section 82; and not having been laid within three months next after the date when the taxes were due and not paid, the Bench of Magistrates rightly held that the information was barred by time. We, therefore, reject the application of the Municipality.

JARDINE, J.—Section 21 of the Act, we have to construe, gives power to impose taxes: the omission to pay I take to be an "offending against the provisions of the Act," and the power to impose penalties in addition to ordering the payment of arrears found in section 84 of the amended Act appears to me to bring the proceedings within the meaning of a "proceeding for the punishment &c.," as used in the Limitation section 82. I think the Bench of Magistrates were right in adopting the definition of offence in the Code of Criminal Procedure in the absence of any definition or clear indication in the Bombay District Municipal Act. I may add, however, that the construction is not without difficulty. The case of *Attorney General* v. *Reedloff* (1) bears some resemblance to the present. In that case the Judges were divided, but I think some of the reasoning of Baron *Parke* and Chief Baron *Pollock* supports the view I take of the case. I concur in the order.

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12 December 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Adam.*

Criminal Procedure Code (Act X of 1882), Sections 118, 107, 112—Magistrate—Order—Procedure.

An order, under section 118 of the Code of Criminal Procedure, can only be passed by a Magistrate after the procedure defined in sections 107, 112, and the following sections of the Code has been followed.

THE accused was prosecuted under section 354, Indian Penal Code, for assaulting one Bai Sone with intent to outrage her modesty but was discharged for want of legal proof under section 253, Criminal Procedure Code. The Magistrate was morally satisfied that the accused did commit the offence. He was further informed that the accused was likely to make a similar assault that might probably occasion a breach of the peace. The Magistrate, thereupon, recorded that "as it is proved necessary to keep the peace till 26th September, 1889, ordered that the accused do execute a bond with two sureties for Rs. 250, or in default to suffer simple imprisonment for a period of one year, under section 118, Criminal Procedure Code."

ORDER.—The Court sets aside the order passed by the Magistrate under section 118, Criminal Procedure Code, as such an order can only

(1) Ex. Rep. 84. *Criminal Ruling 87 of 1888. Criminal Review No. 528 of 1888.

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be passed after the procedure defined in sections 107, 112 and following sections has been followed. The Magistrate's attention should be drawn to the case of *Rajia Run B. S.* v. *Romce T. K.* (1).

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13 December 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Shanker.*

Criminal Procedure Code (Act X of 1882), Sec. 195 (b), 478—Sanction—Private person—Court's Power to Prosecute.

The granting of a sanction, under clause (b) of section 195 of the Code of Criminal Procedure, to a private person does not bar a Civil Court from proceeding under section 478 of the Code; nor can the dismissal by a Magistrate of a complaint made by a private person be a bar, till set aside, to a proceeding under that section.

BIRDWOOD, J.—The granting of a sanction under clause (b) of section 195 of the Code of Criminal Procedure to a private person does not, in our opinion, bar a Civil Court from proceeding under section 478; nor can the dismissal by a Magistrate of a complaint made by the private person be held to be a bar, till set aside, to a proceeding under that section. A private person may never act on the sanction, or his action may fail, as in the present case. Is the Court then unable to take such further action as the interests of justice may demand? It seems to us that, eventhough a Court grants a sanction under section 195, it is still at liberty to proceed under section 478, especially under such circumstances as existed in the present case, where there was ground to suspect that the accused had induced the private complainant to withdraw from the prosecution. The Sessions Judge should, therefore, proceed with the trial.

JARDINE, J:—The two questions stated by the learned Judge relate to competency as a matter of law and not of discretion and ought in my opinion to be answered in the affirmative.

On principle there appears to be no reason why the mere fact that a Court has under section 195 of the Criminal Procedure Code given a private person sanction to prosecute, should debar the Court itself from instituting proceedings under section 478. The sanction under section 195 leaves the private person free to exercise his own unfettered discretion as to whether he will proceed or not: *In the matter of the petition of Giridhari Mondul* (2). But when a Court proceeds under section 478, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and merely sanctioned by the Court: *Queen Empress* v. *Baijoo Lall* (3). The object of all prosecution is the punishment of offences committed: but if the view

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(1) 22 Cal. W. R., 79 Cr. R. *Criminal Reference No. 172 of 1888.
(2) I. L. R. 8 Cal, 435 p. 439 (3) I. L. R. 1 Cal. 450.

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taken by the Sessions Judge is correct, this aim would in many cases be frustrated, as where the private person who has obtained the sanction compounds the offence, or wilfully delays so as to let the limitation of 6 months expire: *Empress* v. *Gavri Shankar* (4). So great an interference with the ordinary right of the Crown to prosecute offences would require express Statute. But I find no such rule in the Code of Criminal Procedure or else where: and as to the authorities, those I have cited above appear to me adverse to the Sessions Judge's opinion.

Similar reasoning applies to the effect of the dismissal of the private person's complaint under section 203 of the Criminal Procedure Code. Section 403 declares that a dismissal is not an acquittal such as bars a fresh trial for the same offence: it cannot be pleaded by the accused as a valid objection to his trial on the commitment to the Sessions: it thus resembles a Bill preferred to a grand Jury, who throw it out. This cannot be pleaded afterwards as an acquittal: 2 Hale 246—see also *The Empress on the Prosecution of Jogendronath Bose* v. *Thompson* (5). The case before us is not a summons case and I do not wish my remarks to be taken as having any reference to the construction of section 247 of the Criminal Procedure Code.

The Sessions Judge leaves somewhat in doubt the question of fact whether the complaint had been dismissed. Assuming now that it has not been dismissed, the sanction must have expired from lapse of time. *In Empress* v. *Nipcha* (6) it was held that where the person to whom the sanction was given did not avail himself of it, the Magistrate of the district was competent, under section 142 of the Criminal Procedure Code of 1872, to take up the case without complaint. The object of Chapter 35 of the Criminal Procedure Code is to enable the Courts to take prompt and effectual means to prosecute offences affecting the administration of justice. The cases already cited show that this aim of the Legislature would in many cases be delayed and frustrated if it were held that when a Court grants the sanction to a private person, it transfers its own authority.

Instead, therefore, of quashing the commitment to the Sessions, we must direct the Sessions Judge to proceed with the trial.

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13 December 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Punjia.*

Penal Code (Act XLV of 1860), Sec. 417—Cheating—False information—Fraudulently or dishonestly.

The accused falsely told his master's brother that his master was ill in a certain village

(4) I. L. R., 6 All, 42. (5) I. L. R. 6 Cal., 523. (6) I. L. R., 4 Cal., 712.

*Criminal Review No. 525 of 1888.

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and so induced him to go to that village. The Magistrate, thereupon, convicted him under section 417, Indian Penal Code :—

Held, that the conviction under the section could not be upheld, unless it appeared that by deceiving his master's brother, the accused fraudulently or dishonestly induced him to do a certain thing which he would not have done, if not so deceived, and which act caused or was likely to cause damage or harm to his master's brother in body, mind, reputation or property.

THE accused was convicted of the offence of cheating in that he being employed as a servant by the complainant's brother in a distant village left the service without leave and deceived the complainant by telling him falsely that his brother was very dangerously ill and intentionally induced the complainant to go to that village to see his brother.

PER CURIAM :—The Magistrate has convicted the accused of the offence of cheating for falsely telling his master's brother that his master was ill in a certain village and so inducing him to go to that village. Dealing with the case under section 439, Criminal Procedure Code, we must take it as established that the accused told a lie and played a practical joke at his master's brother's expense. His conviction, however, under section 417, Indian Penal Code, cannot be upheld unless it appears that by deceiving his master's brother, as he did, the accused "fraudulently or dishonestly" induced him to do a certain thing which he would not have done if "not so deceived and which act" caused or was likely to cause damage or harm to his master's brother in body, mind, reputation or property. The Magistrate has disregarded the requirements of section 367, Criminal Procedure Code, as to the raising of points for determination in his judgment, and he has not considered at all the question whether the accused acted fraudulently or dishonestly. There is nothing in the case to suggest that he acted fraudulently or dishonestly within the meaning of section 415 of the Indian Penal Code: *Queen* v. *Lal Mahomed* (1), *Empress* v. *Narotamdas* (2). We reverse the conviction and sentence passed upon the accused Punjia Ranchod.

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20 December 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Balvantrao.*

Forest Act (VII of 1868), Sec. 75, Rules 13, 26, 3—Pass books—Contractor—Liability.

A person, who had obtained from the Forest Department a contract for cutting timber and had been supplied by the Forest Officer with pass-books containing the following endorsement—"There are 100 passes in this book and there is the official seal in the centre of each pass. This pass-book is given to B, the contractor of Moujeh Medhe, Taluka Wasai, in order that he may let the timber in the compartment go away"—was sufficiently authorized in writing for the purposes of Rule 13, and was guilty of no offence in issuing the passes. The accused who had acted in good faith could not be held criminally liable for the laches of the

(1) 22 C. W. R., C. Ru. (2) I. L. R. 6 All. 98.

**Criminal Ruling* 88 *of* 1888. Criminal Application for Revision No. 456 of 1888.

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Forest Officer in not complying with the requirements of the Rule by giving the accused the authority in writing.

PER CURIAM.—Rule 3 of the rules made by Government, under section 41 of the Forest Act VII of 1878, prohibits the moving of timber or other forest produce within any district of the Bombay Presidency, except within certain limits, without a pass from the conservator of forests or some officer empowered by him or from some person duly authorized under Rule 13. The accused has issued passes for the moving of timber in the Thana District and the question is whether he is a person duly authorized under Rule 13 to issue passes. He has obtained a contract from the Forest Department for cutting timber in the Bassein Taluka and the Forest Officer has furnished him with books containing passes for the moving of timber. In support of the conviction, recorded by the Magistrate Second Class and upheld by the Magistrate First Class in appeal, it is contended that the accused was not duly authorized by the Forest Officer "in writing," as required by Rule 13, to issue passes under Rule 3. But it is not explained satisfactorily for what object the Forest Officer gave the books containing the passes to the accused, who is the owner of timber and forest produce within the meaning of Rule 13, if not in order to issue them to persons moving timber and other forest produce. The pass books contain the following endorsement. "There are 100 passes in this book and there is the office seal in the centre of each pass. This pass book is given to Balvantrao Hari Gavankar the contractor of *Manji* Medhe *taluka* Wasai, in order that he may let the timber in the compartment go away." It is contended that this is not a sufficient authority in writing for the purposes of Rule 13, and that the accused has infringed the rule in issuing the passes given him on the strength of such endorsement and is, therefore, liable to punishment under Rule 26. It is not alleged that contractors have ever received written authority under Rule 13 other than the endorsement on these books of passes. That being so, we cannot hold that the endorsement in question is not such an authorization in writing as is contemplated by the Rule. We must presume that the Forest Officer has done what the Rule intended him to do. If the Forest Officer has not complied sufficiently with the requirements of the Rule, it would be monstrous to hold the accused criminally liable for his laches. We find that the accused acted in perfect good faith in issuing passes which he believed to have been granted to him on sufficient authority; and we reverse the conviction and sentence and direct that the fine, if paid, be refunded.

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21 December 1888. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Dattu.*

Criminal Procedure Code (Act X of 1882), Secs. 309, 367—Sessions Judge—Several offences, some triable by Jury and some by assessors—One trial—Jurors as assessors—Judgment—Heads of charge.

When an accused person is charged at the same trial with several offences, of which some are and some are not triable by jury, and, with respect to the heads of charge on which the Sessions Judge convicts, the jury became assessors, it is the duty of the Judge, under section 309 of the Code of Criminal Procedure, to pronounce a judgment containing the particulars specified in section 367 of the Code.

A reference to the heads of charge to the jury is not a sufficient compliance with the requirements of the section.

PER CURIAM :—The prisoners Dattu and Lakshmi made a separate defence and were represented by a separate pleader at the trial. The case against them is different in several respects to that against the prisoners Bhaurao and Bajiba, although all four have made their appeal in one petition.

The learned Sessions Judge informed the jury that the witnesses Malhari and Thaki, who deposed to seeing the beating of Raghu did not in his opinion see the beating, and that Malhari was in his opinion not present. The Patel Pilaji does not confirm Malhari's statement that Malhari named the four prisoners when he gave information to the Patel. Before the Magistrate Malhari said he did not see Bhawrao beating Raghu. In the Sessions Court he first said he did see this: but in cross-examination his statement before the Magistrate being read to him, he said he did not see it. It appears also that he did not name Bhawrao in his complaint (Ex. 7). Thaki said she did not go into the house. She said that she saw all four beating Raghu but afterwards added that it was dark and she could not see. Before the Magistrate she merely said as to Bhawrao that he was standing by. Padu whom the Sessions Judge believed says merely that he was standing by. He did not see Bajaba striking. He says that Malhari and Thaki went inside. The Patel states that Padu did not give him this information: it must have been given later. When the Patel sent off his report (Exhibit 7) Malhari had told him that Dattu had beaten Raghu but had not named any one else.

The Sessions Judge ought to have pointed out to the jury, who in the matter of the charges less than murder were assessors, that if they believed the statements of Malhari and Thaki as to their presence at the beating to be untrue, it followed that Padu's confirmation of that particular statement was also untrue and might have been made with a view to deceive the Court.

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*Criminal Ruling 90 of 1888. Criminal Appeal No. 224 of 1888.

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The Sessions Judge ought also to have laid before the jury with more detail the case for the defence of Bhawrao and Bajaba, *viz.*, that although they were present at the beating, they took no part therein. If the evidence of Malhari and Thaki is excluded as false, the only direct evidence against them is that of Padu: which is distinctly contradicted by the two sisters of these prisoners. There is also evidence of the Patel and of Malhari that, when questioned by the Patel soon after the beating and before the corpse was found, the prisoner Bhawrao being called out of his house said that Dattu had beaten Raghu. It does not appear that they have changed their statements since. The fact that these prisoners had no motive to injure Raghu ought to have been pointed out to the jury and assessors as giving more credibility to their defence. Whereas Dattu had, according to the theory of the prosecution and the evidence which the Court believed, a motive for anger against him. The fact that the beating occurred in Bhawrao's house is accounted for by Raghu being a servant there and in that house at the time when Dattu came to beat him.

It is remarkable that only one witness Kamlu deposes to the corpse being found suspended with a rope round the neck: the rope also was not seen by others. Kamlu also denies Bhikhia's statement that Kamlu helped to remove the dead body from the shed. The beating does not appear to have been regarded at the time as a serious matter: the immediate neighbours were not called while it was going on: no careful or thorough enquiry was made for Raghu when it was over. The greater part of the facts in evidence can be explained by supposing that Dattu came in the heat of passion, and inflicted severe injuries with his fists, severer than he probably intended: and that Raghu went out into the garden and died there and that his body was removed to Bhawrao's shed afterwards. If the story told by Bhawrao's sister is believed, this removal may have been in order to implicate Bhawrao. It is also to be noted that Bhawrao and Bajaba were not accused of the offence, until some time after the inquiry, before the committing Magistrate, had begun when the Magistrate arraigned them.

For the reasons we reverse the convictions and sentences passed on Bhawrao and Bajaba and dismiss the appeal of Dattu and Lakshmi. As in dealing with the heads of charge, on which the learned Judge convicted, the jury became assessors, it was the duty of the Judge under section 309 of the Criminal Procedure Code to pronounce a judgment containing the matters specified in section 367. A reference to the heads of charge to the jury is not a sufficient compliance with these requirements.

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21 December 1888. BIRDWOOD & JARDINE, JJ.

In re **Shanker Shobag.***

Evidence—Accomplice—Accomplices, after disclosing the conspiracy to authority, associating with their confederates to ensure their conviction—Corroboration.

Persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates till the matter can be so far matured as to ensure their conviction, fall under the class of persons, "apparently accomplices," to whom the rule requiring corroborative evidence does not apply. The early disclosure is considered as binding the party to his duty, and though a great degree of disfavour may attach to him for the part he has acted as an informer, yet his case is not treated as that of an accomplice.

PER CURIAM.—In considering the evidence against the accused Shankar alias Sobhag Vijaiji, the Sessions Judge has, we think, erred in treating the evidence of the witness Punamchand as that of an accomplice of the class whose testimony is not ordinarily acted on unless it is corroborated in some material particular. He belongs rather to the class of persons *apparently accomplices*, to whom the rule requiring corroborative evidence does not apply:—"Namely persons" (as remarked in section 971 of Taylor on Evidence, which is based on the summing up of Lord *Eilenborough* in *Regina* v. *Despard* (1)) "who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates till the matter can be so far matured as to ensure their conviction. The early disclosure is considered as binding the party to his duty; and though a great degree of disfavour may attach to him for the part he has acted as an *informer*, yet his case is not treated as that of an accomplice." The Judge having approached the consideration of the evidence from a wrong point of view, we think that, in the interests of justice, it is necessary that the retrial of the accused should be ordered. We, therefore, reverse the judgment of acquittal recorded by the Sessions Judge and direct that the accused Shankar alias Sobhag Vijaiji be retried by the Court of Sessions. At the retrial, the attention of the Sessions Judge may well be directed to the case of *Queen* v. *Weeks*, (2).

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21 December 1888. BIRDWOOD & JARDINE, JJ.

In re **Salomibai.†**

District Municipal Act (Bom. Act VI of 1873), Sec. 3—Building—Enclosure—Wattle-fence.

**Criminal Ruling* 91 *of* 1888. Criminal Appeal No. 195 of 1888.

(1) Howell's State trials 489. (2) 30 L. J. M. C., 141.

†*Criminal Ruling* 92 *of* 1888. Criminal Application for Revision No. 418 of 1888.

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A mere wattle-fence cannot fall within the definition of a "building" or "enclosure" as contained in the Bombay District Municipal Act, the building specified being all of a substantial kind.

PER CURIAM.—We are of opinion that a mere wattle-fence cannot be regarded as coming within the definition of a "building," contained in section 3 of Bombay Act VI of 1873. That definition includes "compound walls, door-steps, verandahs and the like." The buildings specified are all of a substantial kind and the specification of such buildings would seem to show that the definition was not intended to include a light rattle fence. For a similar reason such a fence would not come within the expression 'enclosure' used in the earlier part of the definition, where, moreover, that expression seems to mean an enclosed area rather than the wall or fence enclosing it. We, therefore, reverse the conviction and sentence.

1889.

10 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Ganpat.*

Criminal Procedure Code (Act X of 1882), Secs. 367, 367—Judgment—Signature.

The signature to a Judgment should be appended at the time of pronouncing it in open Court.

PER CURIAM.—From the 2nd report made by the Magistrate Captain Bukham, it now appears that the first signature was made at the time of writing the Judgment and before it was delivered, and the second signature was shortly afterwards appended on the same day in open Court. Now section 367 of the Criminal Procedure Code requires that the judgment shall be dated and signed by the presiding officer in open Court at the time of pronouncing it. It is the signing of the Judgment, under section 367, which we consider deprives the Court, under section 369, of the power to alter or review it. The cases under section 369 are collected in Mr. Agnew's Code of Criminal Procedure. But the question before us is which of the two signatures must be treated as the one made under section 367. The first signature was not made at the time of pronouncing it, but before; and we infer from the meagre statement of the Magistrate that it was not made in open Court; hence two of the requirements of section 367 appears to have been neglected. The second signature was made soon after the pronouncing of Judgment and in open Court; and, but for the existence of the earlier signature, we do not think it could be objected to as illegal in form. We think, therefore, that the second signature should be taken to be that made under section 367 to which section 369 applies. The reasons why judgments should be passed in

*Criminal Application No. 441 of 1888.

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open Court are weighty: Judges are not Judges of chambers but of Courts as remarked in *Cokes* 2nd Inst. 103. The construction we place on the Judgment also affords to the convicted person the right of appeal.

Applying the above reasoning to the case, in the light of the new facts contained in the Magistrate's report which were not before the learned Sessions Judge, we reverse the Sessions Judge's order and direct him to dispose of the appeal.

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10 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Krishna.*

Penal Code (Act XLV of 1860), Secs. 380, 429—Theft—Mischief—Separate sentences.

The accused having stolen a bullock killed it; for this they were sentenced separately on the charges of theft and mischief:—

Held, that the double sentences were not illegal as the theft preceded the mischief and the property was not transferred by the theft.

THE two accused stole a bullock, killed it, and ate it. The trying Magistrate convicted the accused on two charges, first of theft and secondly of mischief by killing a bullock, and sentenced them each to rigorous imprisonment for six months for each offence.

The District Magistrate of Satara, in referring this case to the High court, observed: "As the accused have each a previous conviction of theft recorded against them, the punishment is not too severe, but a doubt arises in my mind whether two distinct offences have been committed, and, whether, therefore, the Magistrate has not exceeded his power in inflicting a longer term of imprisonment than six months. It is doubtful whether, after a theft is committed, it is possible to commit the offence of mischief in respect of the stolen property. The loss has already been inflicted on the owner by the theft, and it is rather a straining of the law to hold that the destruction of the stolen property (which in this case involved the method of its appropriation to the use of the theives) is a second offence."

ORDER.—Record and proceeding to be returned. The convictions and sentences are not illegal. The theft preceded the mischief and the reasoning in *Reg.* v. *Narayen* (1) applies. There being two separate acts *Reg.* v. *Dod Basawa* (2) does not apply. On principle also we think there is no illegality. The property was not transferred by the theft and the prisoners were rightly punished by separate sentences for the fresh act of mischief.

**Criminal Ruling* 1 *of* 1889. Criminal Reference No. 182 of 1888.

(1) 2 Bom. H. C., 392. (2) 11 Bom. H. C., 18.

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10 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Baba Raghunath.*

Criminal Procedure Code (Act X of 1882), Sec. 488—Maintenance—Enforcing the order—Breaking open the door.

A Police Officer in executing a warrant to levy the amount of maintenance, under section 488 of the Code of Criminal Procedure, can break open an inner door of the house of the person against whom the order is made.

IN this case it appeared that one Satya Bhama Bala alias Raghunath had an order passed by Mr. Wiltshire, Sub-Divisional Magistrate, Sirsi, on 24th October 1887, allowing her a maintenance from her husband at Rs. 5 per mensem, under section 488 Criminal Procedure Code. Subsequently she applied to the Magistrate First Class, Kumta, to recover the arrears of her allowance which had remained unpaid from October 24th, 1887. The Magistrate issued a warrant on 22nd September 1888 for levying the arrears of Rs. 40 and directed it to the Chief Constable of Honore for execution. The Police Officer who was entrusted with the duty of executing the warrant, finding the defendant absent and hearing that he had locked up his property in an inner room of his lodging, broke open the door of the inner room, seized the property, sold it, and produced the sale proceeds amounting to Rs. 34-8-3 before the First Class Magistrate of Kumta.

The District Magistrate of Kanara in making this reference to the High Court stated :—

"The Magistrate has raised a question whether the breaking open of the door to seize the property is lawful. In section 488, Criminal Procedure Code, it is provided that arrears of maintenance may be levied like fines under section 386, Criminal Procedure Code. But there is no provision in the Code as to whether in the execution of warrants of fines the Police Officer has authority to break open the door or lock as in the case of a warrant of arrest or search : Sections 47 and 102.

In the case of destraints under the Civil Procedure Code, section 271 of that Code prohibits a bailiff to break open any outer-door but if he gained access to the dwelling house otherwise, he is empowered to unfasten and open the door of any room in which property liable to seizure may be.

The absence of any clear provision or ruling on the subject has necessitated this reference and I shall be obliged by the orders of the High Court as to whether the seizure and sale of the property under the circumstances stated is valid."

PER CURIAM.—Section 488 of the Criminal Procedure Code applies the procedure of section 386, by which a warrant issues for the levy of the

*Criminal Ruling No. 2 of 1889. Criminal Reference No. 179 of 1888.

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amount by distress and sale of any moveable property belonging to the person ordered to pay. The question raised by the Magistrate appears to be, whether the execution was illegal, because the Police Officer broke an inner door of the house of the person ordered to pay and thus got access to the goods. As regards civil process, the law is settled by *Bai Kuvar* v. *Venidas* (1), and the authorities there referred to, among which *Foster on Homicide* p. 319 and the 3rd and 4th Resolutions in *Semayne's case* may be pointed out. See also *Aga Kudbudin Mahomed* v. *the Queen* (2). We agree with Mr. *Mayne* in his note to section 183 of the Indian Penal Code in holding that the principle applies *a fortiori* to criminal process and that the execution was legal.

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17 January 1889. JARDINE & PARSONS, JJ.

Queen-Empress v. Harilal.*

Criminal Procedure Code (Act X of 1882), Sec. 123—Security bond—Commencement of the period.

A warrant for detention of the accused in prison, under section 123 of the Code of Criminal Procedure, can only be issued on the commencement of the period for which the security bond is required, and on default on the part of the accused in the giving the required security.

An order for the imprisonment of the accused, made in anticipation of his default to give security under section 118 of the Code of Criminal Procedure, is illegal as being opposed to section 123 of the Code.

ORDER.—Return and inform the Magistrate that on commencement of the period for which the security bond is required (the date of such commencement being that determined by section 120, Criminal Procedure Code) and default of his finding the required security, it becomes necessary for the Magistrate to issue the proper warrant for his detention under section 123 of the Criminal Procedure Code.

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21 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Mahadshet.†

Penal Code (Act XLV of 1860), Sec. 425—Mischief—Land—Bona fide dispute—Intent.

Where in a case regarding mischief to land, the defence raises a *bona fide* plea of right to the land, the Magistrate should determine whether the accused acted with any such intent as made his act criminal, *viz.*, any such intent as is mentioned in section 425 of the Indian Penal Code.

THE accused was convicted of the offence under section 426, Indian Penal Code, and sentenced to pay a fine of Rs. 15, by the First Class Magistrate of Chiplun, in that he removed a portion of the earth in a way likely to cause danger to the complainant's house.

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(1) 8 B. H. C. R., 127. (2) 3 Moor. I. A., 164.

**Criminal Ruling 3 of 1889. Criminal Review Nos. 390 and 391 of 1888.*

†Criminal Application for Revision No. 536 of 1888.

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The accused, thereupon, applied to the High Court contending that the gist of the offence prescribed in section 426, Indian Penal Code, being the *intent to cause wrongful loss* to the complainant, the intent was not proved and that there was nothing to show that the petitioner caused damage with a wrongful intent and knowledge that he was not justified in causing such damage.

PER CURIAM.—A *bona fide* plea of right to the land having been raised by the defence, the Magistrate ought to have determined whether the accused acted with any such intent as made his act criminal, *viz.*, any such intent as is mentioned in section 425 of the Indian Penal Code. There being no evidence nor finding of such an intent, we reverse the conviction and sentence and order return of the fine.

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24 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Bai Kusa.*

Village Police Act (Bom. Act VII of 1867),—Police Patel—Personally interested—Criminal Procedure Code (Act X of 1882), Sec. 555.

A Police Patel is disqualified from trying a case in which he is personally interested: since though the Code of Criminal Procedure does not apply to Village Police Officers still the principle stated in section 555 of the Code is based on a general principle of justice.

The District Magistrate of Broach in making this reference to the High Court stated: "It will be seen from the copy of the Register that in the case of *Imperatrix* v. *Bai Hura* the Patel convicted and sentenced the accused to pay a fine of annas eight for having committed a theft of 10 pounds of green *math* from his field. This proceeding of his is contrary to the provisions of section 555 of the Criminal Procedure Code which directs that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try any case to or in which he is a party or personally interested."

PER CURIAM.—Though the Code of Criminal Procedure does not apply to Village Police Officers, the principle stated in section 555 is based on a general principle of justice, and we reverse the conviction and sentence on the ground that the Patel who tried the case had a personal interest.

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31 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Harilal.†

Indian Penal Code (Act XLV of 1860), Sec. 188—Order—Disobedience.

To sustain a conviction under section 188, Criminal Procedure Code, it is necessary to prove that the disobedience complained of would produce one of the consequences specified in the section.

IN April 1888, a serious epidemic of cholera broke out in Ahmedabad and lasted over two months. The Municipality were duly vested with legal

*Criminal Reference No. 1 of 1900. †Report of Proceeding No. 8 of 1889.

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powers to cope with the emergency under section 73 of Bombay Act VI of 1875. At that time of year caste feasts were prevalent. The heat was intense, the feasts were held in the hottest part of the day, and vast amount of greasy and unwholesome food was greedily consumed by the poor members of the caste huddled together in close and unsanitary 'poles' or lanes. At a very early stage of the epidemic the Magistrate ascertained that several deaths had followed directly upon one caste feast from among the partakers, and at the instance of the Civil Surgeon, who held very strong opinion as to the danger of permitting the continuance of these caste feasts, the Municipality under the powers vested in them prohibited, by widely circulated notices, the holding of all caste feasts exceeding fifty guests.

In contravention of this order the accused held a caste feast but on being prosecuted for doing so the Magistrate acquitted him.

The District Magistrate of Ahmedabad in making this reference to the High Courts observed:—

"The Magistrate holds

(i) that it was not *proved* that the holding of the caste feast was dangerous to human life,

(ii) that, as the Municipality failed to call evidence on that point, it was not his duty to do so under section 245 of the Criminal Procedure Code.

On these points I beg to remark that, if when an epidemic is raging, the rules legally made to prevent its spreading are broken, a Magistrate ought, at least so it seems to me, to hold that that breach has involved danger to human health, and that separate evidence to that effect is not necessary. In cases of emergency the Legislature has made the Municipality responsible for taking the necessary measures. Thus the Municipality might deem it necessary and it is a precaution often taken to prohibit the importation and sale of unripe fruit, though in ordinary seasons its consumption is not interfered with, yet the Magistrate holds that, before he will punish a breach of such an order, it must be proved that unripe fruit is unwholesome. But it is a fact, that needs no proof, that the consumption of unripe fruit leads in ordinary seasons to diarrhœa, and that diarrhœa, in times of cholera, should be stopped or it may develope into cholera; and the Magistrate must have known that precisely the same remarks apply to food used at the caste feasts, under the circumstances prevalent in Ahmedabad. The High Court will also notice that in section 89 of the District Municipal Act it is left in specific language to the Municipality to decide if certain unwholesome trades are dangerous to health. They can close certain

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factories, if shown *to their satisfaction* to be a nuisance. The matter is one for their discretion. By the same analogy the Municipality must be assumed only to order such measures as are really necessary to mitigate an out-break of cholera, and acts in contravention of such measures must be punishable.

But even if the holding of caste feasts were not on the face of it dangerous (not only from the circumstances of the case, but because the Municipality had prohibited it) and if special and legal proof were in consequence required of the danger arising from caste feasts in the time of cholera, it seems to me that the Magistrate should have called for the proof. He states that the Municipality would not call the Civil Surgeon as that gentleman might have demanded a fee of Rs. 15. But it was open to the Magistrate to summon the Civil Surgeon and question him, and he ought not to have passed that decision without getting the least evidence obtainable. To allow so serious a case to go by default, indicates a want of appreciation of the public weal.

The case seems one of great importance, and the Magistrate should, it appears to me, the facts being admitted, have convicted the accused, leaving it him, if necessary, to raise a legal objection on appeal. Certainly seeing the grave danger involved to the public health he should not have passed a decision nullifying the powers which the Legislature have conferred on the Municipality to enable them to cope with public emergencies, without the fullest enquiry and the certainty that he was right."

ORDER.—We are of opinion that the matter of this reference would have been more properly brought before this Court by way of appeal under section 417, Criminal Procedure Code, than by way of reference under section 438. We do not think it necessary to interfere in revision, as evidence, that the disobedience would produce one of the consequence specified in section 188, Indian Penal Code, is necessary to sustain a conviction under that section—*Reg.* v. *Nund Kumar* (1) and the case at 4 Mad. H. C. R. Appendix 5. We return the Record and Proceeding.

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31 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Hussendin.*

Railways Act (IV of 1879), Sec. 32—Fraudulent Acts—Fine—Fare.

Section 32 (*d*) of the Railways Act applies only to fraudulent acts, and where it appears that the accused has no intention to defraud, he is not liable, under section 32 of the Act, to payment of fine as well as the fare, but is liable, under section 31, to pay the fare found due.

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(1) L. R. App. 9.

**Criminal Ruling 7 of 1889. Criminal Review No. 483 of 1888.*

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ORDER.—We return Record and proceeding as the accused cannot be found. It will be sufficient to point out to the Magistrate that, as he convicted under section 32 of Act 4 of 1879, that section required him to pass a sentence of fine in addition to an order to pay the fare. Section 32 thus differs from section 31 as pointed out in *Hart* v. *Buskin* (1). The Magistrate found, however, that the accused had no intention to defraud: and as section 32 applies only to fraudulent acts, he ought not to have been convicted under it.

We change the conviction and sentence to an *order* under section 31 to pay the amount which the Magistrate found due.

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31 January 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Pandurang.

Abkari Act (Bombay Act V of 1878), Sec. 47—Liquor—Possession.

To justify a conviction under section 47, Bombay Abkari Act, there must be evidence against the accused showing that the liquor was "in his possession."

PER CURIAM.—We are of opinion that the accused Ragho's statements shew that this Court ought not to interfere.

The other two accused have been convicted, under section 47 of Bombay Act V of 1878, of illegal possession of country liquor. It is admitted that the liquor found was in illegal quantity: but to obtain a conviction under this section there must be evidence against the accused showing that the liquor was "in his possession." As there was evidence from which the Magistrate appears to have inferred that Anant was acting in concert with the owner of the liquor and had a knowledge of it being there we, decline to interfere with the conviction passed on him.

But as regards Pandurang nothing has been pointed out to us as existing in the evidence which was before the Magistrate to show that he was doing more than casual serving in the shop on the day in question. We are of opinion that mere casual presence in, and charge of, a building on a single occasion does not constitute the person so present a possessor of the property of the owner and therefore we reverse the conviction and sentence passed on him.

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11 February 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Jhina Vali.*

Confession—Admissibility—Co-accused—Judge—Jury.

Where an accused makes a confession exculpating himself and inculpating the co-accused, the confession must be taken altogether, and it is evidence for the prisoner as well as against him, but still the jury may, if they think proper, believe one part of it and disbelieve another.

PER CURIAM:—We have had advantage of full argument in this case

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*Confirmation case No. 23 of 1888; and Criminal appeals Nos. 269, 270 and 271 of 1888.

(1) I. L. R. 12 Cal. 192.

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as the Government Pleader appeared for the Crown and most of the observations of Mr. *Chimanlal*, who represented the prisoners Johina and Gani, apply equally in favour of the third appellant, Bai Jakal, who was not represented.

The three prisoners were found guilty, by unanimous verdict of a Jury of murder. The Sessions Judge sentenced Johina and Gani to death and Bai Jakal to transportation for life. The case comes before this Court for confirmation of the capital sentences and on the appeals of the prisoners.

The theory of the prosecution is that on the evening of Thursday, the 4th October, a girl named Ladkor of 7 years of age, was taken by the three prisoners to a place outside the town of Ranpur, near the river, and murdered there for the sake of her ornaments.

The body of a child, in a state of decomposition, was found on the 7th, the Sunday following. On the night of the Monday Jhina pointed out some silver anklets, a petticoat, and a place stained with blood. The Chief Constable took him on the Tuesday before Mr. Younghusband, a Magistrate of First Class, before whom on the 9th he made a statement which he retracted on the 17th alleging that it had been induced by beating. In this statement he admits that he went with the other two prisoners to the scene of the murder Jakal carrying Ladkor, that he saw Jakal throw the child down and Gani cut her throat and cut off her feet and take the child's 2 pairs of anklets and that he then went with Gani and burried them in the place where he afterwards pointed them out. But when the Magistrate asked him "What part did you take in all these proceedings?" Jhina replied "I did nothing. I was only with them. If I had known what they are going to do I would not have gone."

It has been argued that in submitting this statement to the Jury, the learned Sessions Judge misdirected them and that this misdirection has induced an erroneous verdict which this Court ought to reverse.

The directions of the Sessions Judge as to the use of the statement as evidence were the following. "*First*—you are entitled to disregard any self-exculpatory statements there in which you may disbelieve. *Secondly*—I do not ask you to pay any heed to fine drawn distinctions between a confession of guilt of a certain offence and a confession of facts so incriminating that in the absence of some rebutting evidence better than the bare allegation of the accused or at least some credible explanation a presumption of guilt of the said offence amounting to conviction arises. In plain words an accused without saying he is guilty in set words can admit enough to transfer the burden of proof to his own shoulders.

A confession of facts so incriminating amounts for all practical

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purposes to a confession of guilt and may be taken into consideration by you, where it also affects the other two accused, when you are dealing with the evidence connecting them with the murder charged, if you hold that it is so selfincriminating.

The defence as raised by their pleaders is that the evidence is insufficient for their conviction or unreliable and that the confession of accused should not be treated as a confession because he asserts he would not have accompanied the other two if he had known their intention."

The question of misdirection has to be considered in two aspects. Firstly, how should the Sessions Judge have left this statement to the Jury as regards Jhina the prisoner who made it? It was admissible against him: *Reg.* v. *Amrita Govinda* (1). No Indian case has been cited on the proper way of leaving such a statement to the Jury. On referring to the English cases we find that the point was argued in *Reg.* v. *Clewes* (2). There the prisoner, being charged with murder, said in his confession which was read in evidence against him that he was present at the murder, but took no part in the commission of it. Mr. Justice *Littledale* ruled: "the confession must be taken altogether, and it is evidence for the prisoner as well as against him but still the Jury may if they think proper, believe one part of it and disbelieve another." In charging the Jury the learned Judge pointed out that according to the confession the prisoner was present though he did not act in the murder; and added "if it be said that the prisoner did more than is stated in his confession, there should be some evidence of that." In *Queen* v. *Sheikh Boodhoo* (3), where the prisoner was tried for murder it was held that the confession must be taken in its entirety. In *Reg.* v. *Higgins* (4), case of theft, a similar direction was given to the Jury: and in two cases of receipt of stolen property *Queen* v. *Choka Khan* (5) and *Queen* v. *Bishu Manjhi* (6) the same rule was laid down by the HIGH COURT OF BENGAL.

We are of opinion, following *Reg.* v. *Clewes*, that in addition to the directions that he gave, the Sessions Judge might well have pointed out in explicit words that the confession must be taken altogether, that it was evidence for the prisoner Jhina, as well as against him, and that in order to convict him of the murder, the Jury must be satisfied not on the statement by itself but on the part of the statement which they believed, coupled with other evidence, that he did more than was admitted in the statement. We think however that by implication at least, the Sessions Judge did leave to the consideration of the Jury the exculpatory as well as the inculpatory part of the statement: and although the direction about the burden

(1) 10 Bom. H. C., 497. (2) 4 C. and P., 221. (3) 8 W. R., 38. (4) 3 C. and P., 603. (5) 5 W. R., 70. (6) 9 W. R., 16.

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of proof is somewhat too strong, we are of opinion that it was open to the learned Judge to draw attention to the nature of the evidence as was done by the Court in deciding *Reg.* v. *Amrita* (7), where it is said, "It may be that the Court would attach very little weight to the exculpatory parts of this statement as respects the accused person who made it. Taken with the other evidence, it might well seem to establish the case against him." The charge was delivered immediately after the pleaders for the prisoners had argued on the value of the confession. We must take the charge as a whole: and looking to the directions to caution we are unable to say that there was a misdirection as regards Jhina or that the Jury had not before their consideration the whole of the statement. It is to be added that the anklets and petticoat were pointed out by Jhina, as also the blood stains marking the place of murder, and that he gave up the knife used, which was his own. We are therefore of opinion that the verdict of the Jury finding him guilty should not be disturbed.

We are of opinion, on the second point about misdirection which we have to decide, that this statement of Jhina was not admissible in evidence against the other two prisoners and could not be taken into consideration as against them under the section 30 of the Indian Evidence Act: *Reg.* v. *Amrita* (8) *Queen* v. *Belal Ali* (9) *Emp.* v. *Ganrag* (10). We are of opinion that the Sessions Judge should have so directed the Jury and that the contrary direction was a misdirection which led them to an erroneous verdict. The statement of a fellow prisoner jointly tried is by itself evidence of the weakest kind: *Queen Emp.* v. *Dosa* (11) *Emp.* v. *Ashootosh* (12). But this statement we think must have influenced the view taken by the Jury of the remaining evidence and induced them to give it a far greater weight than they would otherwise have given. The rest of the evidence is open to some of the criticisms applied in *Emp.* v. *Daji* (13). The finding of a brass nose-ring in the house of Gani might be a suspicious circumstance against him, there being evidence that it was worn by Ladkor. But in the full descriptions given of the girl, her clothes, and her ornaments, no mention is made of any ring. The only other unambiguous evidence against him is that of the witness Waghee who says he saw all three prisoners with a little girl one evening about the date of the murder near the place where it occurred. But Waghee's statements were very tardily made: and it is to be borne in mind that when Jhina was examined after a tender of pardon he did not implicate the other prisoners. We are of opinion that the Jury took the statement of Jhina as explaining confirming the facts stated by the witnesses: but that without this statement the Jury would have hesitated to find Gani and Jakal guilty.

(7) 10 Bom. H. C., p. 500. (8) 10 Bom. H. C., 497. (9) 10 Ben., L. R., 453. (10) I. L. R., 2 All., 444. (11) I. L. R., 10 Bom., 238. (12) I. L. R., 4 Cal., 483. (13) I. L. R., 5 Bom. 283.

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We now confirm the conviction and sentence of death passed on Jhina and acquit Gani and Jakal.

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11 February 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Narayen.*

Penal Code (Act XLV of 1860), Secs. 372, 373—Unlawful—Immoral.

Per *Candy, J.*—The word "unlawful" in Sections 372 and 373 of the Indian Penal Code must be *ejus dem generis* with "immoral.

JARDINE, J.—The trying Magistrate, who discharged the accused under section 253 of the Criminal Procedure Code, remarks that the evidence goes to show that it is customary and lawful among the Nagpur Koshties to dispose of their wives if poor. The accused Narain sold his wife to the accused Tamba for money, Narain being too poor to support her, and executed a deed of sale. One witness deposed that the transaction was done with the consent of an assembly of a Punch of the caste consisting of 25 persons. The policeman who appeared as complainant deposed that the girl was under 12 years of age; but the District Magistrate who has referred the case to this Court states her age to be 10 years. The trying Magistrate found that Tamba bought her in order to make her his wife. He remarks that he had no decisions of higher authority to guide him and found that the purpose of the sale was not criminally immoral under sections 372 and 373 of the Indian Penal Code. The buyer and seller were both Hindus of the Nagpur Koshti caste and both joined in the transaction.

The question for determination, arising on the facts found or which may assume, was whether the sale by the husband of his wife, she being under 16 years of age, to another man for the purpose of being treated as, and assuming the states of, the man's wife, the husband being too poor to support her and the caste having consented to the sale, brought the buyer and seller within the meaning of sections 372 and 373 of the Indian Penal Code. The part of these sections which has to be considered is the following:—

"With intent that such minor shall be employed, or used for the purpose of prostitution, or for any unlawful and immoral purpose" we would point out to the Magistrate that some of the decisions of the High Court on these sections are commented upon by Mr. *Mayne* in his Edition of the Penal Code under the sections themselves. Others which bear on the matter for decision are collected in his commentary under the section 494. Many of these are reviewed by Mr. Justice *West* in *Mathura Naikin* v. *Esu Naikin* (1).

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*Criminal Reference No. 151 of 1888. (1) I. L. R. 4 Bom. 545 at p. 568.

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In the present case there is no suggestion that the minor was to be used for the purpose of prostitution: so the question is confined to whether the purpose of the disposal was an "unlawful and immoral purpose" and whether the accused had an intent to dispose of her for such a purpose.

In *Uji* v. *Huthi* (2) it was held that a custom which authorises a woman to contract a *Natra* marriage, without a divorce, on payment of a certain sum to the caste to which she belongs, is an immoral custom and one which should not be judicially recognised *Emp.* v. *Umi* (3) shows that among Hindus the extent of the marital right of divorce is a matter to be inquired into as it is limited by the custom of the caste. In *Reg.* v. *Sumbhu* (4) it is said "the Court does not recognise the authority of the caste to declare a marriage void or to give permission to a woman to remarry." It was also held that the *bona fide* belief on the validity of the second marriage did not constitute a defence to a charge under section 494 of the Indian Penal Code, though that circumstance might be taken into account in mitigation of punishment.

Under the Hindu law the power of the *pater familias* over his wife and children does not extend to giving them away or selling them. *Mandiik's* Hindu Law p. 371, *West* and *Buhler* pp. 213, 281, "there being no ownership over a wife, as there is in a cow."

On considering the above authorities, I am of opinion that, before discharging the accused, it would have been better if the Magistrate had elicited fuller evidence of the alleged custom of the caste, I mean proof of previous instances. I do not think the transaction of sale can be justified at all unless by treating it as the accused Tamba argues as equivalent to a divorce unless it be assumed that the wife assented. The evidence on these points is however imperfect and meagre, and even the age of the girl cannot be accepted as proved. The writer of the document says he never wrote such a document before.

Only the accused Tamba has appeared in this Court and we have not had the assistance of learned argument. But the sale being *prima facie* a wrong act, the inquiry into the custom of the case must be made more complete, as without further inquiry it would be difficult for the Magistrate to determine whether the defence of good faith is proved and whether that the defence would enable him to apply the doctrine of *mens rea*: see *Emp.* v. *Musadleaksh* (5), *Reg.* v. *Prince* (6) a case discussed by Mr. *Mayne* under section 79 of his Penal Code. For these reasons we concur with the District Magistrate and set aside the order of discharge and direct further enquiry as regards the accused who has been served with notice.

(2) 7 Bom. H. C., 133. (3) I. L. R., 6 Bom., 126.
(4) I. L. R., 1 Bom., 347. (5) I. L. R., 3 Bom., 178. (6) L. R. 2 C. C., 154.

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CANDY J.—I am willing to concur in the view that the District Magistrate himself or by some Magistrate subordinate to him should make further inquiry as the inquiry cannot do harm and may do good. But the District Magistrate could have done this without any reference to the High Court.

I am inclined to think that the word "unlawful" in section 372-373 must be *ejus dem genris* with "immoral" and would not be covered by the authorities as to "unlawful" divorces in cases falling under the Chapter (XX) of Offences relating to *Marriage.*

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18 February 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Desai Daji.*

Sessions Judge—Jury—Verdict—Questioning the Jurors—Practice.

It is not competent to a Sessions Judge to put question to the Jury where the verdict is general and has been delivered without ambiguity and without incompleteness, and where there is no reason to suspect a misconception or disobedience of the doctrines of law.

A Sessions Judge is not at liberty to put questions to the Jury, after it has delivered its verdict, with a view to bring on record the points on which his opinion is at variance with the Jury.

CANDY, J.—The question is whether the unanimous verdict of acquittal of both the accused is so mainfestly erroneous that we must assume the functions both of Judge and Jury and adjudicating on the evidence in the case give the right Judgment.

The first point alleged against accused No. 1 is that he "entrapped" deceased into accompanying him under the pretext of cutting grass, and then having acted in concert with accused No. 2 deliberately murdered the deceased. The improbability of this theory is apparent. Accused No. 1 and deceased were friends. Admittedly No. 1 had no apparent motive to induce him to enter into a conspiracy with No. 2 against the deceased. Witnesses for the prosecution spoke as to his friendship with the deceased, and no one spoke as to his friendship with accused No. 2.

Again it is doubtful whether accused No. 1 did specially call at the house of deceased to incite him to come and cut grass. It is to be noted that the first information, given by the father of the deceased was that his son had left his home in the early morning, saying that he was going to cut grass: there was not a word about the accused No. 1 calling and taking him away for this purpose. Possibly it is an after "improvement" on the part of the prosecution. But even if accused No. 1 had called his friend that they might go grass-cutting together, it is abundantly clear that there was no "entrapping." The conduct of the accused shows this. He is supposed to have gone quite openly, and to have sat in a public

*Criminal Reference No. 178 of 1888.

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place with the deceased till the mists rose, and then three hours later to have been seen sitting with the deceased under a tree. It is in evidence that they had been thus seen together before. Admittedly it was a natural thing for both accused No. 1 and the deceased to cut grass in the early morning. There is no indication of entrapping on the part of accused No. 1. If calling his friend to cut grass is a fact which naturally excites suspicion against accused No. 1 then how is that the suspicions of the father of the deceased were not aroused against accused No. 1, and why did he not at once complain to the Police Patel, saying "Desai took off my son, who has since disappeared?" It is admitted that he made no mention of this point till after the inquest, and the corpse had been sent to Anand. The next point against this accused is that he is said to have been seen about noon that day with his clothes drenched. It is doubtful whether the Sessions Judge understood the force of this point as put by the prosecution. It is not alleged that this shows that accused must have been in the Ambalia tank where the corpse was afterwards found. On the contrary it is contended that the body of the deceased was not put in the tank till that night; but it is alleged that accused No. 1 must have been bathing at noon, from which it may be inferred that he had touched a dead body. The weakness of such an inference is manifest. It might just as well be contended that Fulo, who met accused No. 1 at noon, had a hand in the death of the deceased, for Fulo admits that he went to bathe after accosting accused. Next the fact the accused No. 1 was asked in the evening by the father if he knew where Ishwar (deceased) was, and he replied in the negative, is said to be a piece of circumstantial evidence against accused. On the contrary it seems in favour of accused. It is difficult to follow the theory of the prosecution here. It seems to be that both accused murdered the deceased in the rice fields between 9 A. M. and noon, and left the body in the rice field, that accused No. 1 then went to the village to bathe and change his clothes, that as the deceased did not return home at noon, search was made for him in the rice fields, but no trace of him or his corpse or any struggle was then found: that accused No. 1 was seen that evening on the Anand road alone and later near the Ambalia tank with accused No. 2 at or after which time both accused concealed the corpse in the tank. The improbabilities of such a theory are apparent.

The next point alleged, and much stress is laid on this, is that the next morning when the father and brother were searching for deceased, accused No. 1 advised them to look in the tank. There are strong reasons for believing that this allegation is false. Accused No. 1 has always denied it. It is clear that when the father gave his first information to the Police Patel, which was not till after the corpse had been found, he said

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not a word about this. On the contrary he said that he himself suspected that the body might be in the tank so he looked &c. This he could not have said, had the statement of No. 1 accused, caused him to look in the tank. This point apparently escaped the notice of Sessions Judge. An "improvement" like this cannot fail to excite suspicion against the story of the prosecution. Next we come to the finding of marks of a struggle in or near the field of accused No. 1. This was not till after the Head Constable arrived (he came about 5 or 6 P. M.) when the accused No. 1 had been arrested on suspicion because he had been in company with the deceased. It is a strange circumstance that these marks had not been discovered in the previous search in the rice field, and even if there was a genuine discovery, it does not follow that accused No. 1 was a party to the murder. Then we come to the alleged production of the charm (*madalia*) and the sickle by accused No. 1 at 8 P. M. If genuine this would show that accused No. 1 must have been cognizant of the murder, but not necessarily that he took part in it. There are however some suspicious points connected with this production. Admittedly the motive for the murder was not theft. Then why should the charm have been removed from the arm of the deceased? And why should the charm have been concealed in one place, and the sickle of the deceased in another, in the field of accused No. 1? What has become of the "*rudraksh*" (beads) and the silver ring, which the father says, were worn by his son when he was killed? Why were not all thrown with the corpse into the tank? It is admitted that no information about the articles was given by the father till 7 P. M., long after the Head Constable arrived on the scene. The things were concealed so slightly that (as the Police Patel says) the earth was *scratched up* and they were revealed. And though they had been in that position for at least 24 hours, and there had been rain the previous evening, the evidence shows that no mud or earth was sticking to them. Under these circumstances it cannot be said that the Jury were unreasonable in suspecting that the zealous Head Constable had placed the charm and sickle where they were found, and forced accused No. 1 to produce them. Lastly, there is against accused No. 1 his statement to the Magistrate that he had seen accused No. 2 and the deceased fighting, and he got frightened, and seeing the charm and sickle lying in his field he spread earth over them. This is not impossible. Accused No. 1 is but a lad (18). If there was no conspiracy to kill the deceased (and probability is certainly in favour of accused No. 1 not joining in such a conspiracy), then it is quite possible that the two young men (accused No. 2 and deceased) had a quarrel and fight without premeditation, that No. 2 accused killed deceased, that in the struggle the charm was torn off the arm of

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deceased and the sickle fell from his hand, that accused No. 1 was too frightened to give information of what had occurred, especially as the fight took place in his field, and so he concealed the charm and sickle and at first denied all knowledge of what had happened to deceased. In fact nearly all the evidence for the prosecution may be genuine and yet accused No. 1 may in no way be guilty of murder.

This is the case against accused No. 1, and having considered all the evidence and having given due weight, no less to the opinion of the Sessions Judge than to the verdict of the Jury, I have come to the conclusion that the verdict was reasonable. As to accused No. 2 admittedly the case against him is less strong than against accused No. 1. The committing Magistrate thought it is so weak that, though he framed a charge of murder, he released him on bail.

Assuming that the quarrel in February was motive for the murder in September (there is nothing on the record to show that since February deceased had given cause to accused No. 2 to bear animosity) the only evidence against accused No. 2 is that he was in company of the deceased and that when arrested he had on a "potia" which apparently showed marks of blood, but which on examination were found to be "stains of some colouring matter other than blood with the single exception of a small, faint, red, oval stain about ½ inch in greatest diameter, which was found to be faint stain of the blood of some animal belonging to the class mammalia."

Possibly the young men, accused No. 2 and deceased, while cutting grass together had a quarrel, and coming to blows accused No. 2 in his rage strangled deceased, and in connection with his previous dispute with the deceased mutilated the corpse. But there is no proof of this; and therefore the Jury reasonably acquitted both the accused. Under the circumstances I do not deem it necessary to consider in the present case the question whether the Sessions Judge was justified in putting questions to the Jury after the verdict of "not guilty" had been delivered.

JARDINE, J.—I concur with my brother Candy in opinion that the unanimous verdict of the Jury is not unreasonable nor manifestly wrong.

The Jury believed the medical evidence which was that the death of Ishwar was caused by strangulation. There is no eye-witness.

The prisoner Desai made a statement to the Magistrate but afterwards retracted it in the Sessions Court. In that statement he said he was present when Ishwar and the prisoner Jetha had a fight in which Jetha clatched Ishwar so that blood came out of his mouth and he died. Desai did not admit that he took any part in the homicide. The whole

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of the statement was for the consideration of the Jury: it was evidence in favour of Desai as well as against him as ruled by Mr. Justice *Littledale* in *Rex.* v. *Clewes* (1). There is no apparent motive for Desai taking part in the murder. It is not alleged that any blood was found on Desai's clothes or that any weapon of his was used. If it be true that he told the father of Ishwar, when asked, that he had better look in the tank, where the body was found afterwards, that answer is not of much importance. It was a natural answer such as any one might give: and it would probably occur to the father himself to look there for his missing son. Nor do I think the fact that Desai had wet clothes on about noon of the day of the murder an incriminating circumstance. There is evidence that after the police had taken up the case, Desai pointed out a charm and a sickle under the earth of his hedge. It may be that he covered them over as he says. It may be that it was not he who put them there, and that he was made to appear to point them out, as the Jury believed, there is force in the argument that a murderer wishing to conceal these articles would have thrown them into the tank. I am of opinion that the whole evidence against Desai is not strong and that the Jury did right to acquit him.

There is very little evidence against the prisoner Jetha. Some witnesses say that about 7 months before the murder, Ishwar had an intrigue with Jetha's wife. But the inference of revengeful motive is weakened by the evidence as it does not appear that Jetha and Ishwar avoided each other, and it is proved that they set off together amically to cut grass. One stain of blood was found on Jetha's dress, but as Chief Justice *Erle* once pointed out such stains are often found on working men's clothes. I do not think that from these facts, and the fact that Jetha was one of the persons last seen with Ishwar, the Jury could safely infer that Jetha had taken a part in killing him. The statement of the other prisoner Desai was not on oath; and Desai could not be cross-examined. Besides, it did not implicate Desai himself and therefore it was rightly treated as no evidence against Jetha. Jetha has denied all part in the murder. I think he was rightly acquitted.

We have given careful attention to the opinion of the Sessions Judge. While we think some of the circumstances in evidence create suspicions against the prisoners, it does not appear to us that the evidence is so cogent or the inferences so certain as to warrant conviction of either of the prisoners. There is room for much reasonable doubt. As was pointed out long ago in *Bushell's case* (2), different minds often come to the different conclusions on evidence about facts. But where the trial is by Jury, it is the province of the Jury to find on the facts. We must give weight

(1) 4 C. and P., 221. (2) 6 How. St. Tr., 999.

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to a unanimous verdict: and as we do not think the verdict unreasonable, we ought not to interfere with it.

We therefore acquit both the prisoners. I notice that a number of questions were but to the Jury to elicit their opinion on a variety of facts and as to the value of the evidence. The learned Sessions Judge records that he thought his procedure necessary because the evidence is mainly circumstantial and he wished to shew on the record in what points his opinion was at variance with that of the Jury. The Judge may under section 303 of the Code of Criminal procedure "ask them such questions as are necessary to ascertain what their veridict is." I think the Sessions Judge ought not to have put any other sort of questions. The prisoners were tried on a charge of murder and the Jury returned a general verdict of not guilty. There was no sign in the foreman's answer of any such lurking uncertainty in the mind's of the Jury as in *Queen* v. *Susteram* (3) was held to justify the Sessions Judge in putting further questions. There was no question raised as to provocation or whether the offence of culpable homicide not amounting to murder, or of grievous hurt had been committed. Now under the section 303 of the Criminal Procedure Code "unless otherwise ordered by the Court, the Jury shall return a verdict on all the charges on which the accused is tried;" and I agree with the learned Judge in *Queen* v. *Hari Prasad* (4) that "if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, we have no doubt whatever that it is competent to the Judge, and is indeed his duty, to put such questions to them as shall elicit a complete finding." The learned Judge in that case also says—"The law does not prescribe any specific form in which the Jury are to return their finding, and we are of opinion that they are at liberty to deliver it in any form which they think fit."

Assuming that a Jury is at liberty to find what in England is called a special verdict, it is to be observed that in the case before us the Jury found a general verdict without ambiguity or defect. To treat it as a special verdict because of the matters of fact specially found in the answers after delivery of this verdict would in my opinion be to introduce a new and confusing procedure, for then we would have, if called upon by a party, and sometimes of our own mention, to consider whether the meaning and extent of the findings on the special facts, and whether these findings taken all together were equivalent to or fell short of or exceeded the general verdict. The complication which would thus be introduced may be estimated by perusal of such cases as *Rex* v. *Royse* (5) and *Rex v. Francis* (6). But even a special verdict is confined to the facts themselves and does not deal with the evidence adduced to prove them:

(3) 21 W. R., 7. (4) 8 Beng. L. R., 557; s. c: 14 W. R., 59. (5) 4 Burr., 2073. (6) 2 Stra., 1015.

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Archbold Procedure and Evidence Criminal Code. 19 Ed, 177. Moreover, "the Jurors are not obliged to agree in the reasons for finding a verdict as it is found; and if a reason be given by one or more of them, upon a question being asked by the Judge for finding it as it is found, this is not to be considered or recorded part of the verdict": *Bacon's* Abrid, Fit., Verdict F. This was the opinion of the Court as delivered by *Vaughan* C. J. in *Bushell's case* (7).

The Indian authorities preponderate against questioning the Jury where the verdict is general and has been delivered without ambiguity and without incompleteness, and where there is no reason to suspect a misconception or disobedience of the doctrines of law. In *Queen* v. *Meajan Sheikh* (8) *Couch*, C. J. said: "Let the Judge be informed that he ought not to put questions to any of the Jury as to the reasons for the verdict he has given." In *Queen* v. *Sustriam* (9) *Phear*, J. in delivering the Judgment of the Court said: "It is only when it is necessary in order to ascertain what the verdict of the Jury really is, that the Judge is justified under this section in putting questions to the Jury. Unless a necessity of this kind truly exists, the questions are not justified in law. No doubt the Legislature thought that it would be very dangerous to give the Sessions Court the power of cross-examining the Jury after they had delivered their final verdict, with a view to show that the conclusions at which they had arrived were not logical or were in consistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict." In *Empress* v. *Mukhun* (10) *Markby*, J. expressed his opinion that a Jury should not be questioned by a Judge as to the grounds on which its conclusion is based. *Prinsep*, J. took the contrary view, but in *Harby Churn* v. *the Empress* (11) that learned Judge observes: "Section 303 no doubt empowers the Judge to ask the Jury such questions as are necessary to ascertain what their verdict is, but it was never in our opinion contemplated that on ascertaining that the Jury were not unanimous, the Judge should make minute inquiries to learn the nature of the majority, and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own or not. . . If we are wrong in concluding this, we think that we are at least bound to express our opinion on the matter so as to prevent any misconception regarding what we consider to be the proper practice. Whatever may have been the individual opinion of the Judge in this matter, if he went so far as to ask the Jury what was the exact majority, and what was the opinion of the majority, we think that he ought

(7) 6 How. St. Tr., 999. (8) 20 W. R., 50. (9) 21 W. R., 1. (10) 1 Cal. L. R., 275.
(11) I. L. R., 10 Cal., p. 144.

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to have to received that verdict without hesitation; and if he differed from it, he should have proceeded as directed by section 307. If the Jury, in the present instance, had been required to retire without having informed the Judge as to the exact result of their deliberations, it is quite possible that on further discussion what was the majority might have become the minority, and we think that in all fairness to the prisoners the course indicated by us should be followed." In *Empress* v. *Dhunam Kazee* (12) the Jury returned an unanimous verdict after which the Sessions Judge put questions to them as to their finding about particular facts. Mr. Justice *Norris* made the following observations on this procedure.—

"It was urged by the learned pleader who appeared for the Crown that these answers showed that the Jury had come to very foolish conclusion upon the evidence, and that, in receiving their verdict, he ought to proceed upon the assumption that these foolish conclusions and these alone had induced them to return a verdict of acquittal. It may be that the conclusions are foolish, but I refuse to consider these answers at all because I am of opinion that the Judge had no right to put the questions which called forth the answers. The Court is authorised by section 263 to ask the Jury such questions as are necessary to ascertain what their verdict is. In this case the Jury had returned a plain, simple verdict of 'not guilty'; it may have been erroneous, but it certainly was not ambiguous, and the duty of the Judge was to receive it and record it without asking any questions about it."

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7 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Sakharam.*

Penal Code (Act XLV of 1860), Secs. 411, 414, 71—Separate sentences—Convictions—Procedure.

Where an accused is convicted of offences under sections 411 and 414, Indian Penal Code, it is not permissible to pass on him separate and consecutive sentences under each head of charge, but in such a case, only one sentence must be passed on him for both offences.

The accused Sakharam *bin* Dhondi and Uma Khuma shet Marvadi were tried and convicted. The former of theft of ornaments valued at Rs. 597 and the latter of receiving stolen property and assisting in the disposal thereof and sentenced on 1st November 1888 by the Second Class Magistrate of Taluka Mawal, Poona District, as follows:—

(1) Sakharam *bin* Dhondi to undergo six months rigorous imprisonment and to pay a fine of Rs. 50 in default to undergo further rigorous imprisonment for one month and a half, section 379, Indian Penal Code; and (2) Uma Khuma Shet Marwadi to undergo six months rigorous imprisonment and to pay a fine of Rs. 100, in default to undergo further

(12) I. L. R., 9 Cal., 61. *Criminal Ruling 8 of 1889. Criminal Reference No. 4 of 1889.

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rigorous imprisonment for one month and a half, under section 411, Indian Penal Code, and to undergo six months rigorous imprisonment and to pay a fine of Rs. 100, in default to undergo further rigorous imprisonment for one month a half, under section 414, Indian Penal Code, the sentence of imprisonment for the 2nd charge to commence on the expiry of that for the 1st charge.

The District Magistrate of Poona in making this reference observed:—

"Having regard to the case of Mussed Nowha, Agra High Court Report 9 of 1866, the conviction of the accused No. 2 Uma Khuma Shet Marwadi on the 2nd charge under section 414, Indian Penal Code, *viz.*, assisting in the disposal of stolen property by having sold in Bombay a portion of the articles which he received in person for Rs. 40 from Sakharam appears improper in as-much-as the subsequent disposal of some of the property by the accused No. 2 cannot be treated as a separate offence. In the District Magistrate's opinion the whole transaction constitutes but one offence (section 411 Indian Penal Code)."

ORDER.—The Court reverses the sentence passed on the prisoner Uma under section 414 of the Indian Penal Code and directs that the fine under that sentence, if levied, be returned.

The District Magistrate ought under the Criminal Circulars to have fowarded an abstract of the facts of the case.

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7 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Mallappa. Queen-Empress v. Shidda.*

Evidence Act (I of 1872), Sec. 30—Confession—Co-accused—'Jointly tried'—'Same offence'.

The confession made by one accused can be taken into consideration against the other only when the two are being tried jointly for the same specific offence, that is to say, an offence coming under the same definition of the law.

IN this case Mallapa and Shidda were tried at the same trial on two different charges; Mallappa under section 304, Indian Penal Code, and Shidda under section 325 of the Code. During the trial, the Sessions Judge treated the confession of Mallapa, which implicated Shidda, as corroboration of the retracted confession of Shidda.

PER CURIAM.—I am of opinion that the conviction and sentence of the prisoner Malappa are justified by the evidence and we dismiss his appeal.

The case against boy Shidda depends on his confession, and the statements of witnesses that he was standing not far from the scene of the homicide about the time and of a witness that there was some blood on his clothes. The assessors thought him not guilty of the grievous hurt for which he was tried. The Joint Sessions Judge found him guilty. But in

*Criminal Ruling 9 of 1889. Criminal Appeal No. 261 of 1888.

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coming to this opinion he treated as corroboration of the retracted confession the statements implicating him made in the confession of Mallapa who was tried at the same trial but on a charge of culpable homicide not amounting to murder. Here we think the Joint Sessions Judge was wrong. Section 30 of the Indian Evidence Act is to be construed strictly. The confession made by one accused can be taken into consideration against the other only where they are being tried jointly for "the same offence." These words do not bear the sense of "the same facts." In *Queen-Emp.* v. *Nur Mohamed* (1) it appears to be assumed by the learned Judge that they mean "an offence of the same definition arising out of a single transaction." So in *Badi* v. *Queen-Emp.* (2) they are paraphrased as "the same specific offence."

On considering Shidda's retracted confession along with the other evidence, we have to remark that the boy was not seen by any of the witnesses to beat the deceased and that they say that he did not run away. We do not think it safe to find that he took part in the beating which caused the death; and if he quarrelled and fought the deceased before the fatal assault, we are of opinion that he has been sufficiently punished. We, therefore, acquit Shidda.

We draw the Joint Sessions Judge's attention to section 399 of the Criminal Procedure Code as regards the order to be made when a Court determines to send a convicted and sentenced prisoner to a Reformatory.

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11 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Howana.*

Penal Code (Act XLV of 1860), Sec. 341—Wrongful restraint—Locking a house—

A person cannot be convicted of wrongful restraint, under section 341, Indian Penal Code, where he locks up a house under a *bona fide* claim to the same.

IN this case, the complaintant and his wife were in possession of a certain house, and claimed it under a will of N. The accused claimed the house as being the adopted son of N, and during the absence of the complainant entered the house, ejected the complainant's wife and locked up the premises. He was, thereupon, charged with the offence of wrongful restraint.

ORDER.—It appearing from the judgment that the accused locked the door in persuance of a *bona fide* claim to the property the Court is of opinion that no offence was committed.

The Court, therefore, reverses the conviction and sentence and directs the fine, if paid, to be refunded.

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(1) I. L. R., 8 Bom., 220 at p. 226. (2) I. L. R., 7 Mad., 571.

**Criminal Ruling* 10 *of* 1889. Criminal Application for Revision No. 21 of 1889.

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11 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Lalsing.*

Sessions Judge—Jury—Evidence—Admissibility—Irregularity—High Court.

The question what the Jury are to *receive* is for the Judge; what they are to *believe* is for the Jury.

Where a Sessions Judge allowed certain documents to go upon the record, which were no proved, for the purpose of comparision of handwriting, and left it to the Jury to form their opinion whether the accused wrote the disputed signature, the High Court held that there was no such irregularity as to warrant an interference on its part.

JARDINE, J.—We are of opinion that no sufficient grounds appear for interfering with the conviction and sentence of the prisoner Lalsing and we therefore dismiss his appeal.

As regards the prisoner Gopaldas we were of opinion, on perusal of the record of the trial held by the Sessions Judge, that certain questions of law required consideration, being of general importance, though not raised in the petition of appeal. These questions and the merits have been argued before us by Mr. *Apte* for the Crown: The principal issue at the trial was whether the document Ex. 2 charged as a forgery had been written as it purports by one Kasiram deceased. To ascertain this fact, five documents were produced by the prosecution solely for the purpose of comparison of signatures on them, purporting to be Kasiram's, with that on the document Ex. 2. As regards each of the five documents, a witness deposed that he saw Kasiram make the signature. About one of them, Ex. 19, there was no cross-examination: the two witnesses deposing about the other four were cross-examined.

The prisoners were defended by a pleader. There is nothing in the record to shew that it was admitted by or for the prisoners that these five signatures were made by Kasiram; nor except the numbering of the documents as Exhibits, when produced, that the Sessions Judge first admitted them as proved before he allowed them to go to the Jury as evidence, *i. e.*, for comparison with Ex 2.

I am of opinion that under section 73 of the Indian Evidence Act, the signatures on the five documents ought not to have been compared with Ex. 2, until the Court had formed an opinion that it was proved that those signatures were made by Kasiram. Under the older law, section 48 of Act 2 of 1855, only undisputed signatures might be compared with the disputed one. Section 73 of the present Act, like section 27 of the Common Law Procedure Act, 1854, (*Taylor* on Evidence section 1667 to 1669, 4th Edition) allows proved signatures writings and seals to be used comparision. But they must first be "proved to satisfaction of the Court." Mr. *Apte* argues that in section 73 the word "Court" means Jury; and

*Criminal Appeal No. 267 of 1888.

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that the ordinary rule of the law, *viz.*, that facts on which admissibility of evidence depends are determined by the Judge, not by the Jury, does not apply. The rule is stated in 1 *Phillips* on Evidence Ch. 1 of the Province of the Judge. It is embodied in section 298 of the Criminal Procedure Code, which section, as shewn by the Illustrations, has been based on consideration of the cases of *Bartlett* v. *Smith* (1) and *Boyle* v. *Wiseman* (2). The question what the Jury are to *receive* is for the Judge, as stated by Baron *Alderson* in the last of these cases: what they are to *believe* is for the Jury. *In Company of Carpenters* v. *Hayward* (3) *Buller* J. says "whether there be *any* evidence is a question for the Judge. Whether *sufficient* evidence is for the Jury." There is no question for the Jnry as to the reception of the evidence, for their dnty does not arise until after the evidence has been received. The Jury are not called upon to deliver any opinion during the course of the trial, nor until the verdict. When the case is left to them by the Judge, the whole of the admissible evidence must go to them: *Empress* v. *Ashootosh* (4). Neither the admissibility nor the effect of evidence will be altered by the circumstance that the fact which the Judge has to decide as a condition precedent is the same fact that is to be decided by a Jury on the issue.

It may perhaps be supposed that the Sessions Judge did treat these five signatures as proved. It does not appear that the prisoner's pleader took objection to the recording of any of the five documents: and it is apparent from the charge delivered to the Jury that the Judge left it to them to from their opinion as to whether Kasiram wrote those signatures. On the whole I am unable to say that there has been any irregularity such as would justify the Court in interfering with the verdict, assuming that we have the power.

In *Jaspath Sing* v. *Queen Empress* (5) the learned Judges doubted whether they had the power, as although the Judge had failed in his duty there was evidence of the offence before the Jury. That seems to be the only reported case decided under the Code of 1882. In *Reg.* v. *Amrita*, (6) the learned Judges construing the Code of 1872, section 280, which contained no express authority for remanding for a new trial, held that the High Court could remand for that purpose, and they reversed the conviction. Express authority to order new trial was given by the Amending Act of 1874. But the present Code contains a provision which restricts the interference of the High Court in appeal with the verdicts of Juries. It is section 423 D—" Nothing herein contained shall authorize the Court to alter or reverse the verdict of a Jury, unless it is of opinion that such

(1) 1 M. & W., 483. (2) 11 Exch. 360. (3) 1 Doug., 374. (4) I. L. R., 4 Cal., 483
(5) I. L. R., 14 Cal., 165. (6) 10 Bom. H. C., p. 501.

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verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury of the law as laid down by him." Thus before any verdict can be altered or reversed on appeal, this Court must come to an opinion that the verdict is erroneous, and that error was caused by misdirection or misunderstanding. Mr. *Apte* had argued that this Court has an inherent power to reverse a verdict and order a new trial where the procedure below has been so entirely wrong or so contrary to the principles of justice, that this Court is unable to say whether or not the verdict is a true or false Judgment on the facts.

It is unnecessary to determine this question or the extent of the restriction imposed on the High Court by section 423, clause D, of the Code of Criminal Procedure, as we do not think that there has been anything amounting to a mistrial. In *Reg.* v. *Murphy* (7) the Judicial Committee of the Privy Council considered that the Supreme Court of New South Wales was wrong in granting a new trial as a remedy for the misconduct of a Jury and that the mischief would be greater if uncertainty was introduced respecting the course to be persued in administering the law relating to charges of felony. While however we ought as far as possible to give effect to the desire of the Legislature as regards the finality of the verdict of a Jury, I am sensible of the importance of guarding the channels through which the evidence is submitted to their Judgment, one of which is in my opinion the determination of the Judge whether a document produced merely for purposes of comparison has been proved.

We now dismiss the appeal of Gopaldas.

CANDY, J.—Gopaldas sued Vithal Uka on an account (*khata*) which purported to be in the handwriting of one Kashi and to bear Vithal Uka's mark in the handwriting of one Lalsing. Vithal Uka deceived that he had authorised Kashi to write the body of the account or Lalsing to make his mark for him. Eventually Gopaldas was convicted of abetment of the forgery of the *khata* and of dishonestly using as genuine the said forged *khata*; and Lalsing was convicted of having forged the *khata* in that he had dishonestly made Vithal Uka's mark there on. Gopaldas and Lalsing have appealed to this Court. It appears from the record that after the verdict of guilty had been recorded the Joint Sessions Judge put certain questions to the Jury, from the answers to which it is clear that the Jury found that:—(*a*) the body of the *khata* was not written by Kashi "on a comparison with Exhibit 19 and the other signatures proved to be his." (*b*) Vithal's mark was not made (by Lalsing) at Vithal's request, as Vithal is able to sign his name, and signed all the bonds produced, and Gopal-

(7) L. R., 2 P.C., 535.

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das would certainly have insisted on his signing the *khata* himself, had the transaction been genuine one.

Referring to the proceedings it appears that certain documents (Nos. 11 to 14 and 19) were put in by the prosecution, purporting to be written or signed by Kashi, and thus, it was said, establishing by comparision of handwriting that Kashi did not write the body of the *khata* in question; also certain documents (Nos. 3-8) were put in purporting to be signed by Vithal himself, and thus, it was said, Establishing that Vithal would not have merely put his mark to the *khata* in question.

Also Vithal Uka signed his name on a piece of paper before the Joint Sessions Judge and Jury.

If there is no reason for interfering with the conviction and sentence of Lalsing, then it is clear that the *khata* was forged document, and Gopaldas by his conduct showed that he had abetted the forgery and that he had fraudulently used as genuine the forged document. The dishonest making of Vithal's mark is enough to sustain the conviction of both the accused and the charges framed against them.

It is therefore unnecessary to record any definite opinion on the question, whether the Joint Sessions Judge was right in allowing the Jury to consider whether the documents produced for comparison of handwriting were "proved" or not. If the Joint Sessions Judge was wrong, I doubt whether there was such a misdirection as would permit us to set aside the verdict. If the law provided in unambiguous terms that the question as to whether a document produced for comparison of hand-writing is "proved" should be solely for the Jury, if the Sessions Judge had refused to allow the Jury to consider this question, holding that it was to be determined by himself alone, then the error might have amounted to a misdirection. But the converse does not necessarily hold good. There is nothing on the record in the present case to show that the Joint Sessions Judge held the documents produced for comparison to be not proved. He ascertained by questions the grounds of the verdict, and he expressed no disagreement. He may be therefore taken as holding that the documents produced for comparison were proved.

As to what is exactly the correct procedure under the section 73 of the Evidence Act I agree with the view of Mr. Justice *Jackson* expressed in *Empress* v. *Ashootosh* (8) that in matters expressly provided for in the Act, we must, so to say, start from the Act, and not deal with it was a mere modification of the Law of Evidence prevailing in England.

Now no doubt it is the duty of the Judge to decide upon all matters of act which it may be necessary to prove in order to enable evidence of

(8) I. L. R., 4 Cal., 483.

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particular matter to be given; as if it is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed, it is the duty of the Judge to decide whether original has been lost or destroyed (Criminal Procedure Code, section 298 (*c*), and Illustration (*b*)) and there is nothing in section 65 of the Evidence Act which militates against the provision. But by section 47 of the Evidence Act it is the Court, *viz.*, the tribunal which is to deal with the case, which has to form an opinion as to hand writing, and it may possibly be argued that it is the same Court to the satisfaction of which the document produced for comparison of handwriting must be proved; also that it is the duty of the Judge to determine whether such and such a document is admissible or relevant; and of the Jury to determine whether such a document if admissible is proved. Under the circumstances, above stated, I would confirm the convictions and sentences.

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21 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Ganapabhat.*

Evidence Act (I of 1872), Sec. 30—Confession—Co-accused—Accomplice—Value of Evidence.

The confession of a co-accused cannot, though it may be taken into consideration under section 30 of the Indian Evidence Act, be treated as of the same value as the evidence of an accomplice taken on oath or solemn affirmation, and tested by cross-examination: in such a case the corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness.

PER CURIAM.—We are of opinion that the learned Sessions Judge did not approach the evidence against the prisoner Ganapabhat in the manner required by law. His Judgment in disposing of the appeal shew that he treated the confessions of co-prisoners, which he might take into consideration under the section 30 of the Indian Evidence Act, as if those confessions were equal in value to the testimony of an accomplice examined on oath or solemn affirmation and subject to cross-examination under section 133. Regarding the confessions, the Sessions Judge observes, "such confessions are legally admissible against Ganapabhat, and there are no legal difficulties against being convicted on them alone." His later observations indicate that he treated the confessions as if they were testimony.

The difference between the confession and the testimony of an accomplice has been pointed out in *Queen-Empress* v. *Dosa Jiva*(1) and in other decisions of this Court, as well as in *The Empress* v. *Ashootosh Chukerbutty* (2) and cases collected under section 30 of the Evidence Act by Mr. *Field*.

**Criminal Ruling* 11 *of* 1889. Criminal Application for Revision No. 15 of 1889.

(1) I. L. R., 10 Bom., 231. (2) I. L. R., 4 Cal., 483.

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On referring to the Judgment of the Magistrate who tried the case, we find that he took the same erroneous view of the value of the confessions of the other prisoners, in estimating the evidence of Ganapabhat, as was taken by the Sessions Judge who tried the appeal.

The error must in our opinion have prejudiced Ganapabhat, as where the accomplice is a co-prisoner, the evidence corroborating what he says against the other prisoner ought to be more cogent and more strictly examined by the Court than when the accomplice gives his testimony as a witness.

In appeal 190 of 1888, we held that the words relating to trial in section 423 of the Code of Criminal Procedure are used in a sense wide enough to include the trial of appeals. We think there is some evidence against Ganapabhat and that the proper tribunal to weigh it is the Sessions Judge as a Court of appeal; and that in the present case it is convenient that we should leave the Judgment on the facts to his Court. The pleader for the prisoner taking no objection to the course proposed, we reverse the order of the Sessions Judge as regards Ganapabhat and direct that he re-hear the appeal of Ganapabhat: and in accordance with the directions in this Judgment he should allow the prisoner such opportunity as the law affords of removing any prejudice which may have been caused by the error of the Magistrate.

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14 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Nahna.*

Criminal Procedure Code (Act X of 1882), Sec. 439—High Court—Revision—Fresh evidence—Enhancement.

Evidence of previous convictions discovered after the trial does not justify the High Court in enhancing a sentence in the exercise of its revisional powers.

THE accused was charged under sections 454 and 380, Indian Penal Code, with having committed house-breaking with intention to commit theft and also committed theft of 8 shers of *bajri* in a dwelling house; and was sentenced under section 454, Indian Penal Code, to undergo rigorous imprisonment for three months and under section 380, Indian Penal Code, to four months rigorous imprisonment, the second sentence to effect immediately after the expiration of the first sentence.

After the trial, it having been discovered that the accused had been previously convicted, the District Magistrate of Panch Mahals made this reference to the High Court observing.—

"The Superintendent of the Ahmedabad Jail on the 26th January 1889, brought to the notice of the trying Magistrate the previous convictions of the prisoners and enquired whether in the Magistrate's opinion he (the

*Criminal Ruling 12 of 1889. Criminal Reference No. 26 of 1889.

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prisoner) should not be classed as an habitual offender. The Magistrate referred the matter to the District Magistrate stating that the previous convictions against the prisoner are two in number and had they during the trial been brought to his knowledge a severe sentence would have been passed on the accused. But upto the time of passing sentence he received no intimation regarding them...Under the above circumstance the District Magistrate considers that the sentence passed in the case under reference are insufficient and should be enhanced."

ORDER.—After inquiry we have found no instance in which this Court has enhanced a sentence on the ground that evidence of previous convictions exists which might have been brought forward at the trial, by the exercise of due diligence. We therefore decline to interfere.

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14 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Chimaba.*

Criminal Procedure Code (Act X of 1882), Secs. 369, 439—High Court—Revision—Review—Fresh evidence.

The High Court cannot review an order made in the exercise of its revisional jurisdiction; and it would not do so on the ground of discovery of fresh evidence, since the Police ought to have produced the evidence of previous convictions at the trial.

IN this, the District Magistrate, made a reference to the High Court in a case, in which a punishment of three months' rigorous imprisonment and a fine of Rs. 50 was awarded by a Second Class Magistrate in contravention of section 33 of the Code of Criminal Procedure. The High Court reduced the sentence. It was subsequently discovered that the accused was thrice previously convicted. The District Magistrate, thereupon, again referred the case to the High Court, this time for an enhancement of sentence.

ORDER.—We are not aware of any precedent for reviewing a revision order, and, decides that this cannot be done, *a fortiori* when the reason for applying is fresh evidence. It was competent for the police to produce evidence of the previous convictions at the trial.

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14 March 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Shivapa.*

Railways Act, (IV of 1879), Secs. 45, 46—Placing obstruction on the rails—Unlawful Act—Rashness—Negligence.

The accused was charged under section 46 of the Railways Act, 1879, with pulling up an iron mile-post and placing it across the rails It was done in the dusk of the evening and the mail train might have been derailed. The District Magistrate was of opinion that section 45 of the Act applied and referred the case to the High Court :—

**Criminal Ruling* 13 *of* 1889. Criminal Reference No. 25 of 1889. (1) I. L. R., 10 Bom., 176.

**Criminal Ruling* 14 *of* 1889. Criminal Reference No. 3 of 1889.

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Held, that the trying Magistrate did not give sufficient consideration to the principle that, when an act unlawful in itself is wilfully done, rashness cannot be usually predicated; and that, therefore the accused should be committed to the Court of Sessions on a charge under section 45 of the Act.

In this case the District Magistrate of Bijapur in making the reference to the High Court stated: "the act with which the accused are charged, is that of pulling up an iron mile post and placing it across the rails of the East Deccan line. The act appears to have been committed in the dusk of evening. The evidence shows that had not the post been discovered a train might have been derailed, *i. e.*, the safety of persons travelling on the railway was endangered.

I am unable to see that the act of the accused was properly classed by the Magistrate as '*rash* or *negligent*.' The act appears to me to have been wilful, and people of the age of the accused must be held to have known its probable consequences.

I therefore think that the act of the accused constituted an offence under section 45 of Act IV of 1879, not triable by the Court of Sessions.

Supposing however that the Hign Court take the view that the accused were properly charged under section 46 of the Act referred to, I beg to call attention to the impropriety of the sentence passed on each of the accused. The offence was one for which the full penalty allowed by law should have been awarded to accused No. 3, aged 20 years.

The Magistrate passed sentences of 4 months imprisonment each on the accused Nos. 1, 2, boys of 14.

It appears to me that the sentence in each case be altered to one of whipping. The Magistrate explains that he considered himself bound by section 44 of the Act to pass sentence of imprisonment, the boys being over 12 years of age.

I do not think that section 44 affects the discretion of the Magistrate in administering the law, as laid down in the Whipping Act, to minors over 12 years of age."

Per Curiam.—Without expressing any opinion on the facts of the case, we think the trying Magistrate did not give sufficient consideration to the principle that when an act unlawful in itself is wilfully done, rashness cannot usually be predicated: see *Queen-Empress* v. *Damodaram* (1) and *Mayne's* commentory to section 304, Indian Penal Code. We now reverse the conviction and sentence and direct the Magistrate to commit the accused to the Court of Sessions on a charge under section 45 of Act IV of 1879, such an offence being beyond the Jurisdiction of the Magistrate.

(1) I. L. R., 12 Mad., 26.

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21 March 1889. SCOTT & JARDINE, JJ.

In re **Dand Hussan.***

Criminal Procedure Code (Act X of 1882), Sec. —District Magistrate—Transfer of case—Notice.

It is not competent to a District Magistrate to transfer a case from one Magistrate to another without giving notice to the parties.

IN this case the complainant Jagannath charged the petitioners with house-breaking by night before the Second Class Magistrate at Bandora. On the 13th February 1889, the Magistrate heard the complaint and examined several of the witness cited by the complainant, and further hearing was then postponed to the 19th *idem*. On the 14th, the complainant, however, applied to the District Magistrate of Thana for a transfer of the case from the Magistrate at Bandora to some other Magistrate and the District Magistrate directed the transfer to the First Class Magistrate, Thana, without giving notice to the accused to show cause why such transfer should not be made, upon the ground that the Magistrate at Bandora was not acquainted with English and that both the professional gentlemen appearing for the parties respectively did not know the vernacular.

The accused, thereupon, applied to the High Court.

ORDER.—The Court cancels the order for transfer made by the District Magistrate of Thana on the 14th February 1889 in the case Jagannath *v.* Dand Hussan and remands the said case to the original Court of hearing.

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4 April 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Vithu.*

Criminal Procedure Code (Act X of 1882). Sec. 138—Magistrate—Jury.

Under section 138 of the Code of Criminal Procedure, the Magistrate must himself nominate the Jury; he cannot delegate this duty to another Magistrate.

JUDGMENT.—The original appointment of the Jury was bad, as section 138 of the Code of Criminal Procedure requires that the Magistrate himself shall nominate and he had no authority to delegate this duty to another. This objection appears however not to have been taken by the party. As one of the Jurors nominated failed to act, it may be that the Magistrate had jurisdiction to pass the order he did under section 141. But in passing any order under that section he was bound to act on considerations of justice and equity: *Reg.* v. *Dalsukhram* (1) and under the circumstances he ought to have appointed a new Jury. The Court now sets aside his order and directs him to do so.

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*Criminal Application for Revision No. 44 of 1889.

**Criminal Ruling* 17 *of* 1889. Criminal Reference No. 36 of 1889. (1) 2 Bom. H. C. R. 364

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11 April 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Lilladhur.*

Criminal Procedure Code (Act X of 1882), Secs. 248, 337—Theft—Co-accused—Pardon—Magistrate.

A Magistrate having issued a warrant against one Manek Bai on a complaint of theft, on her appearance before him allowed the complaint to be withdrawn and made her a witness against Lilladhur, a co-accused in the same case :—

Held, that the offence not being one in which a pardon could be tendered under section 337 of the Code of Criminal Procedure, or in which the Magistrate could permit the withdrawal of the complaint under section 248 of the Code, her evidence was not legally admissible.

PER CURIAM.—In this case the Magistrate had issued a warrant to arrest Manik Bai on a complaint of theft. When she appeared he allowed the complaint to be withdrawn and made her a witness. It appears to the Court that Manekbai's evidence is not admissible. The Magistrate had no power under section 345 of the Criminal Procedure Code to permit the case against her to be compounded. The offence was not one regarding which a Magistrate can offer a pardon under section 337, or in which a Magistrate can permit a withdrawal of a complaint under section 248, the complaint in the present case being of a warrant case, not a summons case. If the evidence against Manik was in the Magistrate's opinion insufficient, he might have discharged her under section 253, after following the procedure of Chapter XXI. That Chapter gives no authority to allow warrant cases to be withdrawn. The reasoning in *Reg.* v. *Hunmant* (1) as to the inadmissibility of the evidence of an accused person not legally pardoned appears to apply to that of a person against whom a charge has been made which has been withdrawn except in accordance with law. The provisions of the Code of Criminal Procedure are, as pointed out in that case, clear and distinct: see too *Emp.* v. *Aschar* (2). We think, however, that the conviction may be sustained on the other evidence exclusive of that of Manik Bai and we, therefore dismiss the appeal and confirm the conviction and sentence.

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11 April 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Karim.*

Criminal Procedure Code (Act X of 1882), Sec. 439—High Court—Revision—Fresh evidence—Enhancement.

Evidence of previous convictions discovered after the trial does not justify the High Court in enhancing a sentence in the exercise of its revisional powers.

ORDER.—The Court does not think that it ought to interfere by issuing notice of enhancement. The omission to produce evidence of the previous convictions at the trial is not a reason for this Court interfering with the

*Criminal Ruling 18 of 1889. Criminal Appeal No. 16 of 1889. (1) I. L. R. 1 Bom., 618. (2) I. L. R., 2 All., 260. *Criminal Ruling 19 of 1889. Criminal Reference No. 36 1889.

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result. It is the duty of the prosecution as well as the Magistrate to ascertain and take notice of any circumstance showing that the accused is an habitual offender who ought under section 348, Criminal Procedure Code, to be committed to the Court of Session. The District Magistrate's statement ought to have contained the particulars required at p. 48 of the Circular Order Book.

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24 April 1889. SCOTT & JARDINE, JJ.

In re **Motilal.***

Criminal Procedure Code (Act X of 1882), Secs. 106, 126—Magistrate—Jurisdiction—Civil Court.

Where a competent Civil Court has decided as to the rights of the parties to the property in dispute, a Magistrate ought not to proceed under section 147, but under Chapter VIII of the Code of Criminal Procedure.

**Criminal Ruling 20 of 1889. Criminal Application for Revision No. 60 of 1889.*

IN this case a dispute having arisen between two co-sharers of a forest the manager of the firm of Ismalji Jalabhai brought a suit against the petitioner in the Court of the First Class Subordinate Judge of Ahmedabad, who held that the petitioner Motilal had a share in the forest, and that he as well as the plaintiff had a right to cut all the wood in the forest, and that neither party was entitled to exclude the other from the forest. Subsequently to this decree one of the plaintiffs represented to the First Class Magistrate of Panchmahals that as Motilal had sent workmen to the forest and they were cutting the same and he had also sent workmen to do a similar work there was likelihood of a breach of the peace taking place and asked the Magistrate to take such measures as would prevent the breach of the peace. The Magistrate, thereupon, made an order under section 147 of the Code of Criminal Procedure directing that neither of the parties should cut or cause to be cut or remove or cause to be removed the wood from the said jungle.

The applicant, thereupon, applied to the High Court.

ORDER.—Following *Sandaram Chetti* v. *The Queen* (1) and *Gobind Chunder* v. *Abdool Sayad* (2) we hold that as a competent Civil Court has given a decision on the rights of the parties the Magistrate ought not to have proceeded under section 147 but under the provisions of Chapter VIII of the Code. We, therefore, reverse the order.

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24 April 1889. SCOTT & JARDINE, JJ.

Moro Krishana v. Yeshwantrao.*

Criminal Procedure Code (Act X of 1882), Secs. 248, 250—Withdrawal of Complaint—Acquittal—Compensation.

**Criminal Ruling 21 of 1889. Criminal Application for Revision No. 12 of 1889.*

(1) I. L. R., 6 Mad., 203, p. 220. (2) I. L. R., 6 Cal., 835, p. 841.

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As section 250 of the Code of Criminal Procedure applies only to acquittals under section 245 or section 247 of the Code, compensation cannot be awarded to an accused person acquitted under section 248 upon a withdrawal of the complaint.

PER CURIAM.—The complainant was allowed to withdraw under section 248 Criminal Procedure Code and ordered to pay Rs. 50 to each of the six accused as compensation under section 250. But section 250 only applies to acquittals under section 245 or 247. This withdrawal being under section 248 is not an acquittal in the sense required by section 250: see also note to section 250 in *Prinsep's* Edition of the Criminal Procedure Code, and the case there cited. The order for compensation must be set aside and the money paid as such compensation to be refunded to the complainant.

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25 April 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Sangappa.*

Confession admissibility of—Value—Corroboration.

When a confession has been made in the manner required by law as a condition of admissibility, and when there is no suspicion of cruelty or improper inducement, and it is amply sufficient to prove the guilt of the accused, it may be accepted as conclusive in itself without material corroboration.

PER CURIAM.—This case depends almost entirely on the confessions of the accused. The other evidence either as in the case of all witnesses save Ramapa does not touch the question of the prisoner's guilt or in Ramapa's case contradicts the confession by throwing the whole crime upon the accused alone. We do not think, under the circumstances of the case, much value should be attached to Ramapa's evidence. It lies too much under the suspicion of having been given not to assist justice but to exculpate Ramapa himself. We must then consider the confession. It was made first before a 3rd class Magistrate and again before the Committing Magistrate after four days' interval. It was made in the manner required by the law as a condition of admissibility. The two statements agree in all material points. There is no inherent improbability in them. The prisoner inculpates Ramapa as well as himself but as regards himself he gives quite a possible story which establishes his own guilt. But at the trial he repudiates this confession, not however on the ground that it was extracted by cruelty or oppression but on the ground that he never made it at all. Now as it is absolutely certain he made it, we are bound to consider it. The question is, can we consider it as absolutely conclusive evidence. How far do the facts corroborate it? He says he and Ramapa went to violate the girl and as she opposed him and his comrade, they killed her. There was none of the usual evidence

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***Criminal Ruling 2 of 1889. Criminal Appeals Nos. 11 and 19 of 1889.**

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of an attempt at rape on a girl of 12, but he says she resisted and screamed and so they killed her quite possibly before anything was done that would leave traces. Ornaments had disappeared from the girl and he does not account for the disappearance. Then he describes in a manner corroborated by the fact of the case the strangling with the girl's own whip. Then comes the independent fact that he was in the next field at the time the girl went to her mother's field and was there when the mother came to look for her. As to the motive it may have been robbery of ornaments which have disappeared or he may have gone for purposes of lust and been driven to kill the girl on account of her screaming. Such are the facts of the case. Cases were cited to the effect that a confession is not sufficient to justify conviction without material corroboration. That is going somewhat beyond the strict law. In India no doubt confessions must be very rigorously scrutinised and corroboration sought, but when they have been properly taken and there is no suspicion of cruelty or improper inducement and they are amply sufficient to prove the guilt of the accused, they may be accepted as conclusive in themselves (see cases collected in *Prinsep's* Criminal Procedure Code notes to section 287) as Mr. *Taylor* in his work on Evidence (paragraph 791) says "deliberate and voluntary confessions of guilt if clearly proved are among the most effectual proofs in the law." The confession in this case was deliberately made. It was voluntary. The prisoner does not even allege that it was extorted from him. It is clearly proved. It was made before two Magistrates in succession, a fact which almost excludes the possibility of oppression or improper inducement. Its details are corroborated substantially by the facts of the case save that the prisoner tried to implicate Ramapa as an accomplice. We are of opinion that the Judge took the right view of the case and we confirm the conviction and sentence.

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11 June 1889. SARGENT, C. J., & CANDY, JJ.

Queen-Empress v. Bhagwan.*

Criminal Procedure Code (Act X of 1882), Sec. 419—Appeal—Presentation—Post.

An appeal transmitted through post cannot be considered as an appeal duly presented within the meaning of the Code of Criminal Procedure.

PER CURIAM.—It is clear that this appeal was not "presented" according to law (section 419 Criminal Procedure Code). It may be the "custom" in the Ahmedabad District to treat appeals received from a Mukhtiar through the post as "presented" but that is not the law. The petition must be "presented by the appellant or his pleader." If appellant is in Jail, it may be presented through the Jail authorities. Here the

*Criminal Appeal No. 61 of 1889.

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appellant was in Jail. As he did not petition through the Jail authorities, his petition should have been presented by his pleader. Still as the District Magistrate proceeded to deal with the petition as if duly presented, he should have given appellant opportunity to be heard. We, therefore, cancel the District Magistrate's order of dismissal and direct him to proceed according to law.

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12 June 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Nandu.*

Penal Code (Act XLV of 1860), Sec. 426—Mischief—Bona fide dispute.

Where the accused put up a hut on a piece of land, to protect the right they believe themselves to possess, they cannot be punished of an offence under section 426, Indian Penal Code.

PER CURIAM.—In this case the Magistrate has not found as a fact the existence of the intent required to bring the accused within section 426. On the facts of the case, as stated in his own judgment, there was a dispute as regards the ownership of the land on which the hut was placed. There is nothing to show the dispute was *bona fide* and after the dispute had continued sometime, the hut was erected. The accused committed the act complained of in order to protect the right they believed themselves to possess. This would not bring them within the meaning of section 426 but would only expose them to a civil suit. The law on the point is fully set out in the judgment of the CALCUTTA HIGH COURT in *Ganouri Lal Das* v. *Q. E.* (1). We have not to consider whether the accused used undue force or violence as the Magistrate acquitted them of the assault charged. We reverse the convictions and sentences and order the fines to be restored.

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13 June 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Satwa.†

Abkari Act (Bom. Act V of 1878), Sec. 43 (b)—Ganja—Removal from one field to an adjoining field.

The accused removed some *ganja* grown in one of his survey numbers to a threshing floor in his adjoining survey number for the purpose of preparing it, the two survey numbers being practically one field:—

Held, that the act of the accused was not a removal from one place to another punishable under section 43 (*b*) of the Bombay Abkari Act.

THE accused removed, without a license, three bales of Ganja (the produce of his field, Survey No. 76) valued at about Rs. 35-8-0 and stored it with the produce of his another adjoining land, Survey No. 75. On being tried, he was convicted of an offence under section 43 (b) of the Bombay Abkari Act (V of 1878) and sentenced on 2nd February 1889 by the 2nd Class

*Criminal Application for Revision No. 68 of 1889. (1) I. L. R., 16 Cal., at pp. 216-221.

†*Criminal Ruling* 23 *of* 1889. Criminal Reference No. 63 of 1889.

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Magistrate of Khed to pay a fine of Rs. 30 and in default to undergo simple imprisonment for one month.

The District Magistrate of Poona, in referring this case for the orders of the High Court, stated:—

"The accused has also been convicted under section 47 of the Abkari Act but as this reference does not affect that conviction, the sentence awarded has not been specified in the foregoing nor is the abstract of criminating circumstances given.

In this case the accused Satwa had grown Ganja in adjoining survey Nos. 75 and 76; his threshing floor for preparing it was in the corner of one field. He removed the crops from No. 76 and placed it with that from No. 75 in the corner of survey No. 75. Practically, although divided for convenience of Revenue Administration, it was all one field and property. The removal was not, therefore, legally speaking, from one place to another and no offence was committed under section 43 (b) of the Abkari Act."

ORDER.—For reasons given by the District Magistrate the Court reverses the conviction and sentence passed under section 43 (*b*) and directs the fines, if paid, to be refunded.

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13 June 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Rama.*

Criminal Procedure Code (Act X of 1882), Sec. 537—Judge—Jury—Charge—Misdirection—Accomplice, evidence of—Corroboration.

The omission by a Judge to direct the Jury in his charge that, although a conviction upon the uncorroborated evidence of an accomplice is valid in law, it is dangerous to convict a prisoner on such evidence alone, and that they must look for corroboration of it in material particulars from independent sources in the case, is an error of law, which, if it materially prejudiced the prisoner, justifies the High Court in setting aside the verdict.

PER CURIAM.—We think the Judge was in error in not telling the Jury in his summing up that although a conviction upon the uncorroborated evidence of an accomplice is valid in law, it is dangerous to convict a prisoner on such evidence alone and that they must look for corroboration of it in material particulars from independent sources in the case. We are of opinion that the omission of such a direction in his charge was an error in law which in this case materially prejudiced the prisoner, as the corroboration of the accomplice Akha's evidence is of the slightest description, there being no proof whatever of his having administered, or even of his having been in possession of poison, whilst Akha herself is specially untrustworthy on account of her contradictory statements. We, therefore, reverse the conviction and sentence of Rama. The evidence against him in the case is not in our opinion such as to justify another trial and Rama must, therefore, be set at liberty.

**Criminal Ruling 24 of 1889. Criminal Appeal No 58 of 1889.*

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13 June 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Govind Ramappa.*

Penal Code (Act XLV of 1860), Sec. 467—Forgery—Valuable security—Sale deed unregistered.

A sale-deed, the registration of which is compulsory under section 17 of the Registration Act and which under section 49 of the same Act could not affect the immovable property to which it referred without such registration, is a valuable security within the meaning of section 30 of the Indian Penal Code, since it, being in other respects complete as a conveyance of land, is, apart from the want of registration, a document purporting to be a valuable security.

Any forgery of such a deed, therefore, falls within the purview of section 467 of the Indian Penal Code.

PER CURIAM.—The accused in this case has been convicted under section 467, Penal Code, of forging a document which purported to be a valuable security. A "valuable security" is defined by section 30, Penal Code, to be a document which is or purports to be "a document whereby any legal right is created, transferred" &c. The document in question in the case is a forged conveyance of land. The forgery is admitted. But it is argued that the document is not a "valuable security" because it is not registered, and that the conviction is wrong so far as it was a conviction for forgery of a valuable security and not for simple forgery. The question before us is whether a document in every other sense complete as a conveyance of land is not a valuable security because it has not been registered. It was argued that it was a document, the registration of which was compulsory under section 17 of the Registration Act and which under section 49 of the same Act could not affect the immoveable property to which it referred without such registration. We were, therefore, asked to come to the conclusion that it could not be held to be a "valuable security" under section 30 of the Indian Penal Code. It must be remembered the section is satisfied if the document "purports to be" a valuable security. No case was cited to us exactly in point and we have not been able to find precedent completely on all fours. But an analogy is to be found in decisions on the forgery of negotiable instruments which were not available for the want of a stamp.

The MADRAS HIGH COURT has held that the fact that a document has not been stamped and is not therefore receivable in evidence and cannot be admitted as available in any Court does not prevent its being a "valuable security" within the meaning of section 30 (7 Mad. H. C. R., app. 26). The Judges there relied on the words "*purports to be*" in the Indian Act as obliging them to follow the English law on the subject, and to hold the document to be a "valuable security" within the meaning of the Penal Code. The English law holds that it is not necessary that the document which is forged should be perfectly valid for the purpose for which it was

*Criminal Ruling 2: of 1889, Criminal Appeal No 53 of 1889.

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intended, as long as it purports to be on the face of it the document in question. See *Russel* on Crimes 757; 2 East P. C. 955-979; 1 Leach 257-258.

In the case of *Hawnes Wood* (1 Leach 257) which occurred before the affixing of the stamp to a bill of exchange after the making was prohibited, the Judges also relied on the point that the holder of a bill was authorized to get it stamped after it was made. In the present case the holder of the deed of sale could similarly as a matter of right get it registered subsequently. We hold that although it was not a complete deed within section 49 of the Registration Act, still it purported to be such and that is sufficient to satisfy section 30 of the Penal Code.

In the present case the intention of the accused to forge a valuable document was quite clear. He not only forged a document purporting to convey a legal right to land, but he also obtained the entry on the face of the document of usual certificates of registration and the forgery was not detected until after that certificate had been impressed on the document. Under these circumstances we think the Judge was right in holding the accused guilty of the higher offence. But we do not concur with him in the sentence he thought necessary to pronounce on account of the frequency of this particular crime in his district. It is the highest sentence applicable to any offence short of murder. There is nothing against the present offenders before this case, and we think their offence will be sufficiently punished and their district sufficiently protected by a sentence of seven years' rigorous imprisonment.

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17 June 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Nana Raju.*

Criminal Procedure Code (Act X of 1882), Secs. 164, 288—Magistrate—Police officer—Witness—Penal Code (Act XLV of 1880), Sec. 193—False evidence—Judicial proceeding.

There is no provision of law which empowers a Police officer to require a witness to go before a Magistrate, not having jurisdiction over the offence, to have his statement taken under section 164, Criminal Procedure Code. Such a statement cannot be used as evidence at the trial nor, if false, be treated as false evidence in a judicial proceeding.

JUDGMENT.—The prisoner Mathu has never confessed to complicity in the murder. It now appears that he denied any connection with it when questioned by the Third Class Magistrate at Yeola on the 31st December. On the 8th January he stated before the committing Magistrate that he was present when the other two prisoners assailed the deceased Pema. It is proved and admitted that he was then in company with his master Pema for the purpose of looking at the crops in Pema's field. So his presence there was on a lawful and reasonable occasion: *Reg.* v. *Farler* (1). Accordingly the rule in *Reg.* v. *Clewes* (2) be applied. "If it is meant to be

*Criminal Ruling 26 of 1889. Confirmation case No. 2 of 1889, Criminal appeal No. 20 of 1889.

(1) 8 C. & P. 603. (2) 4 C. & P. 221.

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charged that the prisoners did not do more than is stated in the confession there ought to be some evidence to shew that." The only evidence of Mathu taking part in the murder consists of statements since retracted by the other two prisoners. These statements may be taken into consideration under section 30 of the Indian Evidence Act. But they are not entitled to as much consideration as the testimony of an accomplice witness. examined on oath and subject to cross-examination: *Queen Emp.* v. *Dosa* (3) and see *Field* on Evidence p. 146. In the absence of independent and trustworthy corroboration it would be highly unsafe to find Mathu guilty of the murder, as has been candidly admitted by Mr. *Shantaram* who appears for the Crown. We, therefore, reverse the conviction and sentence passed on Mathu.

The learned Sessions Judge bases the convictions of the prisoners Nana and Rabha chiefly on the confession made by them on the 31st December to the Third Class Magistrate and the Head clerk to the Mamlatdar of Yeola, which they confirmed on the 5th January, when these confessions were read over to them by the committing Magistrate. This Court directed further inquiry with the allegations of illtreatment made by these prisoners and three of the witnesses for the prosecution. The Sessions Judge has made a full investigation into these matters. We do not think the three witnesses are to be believed as to the alleged beating of the prisoners at Murkhed. The witnesses also vary in their statements as to the tutoring and illtreatment which they say the Police applied to themselves. The evidence of the Third Class Magistrate, who recorded the confessions of these two prisoners and the statements of three witnesses at Yeola on the 31st December, leads distinctly to the inference that the prisoners and witnesses made their statements voluntarily.

For these reasons, applying the strict rules of law, we confirm the convictions passed on the prisoners Nana and Rabha. But under all the circumstances of the case, and especially those we mention in this Judgment, we decline to confirm the sentences of death but commute them to transportation for life.

The evidence discloses a practice of the Police to require witnesses to proceed before Magistrates not having Jurisdiction over the offence. Section 164 of the Criminal Procedure Code empowers such Magistrates to take their statements but we are not aware of any provision of law which empowers a Police officer to require the witnesses to go before such a Magistrate. This procedure is not contemplated by section 160 or 161. The intention of the Criminal Procedure Code is to secure the early attendance of the accused and the witnesses before the Magistrate who has jurisdiction

(3) I. L. R., 10 Bom., 231.

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to inquire, as shewn by section 170. Even as regards accused persons willing to confess the attention of the Magistrate should be drawn to *Reg* v. *Vahala* (4). Again, the statements made by witnesses to Magistrates, not empowered to commit, cannot be used as evidence under section 288: nor if false be treated as false evidence in a judicial proceeding: *Queen Empress* v. *Bharma* (5). In the presnt case these remarks apply to the statements of the three witnesses who seem to have deposed to the Third Class Magistrate on the 31st December that they were eye-witnesses of the murder and who deposed to the committing Magistrate that they knew nothing about it. The Sessions Judge should report, after making a reference to the District Magistrate, on the authority for the practice which was followed in this case.

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24 June 1889. SARGENT, C. J., & CANDY, J.

Queen-Empress v. Raghunath.*

Penal Code (Act XLV of 1860), Sec. 420—Cheating—Attempt—Preparation.

The forwarding of fictitious consignment notes can only be regarded as preparatory to the offence of cheating, as it was not done in the attempt to cheat.

THE facts of this case will appear from the following extract from the Judgment of the Magistrate:—

"Rughonath Pandoorang, from the evidence, joined his appointment of Assistant Station Master at Tinai Ghat on the 10th July 1888, and only four days afterwards on the 14th July 1888 this audacious fraud was planned and perpetrated.

The chain of evidence against the accused No. 1 is complete and conclusive. The Goods Train on the night of the 14th July 1888 was two hours late at Tinai Ghat station. It was raining hard that night. The Chief Guard was hurridly and hastily leaving the Station Master's office to give the signal for restarting the Goods Train when at the door of the office the accused puts a letter into his hand and persuades him to sign his initials in pencil only in the Receipt Book against the words "one only." The descriptive column was blank with no entry in it at that time as the evidence shows. The Assistant Station Master plausibly explains "Go on. The Train is late. It is only a letter. I will fill that in, in the office at once." Or words to that effect.

The accused, after the Train was gone, filled in "Three Bales Silk" in the Descrptive column. He then finds that the "One only" cannot readily be changed into "Three only" he therefore changes three Bales silk into "four Bales silk" and changes the "One only" into "four only." All this cooking of words and figures is plainly discernible in the Guards Receipt

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(4) 7 Bom. H. C., 56. (5) I. L. R., 11 Bom., 2.

*Criminal Application for Revision No. 76 of 1889.

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Book before the Court. This Book was in the Station Master's office and in charge that night exclusively of the Assistant Station Master who therefore alone could have made these entries and is alone responsible for them.

The orders of the company distinctly forbid that any Goods shall be accepted after 5. P. M. at the Railway station. But these alleged four bales silk were distinctly accepted by accused who was the Assistant Station Master at about 8 or 8-30 P. M. entirely on his own responsibility without any reference whatever to the Station Master who was actually in his private qnarters on the station premises at the time and could have been communicated within two minutes.

In fact it clearly appears from the whole evidence that these alleged Four Bales silk never had any existence."

The Magistrate convicted him of an offence under section 418, Indian Penal Code.

On appeal, however, the Session Judge of Belgaum, remarked:—

" In this case the appellant was convicted by the Magistrate under section 418, Indian Penal Code, on a charge of cheating. The charge does not set forth as it ought to have done, how the offence of cheating was committed; and as a matter of fact, assuming that the evidence for the prosecution is substantially true, there is nothing to show that the offence of cheating, as defined in section 415, Indian Penal Code, was committed by the accused. All that the evidence shows is that he attempted to defraud the Railway Company but the ingredients necessary to constitute the complete offence of cheating are absent. He should therefore have been charged and convicted under sections 318 and 511 of an attempt to cheat."

PER CURIAM.—We think that the forwarding by the accused of the fictitious consignment notes can only be regarded as preparatory to the offence of cheating. It was not done in the attempt to cheat. This distinction is well pointed out in *Queen* v. *Dayal Bawri* (1) and *Empress* v. *Riasat Ali* (2). But we are of opinion that the evidence is sufficient to convict the accused of abetment, as was held in *Reg.* v. *Padala* (3) and therefore do not think it necessary to interfere with the conviction except by reducing the sentence to nine months' rigorous imprisonment.

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27 June 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Ramjan.*

Cantonement Rules—Rule 17—Butcher—Slaughter house—Diseased cattle.

The accused, butchers, took diseased cattle to a public slaughter-house for getting them passed by the Inspector in charge as fit for food and for slaughtering them if passed :—

Held, that these acts did not render the accused liable to punishment under Rule 34, Chap.

(1) 3 Beng. L. R., 55. (2) I. L. R., 7 Cal., 352. (3) I. L. R., 3 Mad. 4.

**Criminal Ruling 26 of 1889. Criminal Reference No. 71 of 1889.*

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III of the Cantonement Rules, as that rule applied only to owners or occupants of places used as slaughter-houses, who have killed a diseased animal therein, or have failed to report to the Cantonement Magistrate that such an animal had been taken thither for being killed.

THE accused Ramjan and Ganu were tried and convicted of taking diseased animals to be slaughtered at the cantonement committee's slaughter yard and were fined under Rule 34, Chapter III of the Rules, passed under Bombay Act III of 1867.

The District Magistrate of Poona being of opinion that the convictions and sentences were illegal, made this reference to the High Court, observing :—

"In the opinion of the District Magistrate the decisions of the Second Class Honorary Magistrate are clearly wrong inasumch as Rule 34 Chapter III of the Cantonement Rules under which they are recorded have no bearing on the case. That Rule renders liable to punishment owners or occupants of places used as slaughter houses for killing a diseased animal therein or failing to report to the Cantonement Magistrate that such an animal had been taken thither for being killed. But the accused are neither the owners nor occupants but butchers who took animals to a public slaughter-house for the purpose of being passed by the Inspector in charge and to slaughter them if passed. The convictions and sentences must for the reasons above specified be reversed."

ORDER.—For the reasons given by the District Magistrate the Court reverses the convictions and sentences and directs the fine, if paid, be refunded.

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27 June 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Shesha.*

Criminal Procedure Code (Act X of 1882), Secs. 346, 350—Magistrate—Commitment—Trial.

A Magistrate, to whom a case has been submitted under section 346 of the Code of Criminal Procedure, can commit for trial without taking the evidence afresh. He is competent to base his determination to commit or not on the evidence already recorded and the report sent with it.

PER CURIAM.—The Court is of opinion that the commitment should not be quashed. The Sub-Divisional Magistrate was empowered under section 346 of the Criminal Procedure Code to commit for trial and this he has done. He was not required by that section or any other provision of law to take the evidence afresh before making the commitment. The law allows of exceptions to the principle that the presiding officer of the Court which determines a case shall have heard the evidence. Section 350 of the Criminal Procedure Code is an exception in point. But the proviso of section 350 which gives relief where the exception might cause or has caused prejudice is stated to be inapplicable to cases under section 346. The in-

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**Criminal Ruling* 29 *of* 1889. Criminal Reference No. 73 of 1889.

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ference is that the law assumes that in determining whether or not to commit for trial the Magistrate to whom the case is submitted is competent to base his determination on the evidence already recorded and the report sent with it. In the somewhat analogous cases *Imperatrix* v. *Abdulla* (1), *In re Chinnimarigadu* (2) and *Q. E.* v. *Chandu* (3) the present objection to the order of commitment does not appear to have been raised. The Sessions Judge should proceed to dispose of the case.

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27 June 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Husein.*

District Magistrate—Sessions Judge—Sanction—High Court—Revision.

When a District Magistrate, being of opinion that the Sessions Judge gave sanction for prosecution on a mistaken view of evidence, referred the case to the High Court, the High Court declined to interfere on the ground that questions of fact must be dealt with by the Court which might try the case.

ORDER.—The High Court declines to interfere with the ordinary action of the law because the District Magistrate is of opinion that the Sessions Judge gave the sanction for prosecution on a mistaken view of the evidence. Questions of fact must be dealt with by the Court which may try the case. The accused had the usual opportunity of showing cause to the Sessions Judge why the sanction should not be granted. The circumstances are not so special as to justify the present reference: see *Q. E.* v. *Zorsingh* (4) and this Court's Criminal Ruling dated 9th March 1885 (5).

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4 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Devji Asa.†

Penal Code (Act XLV of 1860), Sec. 228—Prevarication—Refusal to answer—Contempt of Court—Interruption in judicial proceeding.

Though prevarication or persistent refusal to answer questions does not necessarily constitute the offence of contempt of Court, punishable under section 228 of the Indian Penal Code, it may, according to circumstances, constitute such an interruption to a public servant sitting in a stage of a judicial proceeding as to be an offence under that section.

THE District Magistrate of Nasik in making this reference to the High Court remarked: "Mr. Doderet has convicted the accused, in this case, under section 228, Indian Penal Code, and sentenced him to pay a fine of Rs. 3. This conviction and sentence, however, appear to be illegal, under the authority of the decisions of the BOMBAY HIGH COURT in *Reg.* v. *Amba bin Bhivarao* and *Reg.* v. *Pandu bin Vittoji* and should be reversed; inasmuch as prevarication does not amount to interruption, nor does persistent refusal to answer questions constitute an offence under section 288, Indian Penal Code."

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(1) I. L. R., 4 Bom. 241 (2) I. L. R., 1 Mad., 289 (3) I. L. R., 14 Cal., 355

**Criminal Ruling* 30 *of* 1889. Criminal Reference No. 72 of 1889. (4) I. L. R. 10 All., 145.

(5) *Supra* p. 212. †*Criminal Ruling* 31 *of* 1889. Criminal Reference No. 78 of 1889.

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ORDER.—Record and proceedings to be returned. It should be pointed out to the District Magistrate that the cases *Reg.* v. *Amba* and *Reg.* v. *Pandu* (1) are explained in *Reg.* v. *Jaimal* (2). The order passed is not necessarily illegal.

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8 July 1889. SCOTT & JARDINE, JJ.

In re **Ratanji Premji.***

Criminal Procedure Code (Act X of 1882), Sec. 528—District Magistrate—Transfer—Notice.

A District Magistrate should give notice to the parties before ordering a transfer of case under section 528, Criminal Procedure Code. The District Magistrate is not justified in transferring a case from one place to another, on the ground that the complainant is a man of importance at the former place.

IN this case the applicant filed a complaint of theft before the Third Class Magistrate of Thana. The Magistrate heard the witnesses produced by the complainant and after having been satisfied that a *prima facie* case had been made out against the accused, framed a charge against him and called upon him to enter upon his defence. In the meanwhile, *i. e.*, after the charge was framed and the accused entered upon his defence, the accused applied for a transfer of the case to the District Magistrate of Thana. The District Magistrate, without issuing any notice to or calling upon the complainant to show cause why the case should not be transferred, directed on the mere application of the accused, a transfer of the case. The District Magistrate stated, "among other allegations it is alleged that the case should be transferred as the complainant is a man of great influence at Thana." The complainant applied to the High Court.

PER CURIAM.—We think notice ought to be given, as a matter of justice, on an application under section 528 Criminal Procedure Code and we follow the authority and the unreported case of this Division Bench, Criminal Application No. 44 of 1889, decided on the 21st March 1889. We do not think the reason, that the complainant was a man of importance at Thana, given by the District Magistrate, sufficient to justify the transfer. Bias must be proved, and not presumed, in such a case and there is no proof whatever of bias in the facts of this case. The case must be retransferred to the Court before which it was commenced, that is, the Court now presided over by Mr. Balaji Laxmon, Second Class Magistrate, Thana.

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11 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Pudmon.†

Defamation—Adultery—Woman—Medical Examination of her person—Practice.

The accused being charged with defamation, in having publicly charged a woman with

(1) 4 Bom. H. C. R., p. 6 and 7. (2) 10 I. bid. 69.

**Criminal Ruling* 32 *of* 1889 Criminal Application for Revision No 166 of 1889.

†*Criminal Ruling* 33 *of* 1889. Criminal Application for Revision No. 203 of 1889.

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being pregnant by adultery, requested the Court to have the complainant, the woman, medically examined in order that the truth or falsehood of the matter alleged might be satisfactorily established.—

***Held*, that there was no law which empowered the Courts to order such an examination in such a case.**

PER CURIAM:—The accussd was charged with defamation, under section 500 of the Indian Penal Code, in having publicly charged the complainant before a number of her caste people of being pregnant by adutlery. The charge was found to be unfounded. We are asked to interfere in revision on two grounds (1) that the complainant delayed unduly in bringing forward his complaint (2) that the imputation was brought forward under circumstances that made it privileged. As regards (1) the complainant was not asked in cross-examination for any explanation of her delay and the delay of four months may have been capable of complete explanation. The lower Court rightly refused to draw the adverse inferences suggested by the accused as he gave the accused no opportunity of answering them. As regards (2) we do not think the circumstances show that the publication of this charge was made for the public good. In *Reg.* v. *Kashinath* (1) the woman' name was not mentioned and the imputation was against the man, not against her, so that the case can be distinguished from the present one. There is no doubt the imputation would lower the character of the complainant in respect of her caste. In order to make it a privileged statement, it was for the accused to prove it was made in good faith and for the public good. The judge has found against him on both points. The manner of publication involved unnecessary publicity at a stage when the charge was unproved and this fact coupled with the total absence of affirmative proof of the charge negatives the good faith. As regards the question whether it was done for the public good that is totally inconsistent with the publication of such a charge without proof. It was the clear duty of the accused to investigate the charge more fully before he made it public and exposed the complainant not merely to loss of character but also to the possible infliction of penance and loss of caste (See *Steele* on caste p. 172). We think, therefore, the circumstances do not show privilege. As regards the ground advanced in the petition, but abandoned in argument, that the refusal by the Magistrate and Sessions Judge to order the medical examination of the complainant was wrong and ought to be treated as ground for revision, we feel it right to add that such a contention is absolutely without legal justification. There is no law which empowers the Courts to order such an examination in such a case: see *Agnew* v. *Jobson* (2).

(1) 8 Bom. H. C., 168. (2) 13 Cox. C. C. 625.

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18 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Suckoo.*

Cantonement Rules—Rule 63—Public road—Management—Forbidding the use of public road.

Cantonement Rules must, if their language admits, be interpreted so as to uphold their legality under the law under which they are passed.

Rule 63 of the Rules passed under Bombay Act III of 1867, section 10, clause 6, which gives power to make rules for the management and regulation of the public road, did not authorise the Cantonement authorities to forbid altogether the use of a public road under ordinary circumstances.

PER CURIAM.—We adjourned disposal of these references in order to enable the Government Pleader to communicate with the Military authorities of the Malegaon Cantonement where the cases occurred. The Cantonement Rule 63 must, if the language admits, be interpreted so as to uphold its legality under the law under which it was passed, *viz.*, Bombay Act III of 1867, section 10, clause 6. This clause only gives power to make rules for the "management and regulation of the public roads." But what has been forbidden by the Cantonement authority in the cases before us is the use of a public road altogether. This appears from the facts of the cases in which the offence is described as taking a cart along a public road, within the limits of the Cantonement, the use of which has been prohibited by the Commanding officer. We do not think the law intended to confer any such general powers. The powers conferred are similar to those given to the Police by such Acts as Act 5 of 1861, sections 30 and 31, and Act 13 of 1856, section 77. It is easy, specially in Military Cantonements, where troops are constantly passing, to imagine circumstances in which the local authority may properly close a public road for all traffic or for certain kinds of traffic for a time or times. But if the Legislature had intended to give power to prevent the public from using a public road altogether, under ordinary circumstances, it would have done so by unmistakable language. We, therefore, reverse the convictions and sentences and direct the fines to be restored.

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18 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Jobania.†

Penal Code (Act XLV of 1860), Secs. 394, 397—Robbery—Grievous hurt—Magistrate—Trial—Committal—Sessions Court.

If a Magistrate finds that an accused person has caused grievous hurt in committing robbery, he is bound to commit him to the Court of Sessions under section 397 of the Indian Penal Code; it is illegal to treat the grievous hurt as simple hurt and convict the accused under section 394 of the Code.

**Criminal Ruling 35 of 1889.* Criminal Reference No. 51 to 55 of 1889.
†Criminal Ruling 36 of 1889. Criminal Reference No. 59 of 1889.

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PER CURIAM.—The Magistrate was wrong in treating a grievous hurt as an ordinary hurt and, if in his opinion the offence disclosed was punishable under section 397, Indian Penal Code, he was bound to commit to the Court of Sessions and had no discretion to act contrary to the law. The evidence is not absolutely clear as to whether robbery was committed, or whether the violence used was merely to prevent arrest and thus unconnected with the theft. But as the Magistrate found that the offence was robbery, the Court sets aside the conviction and sentence passed on prisoner Jobania and directs that he be committed to the Court of Sessions under section 397. The Court leaves the conviction of Bapudia in tact.

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18 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Sham.*

District Municipal Act (Bom Act VI of 1873), Sec. 53—Dirt—Back of the house.

The High Court reversed a conviction of the accused, under section 53 of the Bombay District Municipal Act, for depositing dirt on the back ground of his house, since the dirt &c., was not deposited in "any street, public quarry, jetty or landing place or any part of the seashore or bank of tidal river."

ORDER.—The dirt etc. not having been deposited "in any street, public quarry, jetty or landing place or any part of the sea-shore or bank of tidal river," the case does not come within section 53 of Act VI of 1873. Conviction and sentence reversed. Fine to be returned.

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24 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Bhogilal.†

Magistrate—Trial—Witness—Trial of witness immediately after his examination—Practice.

During the trial of the accused, a witness was, immediately after he had given his evidence for the prosecution, put upon his trial with the other accused. There was no proof against him sufficient to justify the Magistrate in so acting, and he was discharged subsequently without any charge having been framed:—

Held, reversing the conviction, that little value could be attached to the evidence of the succeeding witnesses. Such a proceeding as the hasty placing of a witness on trial as an accused is unauthorized, unless the circumstances are exceptional, because the obvious consequences of it must be to intimidate more or less the witnesses who follow.

PER CURIAM:—We think that the Magistrate was too hasty in his action in putting witness No. 3 on his trial with the other accused immediately after he had given his evidence. It does not appear that there was any proof against him sufficient to justify the Magistrate in the act and he was discharged subsequently without any charge having been framed. Such a proceeding as the hasty placing of a witness on trial as an accused is much to be deprecated unless the circumstances are very exceptional. Obviously the consequences of it must be to intimidate more

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*Criminal Ruling 37 of 1889. Criminal Review No. 199 of 1889.

†Criminal Ruling 39 of 1889. Criminal Application for Revision No. 149 of 1889.

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or less the witnesses who follow. In *Reg.* v. *Kashinath* (1) this Court, sitting as a Full Bench, thought this intimidation so highly probable as a consequence of such a proceeding that they declined to attach any value to the evidence of certain witnesses because a sanction to prosecute had been given as regards the witnesses who preceded them. Following this precedent, we feel bound to attach a much diminished importance to witness No. 5 and those who followed. This throws the proof of conviction almost entirely on the confession of Sankla, the co-accused. This is a kind of evidence to which little credit is attached in any case and this particular confession does not appear to us to be free from the suspicion of being made in consequence of inducements held out by the complainant. As regards the other facts of the case, the Letter (Exhibit A) is not in our opinion satisfactorily traced to the accused personally. It may have been received for him by Manilal, his nephew, in whose house it was found. The possession of a half sicca rupee is no certain proof of possession of a portion of the stolen property. None of it has been traced to Bhogilal or found in his house. The possession of Sankla's carpet bag is not connected with the robbery in a manner sufficient to constitute a proof. On the whole we are of opinion the Magistrate has failed to exercise a judical discretion in his estimate of the value of the confession and in his conduct of this case as regards the committal of Manilal. The evidence is most unsatisfactory and inconclusive, and we, therefore, reverse the convictions and sentences and order confirming them.

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25 July 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Hargowin.*

Village Police Act (Bom. Act VII of 1867), Section 16—Police Patels—District Magistrate—High Court.

A District Magistrate cannot remit any portion of a fine inflicted by a Police Patel, under section 16 of the Bombay Village Police Act, to make it conform to law, but must refer the matter to the High Court.

The Police Patels have always been treated as subject to the superintendence of the High Court.

THE District Magistrate of Surat in making reference to the High Court remarked: "The accused was, in this case, charged on 8th April last with depositing dirt in a forbidden place under section 16 of the Bombay Village Police Act (VIII of 1867) and sentenced to pay a fine of Rs. 2, whereas the maximum fine that can be inflicted under that section is one rupee. My predecessor Mr. Boerey on receipt of the proceedings, under section 17 of the Act, ordered one rupee out of the fine to be refunded to the accused. I am unable to find any provision in the act, which empowers a District Magistrate to revise the proceedings of a Police Patel. The law is silent as to

(1) 8 B. H. C. R., Cr. C. 126. **Criminal Ruling of* 1889. Criminal Reference No. 81 of 1889.

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the procedure to be adopted when the order passed by a Police Patel is illegal and in order to have an authoritative ruling on the point, I take this opportunity to submit the question for the orders of the High Court.

Mr. Boerey appears to have acted in pursuance of the decision of the High Court on a similar reference, communicated to this office under the Deputy Registrar's No. 612, dated 25th May 1882, but in that case their Lordships simply said that they did not think it necessary to pass any order. In my opinion this decision cannot be construed as meaning that a First Class Magistrate or a District Magistrate has power to set aside an order passed by a Police Patel.

The Criminal Procedure Code does not apply to Village Police Officers in this Presidency (section 1 (*d*) of Act X of 1882).

The Mamlatdars' Court Act (Bombay Act III of 1876) does not prescribe the steps to be taken when a Mamlatdar's decision under that Act is improper, but it has been held that the Mamlatdar's Court is a Civil Court for the purposes of the Act and that the High Court has power to review a decision under that Act. I am deferentially of opinion that in the same way a Police Patel should be considered a Criminal Court for the purposes of the penal provisions of the Bombay Village Police Act, and that his proceedings should be liable to revision by the High Court."

ORDER.—Record and proceeding to be returned with an intimation that although the order to return the rupee 1 of the fine ought not to have been made by the District Magistrate but by this Court, there is no need to interfere. It has been the practice of this Court to treat the Police Patels as subject to its superintendence.

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1 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Sitaram.*

Criminal Procedure Code (Act X of 1882), Sec. 349—Sub-Divisional Magistrate—Disposal of the case.

A Sub-Divisional Magistrate, to whom the proceedings are submitted under section 349 of the Code of Criminal Procedure, cannot send the case back to such Magistrate for disposal by passing any sentence which he is competent to pass; but must himself pass such judgment, sentence, or order, in the case as he thinks fit and as is according to law.

IN this case one Sitaram broke, on the 20th May 1889, the finger of the goddess Padmavati of the village of Dhotro which was held sacred by the Hindus, with the intention of insulting their religion, and was charged under section 295, Indian Penal Code. The Second Class Magistrate of Barsi, before whom the accused was placed, sentenced him to suffer rigorous imprisonment for six months.

**Criminal Ruling 44 of 1889. Criminal Reference No. 95 of 1889.*

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The District Magistrate of Sholapur, noticing some irregularity in the procedure, referred this case to the High Court observing: "The Magistrate Second Class sent the papers and the accused to the Sub-Divisional Magistrate who without passing the sentence himself returned the papers and the accused to the Second Class Magistrate for passing such sentence as he was competent to do. This is illegal, *vide*, 5 Mad. H. C. R., App. xliii; I. L. R., 4 Mad., 233; 6 Mad. H. C. R., App. ii, and 6 Cal. L. R., 246."

ORDER.—Following 6 C. L. R. 277 and *Q. E.* v. *Mahadu* (1) the Court directs that the conviction and sentence be reversed, that the Sub-Divisional Magistrate recall the case and pass judgment, sentence, or order, under section 349, taking into consideration any imprisonment that may have been undergone by the accused.

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1 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Bhaya Ramratan.*

Contonement Rules—Rule 68—Public nuisance—Drum, beating of.

The accused was convicted of a breach of Rule 68 of Chapter III of the rules under the Cantonement Act, on account of having beaten a drum at a certain specified time:—

Held, that the act did not come within either sub-sections 5 or 6 of section 11 of Bombay Act III of 1867, the beating of a drum *per se* not being a public nuisance, or coming within the management and regulation of public roads.

ORDER.—The act for which the accused was fined does not come within section 11 of Bombay Act III of 1867. The two sub-sections which may have been in the consideration of the maker of Rule 68 are sub-sections 5 and 6. But the beating of a drum *per se* is not a public nuisance (*Mayne's* Penal Code, Commentary under section 268), nor can the rule be held to come within the management and regulation of the public roads. The rule goes beyond the power conferred by the Act. The sentence must be reversed and fine returned.

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1 August 1889. SCOTT & JARDINE, JJ.

In re **Clive Durant.†**

Bail—Granting of bail—Defamatory applications—Practice.

An accused should not be admitted to bail where the possibility of his conviction being wrong depends on a mere technical ground.

The Courts have powers to delete the defamatory portions from applications presented to them.

SCOTT, J.—Two applications are before us. The first is an application to be admitted to bail. The libel for which the petitioner is in prison is on the face of it grossly defamatory. He says it was justified in fact and that he wrote it for the public good. The jury however found him guilty. We have admitted his appeal, and he will have an opportunity of proving the Jury wrong. But I see no reason to release him on

(1) *Supra* p. 387. **Criminal Ruling* 45 *of* 1889. Criminal Review No. 229 of 1889.
†Criminal Appeal No. 151 of 1889.

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bail, on the apparent merits of his case so far as they appear from the proceedings forwarded to us. He says he made an application to the Magistrate for leave to apply to this High Court for a transfer of the case, and that the transfer was refused. But it appears he had already applied for transfer to the High Court on the 3rd May, and his application was refused. I do not think therefore that on the possibility of the conviction being wrong, on this technical ground, he should be admitted to bail. His application must be rejected. The petition he now presents is full of defamatory allegations which are irrelevant to this application and most improper in themselves. It cannot be placed on the records of the case in its present scandalous form and must be returned.

The second application is for a copy of the report of the Magistrate to this Court in reply to a question from us. The petitioner is not in strictness entitled to have a copy but we see no reason to with-hold it from him and a copy may be supplied to him.

JARDINE, J.—In his petition of appeal the prisoner Durant applied to be admitted to bail, and at the hearing of that petition his counsel argued that the trying Magistrate had contravened section 526 A of the Code of Criminal Procedure, and that the proceedings ought therefore to be quashed. It now appears from the report furnished to us by the Magistrate that although section 526 A was not brought to his notice, the prisoner did obtain an adjournment which according to his present allegations he made use of by coming to Bombay to make an application to this Court for transfer of his case, which application was rejected. On the facts brought to our notice, it would appear that the trial by Jury began after the High Court had passed its order, and that section 526 A has not been contravened, and that the reason given for admitting to bail has not been substantiated. I see nothing special in the merits which ought to induce us to interfere with the execution of the sentence before we hear the appeal.

The prisoner has since forwarded two copies of a printed petition addressed to this Court. So far as this document is concerned with the case, now before us on appeal, its allegations might be unobjectionable. But in this lengthy document, the prisoner makes observations on the manner in which he says justice was administered by the learned Judges who heard his petition in this Court, which are so disrespectful and improper as to savour of contempt of Court. The document also contains allegations bearing cruelty upon the moral character of individuals and not relevant to the subject. These ought to be struck out and the Court has to see that this is done: see Lord *Eldon's* remarks in *ex parte Simpson* (1) and *Crackwall*

(1) 15 Ves. 476.

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v. *Janson* (2). In Loffts R. there is a case where Lord Mansfield said that a defamatory affidavit is not to be endured. The document also contains attacks, quite irrelevant to the case before us, upon the trying Magistrate, upon the personal and public character of other officers high in the service of the Government of India, and upon the impartiality of the tribunals which throughout India administer justice on behalf of the Crown. I am of opinion that what Mr. Justice *Burrough* said in *Butt* v. *Conant* (3) expresses a principle which we should apply now—namely that the people "have a serious interest in the characters and conduct of the Judges and others, who are appointed to serve in high and important offices: and the individual men have a valuable property in their respective characters." It is the duty of the High Courts to set an example to all inferior tribunals: and I think we may safely follow the practice of the Court of Chancery and Queen's Bench for the reasons given by so great an authority as *Story* in section 270 of his Equity Pleadings. He says: "scandal is calculated to do great and permanent injury to all persons, whom it affects by making the records of the Courts the means of perpetuating libelous and malignant slanders: and the Court, in aid of the public morals, is bound to interfere to suppress such indecencies, which may stain the reputation and wound the feelings of the parties and their relatives and friends."

When a few months ago a petition of one Ganesh Sathe came before us, in our Revisionary Jurisdiction, we informed the pleader that, as it contained somewhat scandalous and irrelevant expressions concerning the Government and a District Magistrate, we declined to receive it until the scandalous matter was struck out.

The present petition is more objectionable and, being of opinion that we ought not to allow it to defile our records, we must reject it and order its return to the prisoner.

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1 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Amba Balya.*

Abkari Act (Bom. Act V of 1878), Sec. 59—Reward.

Under the rule under section 59 of the Bombay Abkari Act, a Magistrate is bound to name each person to whom a portion of the fine is to be given by way of reward.

ORDER.—The Court points out that under rule under section 59 of the Act the Magistrate is bound to name each person to whom the portion of the fine is to be given by way of reward.

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(2) 11 Chan. D. 1. (3) Br. and Bing at p. 567.

**Criminal Ruling 46 of 1889. Criminal Review No. 236 of 1889.*

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7 August 1889. SCOTT & JARDINE, JJ.

In re **Devendrappa.***

District Municipal Act (Bom. Act VI of 1873) Sec. 33—Addition to existing building.

The erection of a *katta*, which is permanent in character and which serves as a broad extended door-step or raised platform of communication with the public road, is an addition to an existing building within the meaning of clause (1), section 33, of the Bombay District Municipal Act.

PER CURIAM:—We think the erection of this *katta* comes within clause 1 of section 33 as an addition to an existing building under the wide definition of a building given by section 3 of the Act. It is permanent in character and serves as a broad extended door-step or raised platform of communication with the public road. As a 'door-step' is in terms included in the definition of a building, we are of opinion this erection is included also. The appeal order of acquittal must be reversed and we restore the conviction and sentence passed by the Bench of Magistrates.

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15 August 1889. SCOTT & JARDINE, JJ.

Inward No. 990 of 1889.†

Regulation 12 of 1827—District Magistrate—Billiard saloons—Order of prohibition.

Section 19 of Regulation 12 of 1827 does not empower a District Magistrate to forbid the keeping of billiard saloons or to require that the keeper should take out a license, his power under that section being confined to the regulation only of such places.

Any notice issued by a District Magistrate under Regulation XII of 1827 for the regulation of such places must be fixed and kept at such place or places as may be best adapted to convey information to the public or the class concerned.

ORDER.—We are of opinion that the Regulation 12 of 1827 does not empower the District Magistrate to forbid the keeping of billiard saloons or to require the keeper to receive a license. Such power can only be conferred by legislation. The power of the Magistrate is confined to the regulation of such places. He cannot under section 19 Regulation 12 of 1827 insist on license being taken out previous to their establishment and no other section applies. The Court must, therefore, forbid the proclamation.

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15 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Mahadu.††

District Police Act (Bom. Act VII of 1867), Sec. 31—Magistrate, resident—On Tour.

The words "Magistrate resident", in section 31 of the Bombay District Police Act, do not include a Magistrate who happens on his tour to stay a few days at the place, mere presence not being the same thing as residence.

**Criminal Ruling* 47 *of* 1889. Criminal appeal No. 119 of 1889. †*Criminal Ruling* 48 *of* 1889.
††*Criminal Ruling* 49 *of* 1889. Criminal Review No. 146 of 1889.

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ORDER.—It is unnecessary to interfere with the convictions. But it should be pointed out to Mr. Lucas that he misinterprets the meaning of the words "Magistrate resident" in section 31 of Bombay Act VII of 1867. They do not include a Magistrate who happens on his travel to stay a few days at the place. Mere presence is not the same thing as residence.

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20 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Rama.*

Penal Code (Act XLV of 1860), Sec. 45—House trespass—Compound.

The word "compound" is not included within the words "house" or "building used as a human dwelling," as used in sections of the Indian Penal Code.

IN this case the accused were convicted of house-breaking by night with intent to commit theft, in that the accused No. 1 intending to commit theft in complainant's house, entered his closed compound at night by climbing over one of its walls and Nos. 2 and 3 also intending to commit theft in the same complainant's house entered his closed compound at night either by climbing over one of its walls or through the buck-door opened by accused No. 1 who had entered the same in the manner described above.

PER CURIAM.—The Courts below have treated the entry of the prisoners upon the inclosure outside the house as equivalent to an entry into the house and convicted the prisoners of house-breaking by night. This is an error in law, there being no principle nor authority for including compounds within the words "house" or "building used as a human dwelling." The facts found disclose criminal trespass and attempt at house-breaking by night with intent to commit theft. We do not interfere with the sentences but alter the convictions to attempt under section 511 and 457 of the Indian Penal Code.

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21 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Ardeshir Merwanjee.†

Penal Code (Act XLV of 1860), Sec. 405—Criminal Breach of trust—Chairman—Municipality.

The chairman of the Lanowlee Municipality was convicted of criminal breach of trust in respect of Rs. 68, part of a sum of Rs. 466. The Cash-book made up to the 8th December 1888 showed correctly that the sum of Rs. 466 was the balance received. On the 12th when the Mamlatdar came to examine the accounts at the order of the President of the Municipality, the accused told him that he had Rs. 298 in hand and that the rest was with the Secretary. It turned out that the Secretary had with him only Rs. 99, and that Rs. 68 were in hand due to petty servants,

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*Criminal Review No. 233 of 1889.

†*Criminal Ruling* 50 *of* 1889. Criminal Appeal No. 188 of 1889.

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which fact the accused concealed from the Mamlatdar, the money being paid on or about the 14th to petty servants:—

Held, reversing the conviction and sentence, (1) that no duty to pay the servants on a fixed day of such a stringent character that its breach would in itself be evidence of misappropriation having been proved, the mere delay of payment to petty servants did not imply any criminality;

(2) that as no evidence was given of any dishonest use of the money in fact, the money having been always ready and available, since the servants were all paid about the 14th at the latest, and as there was no evidence of any demand for earlier payment, the Judge ought to have very carefully charged the Jury as to the necessity of strict proof of a *mens rea*, a fraudulent intent, a wilful violation of the trust with fraudulent design, and not merely a civil breach of trust, and at the same time suggested the possibility of the facts being reasonably consistent with innocence;

(3) that the case differed substantially from the cases of *Q. E.* v. *Ramkrishna* and 31 L. J. M. C. 71 as in both those cases there were erroneous statements as to the money received, which was not the case here.

PER CURIAM:—The accused in this case was charged with a criminal breach of trust in Respect of 68 rupees, part of a sum of Rs. 466 for which he was accountable to the Municipality of Lanowli as their Chairman. The cash-book made up to the 8th December last showed that 466 rupees was the balance received and the statement is correct as to the actual amount received. On the 12th the Mamlatdar at the order of the President of the Municipality came to examine the accounts, it being, under section 25 of the Municipal Act, the duty of the President to supervise the accounts. The Chairman told the Mamlatdar on the 12th he had 298 rupees in hand and he gave a Memo (Exhibit 6) to show that. He said the rest was with the Secretary. It turned out the Secretary only had 99 rupees and that 68 rupees were either in hand and due or had been paid to petty servants. These servants were actually paid and the payment was made by the Chairman either on the 10th or on or about the 14th. Exhibit 5 was put in to show the payment was made on the 10th but the Jury did not believe the evidence and it must be inferred here that the accused concealed the fact to the Mamlatdar that on 12th he had 68 rupees in hand still due to petty servants. On these facts the Jury found the accused guilty of criminal breach of trust. We can only interfere with the verdict of a Jury when there is an error of law. We think in this case there was an error of law in the charge of the Judge. It is somewhat difficult to say what the exact terms of the trust reposed in the Chairman were. But it is clear that accused received this money for the specific purpose of meeting the charges of the Municipality and strictly speaking he or the Secretary ought, under the rule cited to us, to have handed it over to the Taluka Treasury. He did not do that but still he was bound to hold it for the use of the Municipality. There was not however any duty proved to pay the

(1) I. L. R., 12 Mad., 51, 80. (2) 31 L. J. M. C., 71.

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servants on a fixed day of such a stringent character that its breach would in itself be evidence of misappropriation. On the contrary, the payments seem to be made on no fixed day and only after sanction of the board. The mere delay of payment does not therefore imply any criminality. Nor was any evidence given of any dishonest use of the money in fact. Indeed it is pretty clear that the money was always ready and available as the servants were all paid about the 14th at latest, and there is no evidence of any demand for earlier payment. In such a set of facts the Judge ought to have very carefully charged the Jury as to the necessity of strict proof of a *mens rea*, a fraudulent intent, a wilful violation of the trust with fraudulent design, and not merely a civil breach of trust, and at the same time suggested the alternative possibility of the facts being reasonably consistent with innocence. This was not done. The need of a "dishonest" intention was not explained fully—the fact of the cash-book showing the real amount received was not pointed out—the further fact that the money was apparently ready for use, when needed was not alluded to. The case differs substantially from the cases cited (*Q. E.* v. *Ramkrishna* (1); 31 L. J. M. C. 71), as in both cases there were erroneous statements as to the money received which is not the case here. We may also refer to 3 C. and P. 422 and 7 C. and P. 833 as the necessity of referring the Jury in such cases to all the facts consistent with innocence. The concealment of the 68 rupees may well have been the result of a desire to hide the delay as there is no proof of an improper use of the money. We think the charge was not sufficiently explanatory of the law and facts, and we further think that, if it had been made more exhaustive, the Jury would have returned a verdict of acquittal. We must, therefore, reverse the conviction and sentence and the fine must be returned.

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22 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Ganu.*

District Police Act (Bom. Act VII of 1867), Sec. 42—Police officer—Protection—Official acts done in good faith.

The protection intended to be afforded to Police Officers by section 42 of the District Police Act, by means of notice, is not a condition precedent to a prosecution relating to a violent assault by a Police Officer. The protection extends to official acts done in good faith, and which may reasonably be supposed to be done in persuance of official duty, eventhough legal powers may be exceeded, but not to acts for which there is a total absence of authority.

THE facts were that on the 1st July 1889, there was a *katha* in the temple of God Balaji and at about 12 o'clock in the night when it was expected to be over, the complainant Gayadin, a servant in the employ of one Bhana Shet, was going to the temple with

*Criminal Ruling 51 of 1889. Criminal Reference No. 101 of 1889.

(1) I. L. R. 12 Mad. 51.

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a lantern to bring some member of his master's family house from the temple. The accused Nos. 1 and 2, who were the Head Constable and Constable on their night patrol, asked the complainant who he was and where he was going. The complainant said he was Bhana Shet's peon and was going to the temple to bring home some of his master's family. The accused thereupon beat the complainant very severely with his sticks and extinguished the light in the hand of the complainant and used abusive language towards him and respecting his master.

Upon an application having been made to the District Magistrate of Kolaba, for a transfer of the case, the Magistrate made this reference to the High Court observing :—

"The accused applied to me to transfer the case on the ground of prejudice against them or one of them in the mind of the trying Magistrate.

This question remains as yet undecided; because it appears that they are, one a Head Constable, and two Constables, of the Kolaba Police; that the offence, if committed at all, was committed in the course of a night patrol duty and under pretence of its execution; and therefore under (or under colour of) 'the general Police powers conferred by' Bombay Act VII of 1867, and I am certified by the Superintendent of Police that the notice of prosecution required by section 42 of that Act was not given to him and it appears that the proceedings are void from the start; and the case cannot be transferred to any other Magistrate for trial."

ORDER.—Taking the facts as stated by the District Magistrate, but without expressing any opinion on the evidence, the Court is of opinion that the protection intended to be afforded to Police officers by section 42 of Bombay Act VII of 1867 by means of notice is not a condition precedent to the prosecution. See chapter of Powers of Executive Officers 325, 3rd Ed. and cases there cited. This protection extends to official acts done in good faith and which may reasonably be supposed to be done in pursuance of the official duty, even though legal powers may be excuded: *Greenway* v. *Hurd* (1). But where there is a total absence of authority the protection does not exist, *Cook* v. *Leonard* (2), as where a customs officer obtained money by extortion: The *King* v. *Wilson* (3), *Morgan* v. *Palmer* (4), *Parton* v. *Williams* (5), *Agnew* v. *Jobson* (6). The Court is therefore unable to say that the proceedings are void for want of notice, as the evidence given relates to a violent assault by public officers. The Record and proceeding are returned.

(1) 47 R. 553. (2) 6 B. & C. 351. (3) 4 T. R. 487. (4) 2 B. & C. 729.
(5) 3 B. & Ald. 330. (6) B. Con. cc. 625.

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22 August 1889. SCOTT & JARDINE, JJ.

Queen-Empress v. Vidiadhar.*

Land Revenue Code (Bom. Act V of 1879), Sec. 189—Mamlatdar—Summons—Inquiry into the appointment of a Police Patel.

Section 189 of the Land Revenue Code does not empower a Mamlatdar to summon any person to attend before a Deputy Collector, who was making certain inquiries about the appointment of a Patel for a certain *inam* village.

IN this case "the accused was convicted of an offence, under section 174 of the Indian Penal Code, of non-attendance in obedience to an order from a public servant, in that the Mamlatdar of Bhiwandi, being legally competent to issue a summons under section 189 of the Land Revenue Code (Bom. Act V of 1879), did by his summons call upon the accused to appear personally and give his evidence at the District Deputy Collector's Court, on the 17th December 1888, in a revenue matter pending before him in connection with the appointment of Patel at the Inam village of the accused, and such summons was duly served upon the accused who was legally bound to attend in obedience to the same, yet he intentionally omitted to attend the said Court according to the summons".

ORDER.—Section 189 of Bombay Act V of 1879 does not empower a Mamlatdar to summon persons to attend before a Deputy Collector. The Court therefore sets aside the conviction and sentence under section 174, Indian Penal Code, and directs the fine, if paid, to be refunded: see *Reg.* v. *Parushottam* (1).

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17 September 1889. RESOLUTION IN CHAMBERS.

In re Pali.†

Criminal Procedure Code (Act X of 1882), Sec. 488—Court Fees Act (VII of 1870), Sch. II, Art. 1 (b)—Maintenance order.

An application made to a Magistrate to enforce payment of maintenance already awarded under section 488, Criminal Procedure Code, is chargeable with a fee of eight annas under Schedule II Article 1 (*b*) of Act VII of 1870.

The Court cannot under section 31 of Act VII of 1870 order the defaulter to repay to the complainant the fee so paid on the application.

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19 September 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Kalidas.††

Penal Code (Act XLV of 1860), Sec. 193—Criminal Procedure Code (Act X of 1882), Secs. 161, 155—Alternative charge—Police officer—Delegation of investigation.

The accused, a Police Patel, having stated to a Chief Constable, that he had paid Rs. 5 to a classer as a bribe to prevent the assessment on his fields from being raised, and subsequently before a Magistrate having stated that he paid the Rs. 5 for provisions, was charged in the alternative and convicted of an offence under section 193, Indian Penal Code:—

**Criminal Ruling. 52 of 1889. Criminal Review No. 272 of 1889. (1) 5 B. H. C. R. p. 33 cc.*

†Criminal Ruling ††Criminal Ruling 57 of 1889. Criminal Revision No. 283 of 1889.

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Held, reversing the conviction and sentence, that, as section 161 of the Code of Criminal Procedure, binds a person to answer truly only questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture, the accused was not liable, in respect of his first statement to the Chief Constable, to a prosecution under section 193 of the Indian Penal Code, the offer of a bribe being an offence punishable under the Indian Penal Code, and the accused being liable to loss of his office for misbehaviour.

Quaere:—Whether a Police Inspector, who has been appointed as a Magistrate to investigate a non-cognizable offence, can legally delegate the duty of making the investigation to a Chief Constable.

PER CURIAM.—The accused was sentenced by Mr. Hill to 12 months' rigorous imprisonment and a fine of Rs. 50 or in default 2 months' additional rigorous imprisonment under section 193 of the Indian Penal Code for intentionally giving false evidence. The conviction was on an alternative charge. The Magistrate found that the prisoner had made statements on two occasions. At both times he said he had paid Rs. 5 to a Revenue Survey Classer: but on the first occasion which was in answer to a Chief Constable he said he paid them as a bribe to prevent the land assessment on his three fields being raised: and on the second occasion when examined as a witness before Mr. Dracup in a criminal trial, he said he paid the Rs. 5 to the Classer for provisions. Mr. Hill's finding is that one or other of these statements is false. He does not find out either definitively that it is false.

On reading the record we find that Mr. Hill failed to notice the protection which section 16 of the Criminal Procedure Code throws over persons under examination by the Police. It says "Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have tendency to expose him to a criminal charge or to a penalty or forfeiture." As the offer of a bribe to a Survey Officer as an inducement to prevent the assessment being raised at the time of revision is an offence and punishable, and as the prisoner is a Police Patel exposed to lose his office on proof of misbehaviour, he was not legally bound to answer questions put by the Police regarding his offer of this bribe and could not have been convicted for giving false incriminating answers on that subject under section 193 of the Penal Code. As guides to the Courts in dealing with the admissions of guilt made to the Police, we may refer to *Melvill* J.'s remarks in *Imperatrix* v. *Pandhari* (1) and to *Imperatrix* v. *Baikantnath* (2). There being no finding that the evidence given by the prisoner before the Magistrate was false, nor sufficient evidence on record to justify this Court in so finding, we are obliged to reverse the conviction which was in the alternative, and the sentence which the Magistrate passed.

(1) I. L. R., 6 Bom., 36. (2) I. L. R., 16 Cal. 349.

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We have also to advert to mistakes of procedure which have been made in this case. The Chief Constable took the signature of the prisoner to his statements and in so doing acted contrary to the plain words of section 162 of the Criminal Procedure Code which forbid that practice.

The charge framed by the Magistrate was very defective in its terms and did not state the words, or their substance, charged in the alternative as false. In order to give clear information to the prisoner of the exact nature of the charge these details should of course have been inserted. The Magistrate's attention is drawn to *Q. E.* v. *Kabhai* (3) and to the commentary to section 72 of *Mayne's* Indian Penal Code. We must also observe that the record of the Magistrate does not shew clearly that the Chief Constable had any jurisdiction to make an investigation into the case in which he examined the prisoner Kalidas. Section 155 of the Criminal Procedure Code declares that no Police officer shall investigate a non-cognizable case without the order of a Magistrate. As a rule a Magistrate cannot delegate his trust: 19 State Trials 1027, 1063. After perusal of the letter of the District Magistrate of Ahmedabad to the Inspector of Police, No. 387 of the 8th February 1889, we feel we have not sufficient information as to what happened in this case or whether the classer Ranchod to whom Kalidas said he paid Rs. 5 was within the reference made to the Inspector by that letter. There is also a question whether, when the Inspector had been specially appointed by the District Magistrate, he had any authority to appoint the Chief Constable as his deputy in the particular investigation: see *Reg.* v. *Vinayak Devakar* (4). We mention the subject now as the same point appears to arise in another case which we will postpone for a week in order that the Government Pleader may be instructed.

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26 September 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Edward Goldstein.*

Police Regulation 1827 (*Zilla*), *Sec.* 19—*District Magistrate—Billiard Saloons—License.*

A District Magistrate has no power under the Regulation XII of 1827 to forbid the keeping of billiard saloons or to require the keeper to take out a license.

THE accused Edward Goldstein was charged before the Magistrate First Class, Poona Cantonement, with keeping a public billiard room and allowing the public to play on Sundays without a license required under the rules framed by the District Magistrate under the provisions of clause 6 section 19 of Regulation XII of 1827. He pleaded not guilty. The Magistrate fined him fifty rupees and ordered that his billiard saloons be closed.

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(3) *Ante* p. 336. (4) 8 Bom., H. C. R., 36 cc.

**Criminal Ruling* 59 *of* 1889. Criminal Reference No. 127 of 1889.

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The Sessions Judge of Poona in refering this case to the High Court stated: "It has been held by their Lordships the Judges of the High Court that the District Magistrate is not empowered under the law in question to forbid the keeping of billiard saloons or require that the keeper receive a license—consequently no offence is committed by a breach of such rules."

ORDER.—The Magistrate has not noted under what section of what law he inflicted a fine. Clause 6, section 19, Reg. XII of 1827, provides an important limitation of the fine. This may be pointed out to the Magistrate.

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10 October 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Bhika.*

Criminal Procedure Code (Act X of 1882), Sec. 191—Process-fees—Non-payment—Dismissal of complaint.

Where a complainant being liable, under Rule 11 at page 7 of the High Court Circulars (Criminal), to pay process-fees, neglects or refuses to pay the same, the Magistrate should dismiss the complaint, unless he considers that there should be a prosecution in the public interest, to which section 191 of the Code of Criminal Procedure applies.

The District Magistrate of Khandesh referred this case to the High Court under section 438 of the Code of Criminal Procedure. The case was of criminal misappropriation of property under section 403, Indian Penal Code, in which the complainant refused to give process-fees. As the offence was non-cognizable and bailable one (Bombay High Court Circular Book, Rule 11) process must be recovered from the complainant: but as there was no provision of law as to how cases of this nature were to be disposed of, the present reference was made.

ORDER.—The Court is of opinion that the Magistrate should dismiss the complaint if the complainant neglects, or refuses to deposit the necessary process-fees, unless the Magistrate considers that there should be a prosecution in the public interest to which section 191 of the Criminal Procedure Code applies.

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10 October 1889. JARDINE & CANDY, JJ.

Queen-Empress v. Tulsaji.†

Evidence Act (I of 1872), Sec. 73—Criminal Procedure Code (Act X of 1882), Sec. 298—Admission—Document—Forgery—Comparison of handwriting.

Before admitting documents under section 73 of the Indian Evidence Act for the purpose only of comparison with a document alleged to be a forgery, it is the duty of the Judge to find, as required by section 298 of the Code of Criminal Procedure, that they are admitted or proved and the fact that the question of admissibility has been determined should be noted by the Judge in the record of the case.

**Criminal Ruling* 60 *of* 1889. Criminal Reference No. 80 of 1889.
†*Criminal Ruling* 61 *of* 1889. Criminal Appeal No. 165 of 1889.

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PER CURIAM.—We are of opinion that this appeal should be dismissed. We had to consider whether the various documents which were admitted in evidence under section 73 of the Indian Evidence Act for the purpose only of comparison with the document charged to be a forgery had been found by the learned Judge to be admitted or proved before he allowed them to go to the Jury. This preliminary adjudication is we consider the duty of the Judge under section 298 of the Code of Criminal Procedure: *Boyle* v. *Wiseman* (1) *Bartlett* v. *Smith*, (2) *Cooper* v. *Dawson* (3), 2 *Taylor* on Evid. Section 1870, 5th Edition. We think the record ought to contain some note that the Judge has determined the question of admissibility. On examination of the whole proceedings we are of opinion that the Judge did determine this before leaving the documents to the Jury.

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18 November 1889. SCOTT & CANDY, JJ.

In re Ishwar.*

Criminal Procedure Code (Act X of 1882), Sec. 517—Magistrate—Property produced—Disposal—Suspicion—Judicial inquiry.

A Magistrate acting under section 517, Criminal Procedure Code, cannot, on mere suspicion that an offence has been committed with respect to property produced during the trial of a criminal case, order its forfeiture; he can only do so after a separate judicial inquiry in which the complainant has an opportunity of explaining any suspicious circumstances. If there be any doubt as to the person or persons legally entitled to the property, the Magistrate should proceed under section 523, Criminal Procedure Code.

PER CURIAM.—In this case the Magistrate has ordered under section 517, Criminal Procedure Code, what is equivalent to the forfeiture of the complainant's property which he deposited with the Police pending disposal of a charge of cheating brought by him against certain persons who were acquitted. The Magistrate acted under section 517 of the Criminal Procedure Code on his opinion that this property had been used for the commission of an offence and sequestered it. His opinion did not amount to more than suspicion and there was no judicial inquiry where the complainant might have explained the circumstances. All that appears from the Judgment is that although the Magistrate thought the accused had been cheated, he also suspected the complainant's money, Rs. 500, was used with the knowledge of the complaint for the purchase of stolen property and that the money, 250 rupees deposited by him with the Police was part of the 500 Rupees which had been so used. It may be that the sum handed over to the Police by the complainant had been so used for the criminal purpose. But to declare this sum forfeited is in our opinion

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(1) Ex. R. 360 (2) 11 M. & W. 483 (3) 1 F. & F. 550

**Criminal Ruling* 62 *of* 1889. Criminal Application for Revision No. 288 of 1889.

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a straining of section 517 which neither the words nor the intention of the section can bear. Forfeiture is dealt with in sections 61-62, Indian Penal Code, and is only inflicted on conviction of certain offences of a gravity much greater than the offence of which the complainant was only suspected. In the present case there has not been an inquiry still less a conviction, and the complainant has not been heard. Paragraph 2 of section 517, which says that the detained property should be delivered to the person entitled, seems to show that detention by Government was not contemplated, but if it were contemplated we do not think the facts of this case justify detention. If there was any reasonable doubt as to the person entitled to the 250 Rupees, then proclamation might have been made and proceedings taken under section 523. But there appears to be no doubt as to the complainant being the only claimant. The only question is whether the circumstances of the case justify the extreme measure of its forfeiture or whether it should not be returned to the complainant, the person from whom it was taken. We do not think the case justifies forfeiture. It is clear the complainant has lost half of his rupees 500 and there seems no reason why he should not receive back the remainder. We reverse the order of the Court below and order the rupees 250 to be returned to him.

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21 November 1889. SCOTT & CANDY, JJ.

Queen-Empress v. Muse Bagas.*

Penal Code (Act XLV of 1860), Secs. 71, 148, 302, 326—Criminal Procedure Code (Act X of 1882), Sec. 235—Murder—Rioting—Separate sentences—Offences forming parts of the same transaction.

An accused, who is punished for murder, or voluntarily causing grievous hurt with a dangerous weapon, cannot be also punished by fine for rioting when all the offences formed parts of the same transaction.

PER CURIAM.—We have carefully reconsidered the evidence and documents in this case by the light of the able arguments of the learned counsel for the defence. But we see no reason to think the Sessions Judge has not come to a right conclusion. There is of course no doubt that the deceased died in a few hours from blows on the head which fractured the skull. Guilt is brought home to the accused by the evidence of eye-witnesses and by the dying declaration of the deceased. The accused all set up an *alibi* but did not attempt to prove it. But as regards the witnesses it was contended they had concocted a false story and it was also contended as regards the declaration that it was fabricated. But the declaration was taken within two hours of the assault and by a person of some position and dictated by him to a Hindu who would not be influenced

* *Criminal Ruling 63 of 1889.* Confirmation case No. 21 of 1889; Criminal Appeal No. 217 of 1889.

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by the faction feeling of the Mahamadons of the village which was the cause of the assault. It was argued that the state of the deceased after such blows as were inflicted made it impossible for him to have spoken in the coherent and sensible manner he did. But the cases given in *Taylor's* Medical Jurisprudence (p. 509 1st Edition) show that it is quite possible for a person to remain sensible after the infliction of wounds on the head of much more serious character. Moreover it was a practicable impossibility to have within the time tutored a man in such a state as the deceased to tell, in conjunction with the witnesses, the story told to the Patel by him. Such a plot must have broken down. It would perhaps have been better if the Judge had questioned the school-master who wrote down the statement and if the Judge had himself examined the doctor. But we do not think it necessary under the circumstances of the case to send the case back for such further investigation as we are satisfied that the Judge has come to a right conclusion. We cannot, however, agree with him as regards the punishment of the offence. No. 6, Jiva Anandaji, no doubt set on the others but the words put into his mouth by the deceased "kill him" are changed to " strike him " by other witnesses. Nor do all the witnesses confirm the deceased in his statement that No. 6 as well as No. 1 struck him (the deceased) on the head. It is, however, clear that he was a leader in the attack. It is equally clear that accused No. 1 began the blows and struck at least one of the blows on the head. These facts led the Judge to think these two men ought to be treated more severely than the rest. But although it is necessary to visit such offences of violence in a turbulent district with severity, we do not think the facts of the case conclusively point to these two men as being especially the cause of the death that ensued. We therefore commute the death sentence to that of transportation for life. As regards the rest of the accused we see no reason to interfere save as regards the fine imposed under the charge of rioting. There was only one offence though it was made up of parts each of which was itself an offence ; and as the accused have been punished for the graver offence they cannot be punished also by fine for the lighter offence (see section 71, Indian Penal Code *Empress* v. *Ram Partab* (1)), and the fine must therefore be remitted.

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26 November 1889. SCOTT & CANDY, JJ.

Queen-Empress v. Manaji. Queen-Empress v. Lal.*

Reformatory Schools Act (V of 1876), Sec. 8—Magistrate—Order—Judicial Proceeding—High Court—Revision—Criminal Procedure Code (Act X of 1882), Sec. 435.

The order of a Magistrate, under section 8 of the Reformatory Schools Act, 1876, is not an executive act but is a judicial proceeding; and the High Court has jurisdiction to revise it.

(1) I. L. R. 6 All. 121. *Criminal Review No. 353 of 1889. Criminal Reference No. 138 of 1889.

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PER CURIAM.—In this matter the record and proceedings were brought before us in revision under section 435 of the Criminal Procedure Code. The Magistrate within whose jurisdiction lies the Yerrowda Jail has, under section 8 of Act V of 1876, altered a sentence of six months' rigorous imprisonment to one of five years' detention in a Reformatory or until the offender shall attain the age of 18. The Government Pleader on behalf of the Crown took exception to the jurisdiction of this Court, on the ground that the intervention of the Magistrate under section 8 of the Reformatory Act (V of 1876) was an executive act, and not a proceeding before an inferior Criminal Court subject to the revisional jurisdiction of the High Court within the meaning of section 435, Criminal Procedure Code, nor a "case" tried within the meaning of section 28 of the Amended Letters Patent. Section 8 of the Reformatory Act says that in case the officer in charge of Jail is of opinion that any offender sentenced to imprisonment is under sixteen years of age he may bring him before the Magistrate within whose jurisdiction the jail is situated and the Magistrate may, if he thinks the offender under 16 years of age and a proper person to be an inmate of a Reformatory, direct him to be sent to a Reformatory. Thus a certain discretion is invested in the Magistrate, and he is empowered to alter the original sentence. It is to be observed that the discretion is to be invoked and this power of altering a judicial sentence exercised, not under the power of commutation possessed by Government under its prerogative of pardon, but merely by the particular jail officer and Magistrate in the course of their official duty. No mention is made of Government in the section, although by a subsequent section Government is empowered to discharge from a Reformatory or to remove from one Reformatory to another.

In the interpretation clause of the Criminal Procedure Code (section 4) the expression "judicial proceeding" means "any proceeding in the course of which evidence is or may be legally taken." Under section 8 of the Reformatory Act, clearly evidence may be taken by the Magistrate as to the age of the offender. This proceeding would seem, therefore, to be a judicial proceeding. The proceeding, moreover, involves an alteration of a sentence of a competent Court as in the present instance of six months' imprisonment to some years in a Reformatory. The alteration is made by a Magistrate only after he is satisfied on two points which are submitted for his decision. Supposing he does not exercise proper discretion on those two points, what authority is there to revise his decision and set him right.? The case seems to us to come within the meaning of a "proceeding" under section 435 of the Criminal Procedure Code, and the High Court, therefore, is the revising authority. It seems to us impossible to

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hold that the proceeding involving as it does the alteration of a sentence after the exercise of judicial discretion, is not of a judicial character, and that the Magistrate is not referred to in the Act *qua* Magistrate. It is doubtful whether it is a " case " under section 28, Letters Patent, but it seems to us to come within section 435 of the Criminal Procedure Code. Holding, therefore, that we possess revisional jurisdiction, we proceed to deal with the cases before us.

As regards No. 353 of 1889, it appears that the Magistrate directed the prisoner to be sent " to the Reformatory at Yerrowda for five years or until he shall attain the age of 18. " The question arises whether the Magistrate was not bound to ascertain the age of the prisoner, and in accordance with that finding to direct the confinement in the Reformatory according to the rules. It is not enough to simply find that the offender is under the age of 16. Otherwise it will be necessary for the Superintendent of the Reformatory to make enquiries on this point. In the criminal return the prisoner's age is apparently entered as 14, but in the record of the prisoner's statement before the Bench of Magistrates the age is entered as 17, while in the proceedings the clerk to the Bench of Magistrates entered the age as 16. We, therefore, reverse the order of the Magistrate, and return the proceedings to him that he may ascertain the prisoner's age, and then pass an order in accordance with section 8 and with the rules under section 22 of Act V of 1876. In case No. 138 of 1889, in which no exception was taken to our jurisdiction, as it arose under section 7, not section 8 of Act V of 1876, it is clear that the Magistrate has entirely overlooked the rules under section 22 (page 544, Government Gazette, 1889.) We must, therefore, reverse his order and return the proceedings that we may pass an order in accordance with section 7 and the rules under section 22 of Act V of 1876.

1890.

13 January 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Girji.*

Criminal Procedure Code (Act X of 1882), Sec. 518—Judge—Disposal of Property.

An order of reference under section 518 of the Code of Criminal Procedure can be made only in respect of property regarding which any offence appears to have been committed or which has been used for the commission of any offence.

ORDER.—The order of the Assistant Sessions Judge directing, under section 518, Criminal Procedure Code, that certain property produced in the case, including a sum of Rs. 20 in cash, should be delivered to the District Magistrate to be dealt with in the manner contemplated in that

* *Criminal Ruling 2 of 1890.* Criminal Reference No. 139 of 1889.

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section, is reversed, as the Assistant Sessions Judge has no jurisdiction to make such an order. It is only in respect of property regarding which any offence appears to have been committed or which has been used for the commission of any offence that an order of reference can be made under section 518 of the Code. In respect of a part of the property alleged to have been stolen in this case, the Assistant Sessions Judge found that the offence of theft had not been committed. The Court of Sessions should now make an order according to law as to the disposal of the property regarding which the Sessions Judge has applied for the orders of this Court.

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13 January 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Motilal.*

Cantonement Act (Bombay Act III of 1867), Rule 76—Owner—Resident agent.

Rule 76 of the Cantonement Rules which requires every owner of certain property within the limits of a Cantonement to appoint a resident agent, who shall be responsible for the observance of the rules referring to the owners of such property, is not a rule, the omission to comply with which is penal under section 11 of the Cantonement Act, 1867.

BIRDWOOD, J.—Rule 76 of the Cantonement Rules, framed under Bombay Act III of 1867, requires every owner of any house, building or premises or other immovable property within the limits of a Cantonement, "not residing within the Cantonement or in its immediate vicinity" to appoint, within a certain time specified in the Rule, "a duly authorized agent, resident within the Cantonement or in its immediate vicinity, who shall be answerable for the observance of all the present Rules which refer to the owners of houses or other property as aforesaid." It is not quite clear that this rule relates to any matter mentioned in any of the clauses of section 11 of the Act, in respect of which power is given to the Government to make Rules and Regulations under section 9; but, assuming that the Rule was properly made under sections 9 and 11, still I cannot hold that a breach of the rule is penal under clause 11 of section 11; for though that clause empowers the Government to impose penalties on persons convicted of the breach of any rules and regulations made under section 9, still it does not seem to have been the intention of the Government that the breach of this particular rule should be punishable with fine or imprisonment. Rule 76 is contained in Chapter III of the Cantonement Rules; and Rule 1 in that chapter provides a penalty for the breach of any rule contained in the chapter; but the special proviso to Rule 76 takes that Rule out of the operation of Rule 1. The proviso says that, failing the appointment of an agent under the rule, "the person authorized to receive rents or to act in any other way on behalf of an absentee owner in respect of immoveable property aforesaid, shall, if resident, as above

*Criminal Ruling 3 of 1890. Criminal Review No 391 of 1889.

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stated, be considered to be the agent appointed for the purposes of this rule." The proviso refers only to the case of a resident agent. In the present case, the accused who resides in the city of Ahmedabad, seems to have had a *gomashta* to whom some communication was made with reference to the notice sent to the accused for the appointment of an agent; but it does not appear whether the *gomashta* was resident in the Cantonement or not. But even in cases where there is no agent resident in the Cantonement, I cannot hold that the omission to appoint an agent constitutes a punishable breach of the Rule. The Rule is one of procedure only. If a landlord does not appoint an agent, the only consequence is that some person acting on his behalf, if there is such person resident in the Cantonement, will be considered as his agent for the purposes of the Rule. That is in such cases the omission to appoint is not to be regarded as an offence. The Government did not apparently consider it necessary to provide for cases where there was no such person resident. Possibly, it was thought that most absentee Cantonement landlords would have some resident agent. Any way, the proviso indicates very clearly that the Rule itself was not intended to be one the omission to comply formally with which was to be treated as penal. Whether, therefore, the accused's *gomashta* resides in the city or the camp of Ahmedabad, the conviction is bad and must be reversed, and the fine restored.

JARDINE, J.—I concur. It is contended by the Government Pleader that the intention of the Legislature in enacting section 11 clause 6 of Bombay Act III of 1867 was to include, within the general terms used, the failure to appoint an agent by the owner. This argument, if sound, would apply equally to cases where, in the event of failure, the second part of Rule 76 provides an agent by operation of the Rule, so here we have a test of the meaning. Now in such circumstance the supposed mischief likely to arise to the sanitation of the Cantonement from the failure to appoint an agent cannot occur, the Rule itself having specified an agent. Then if there is no mischief to be stopped, there is no reason to suppose that the Legislature would provide a penal sanction. I am of opinion, therefore, that it would be *ultra vires* of the Act to make the failure to appoint an agent a penal offence. It is safer to assume that the framers of Rule 76 intended it as a rule of procedure and convenience, especially as the ordinary substantive law and the rules legally framed to define nuisances and breaches of order are the usual means of preventing these kinds of mischief. I would therefore quash the conviction and sentence.

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27 February 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Fakira.*

Criminal Procedure Code (Act X of 1882), Secs. 346, 254—Whipping—Magistrate—Powers.

When a case is reported to a District Magistrate by a Second Class Magistrate, because the latter thinks that it is one which he ought not to try as a sentence of whipping, which he is not competent to pass would be the appropriate punishment, the report should be treated as one under section 346 of the Code of Criminal Procedure and an order such as is contemplated by the second para of that section should be made. The District Magistrate should not in such cases send back the case to the Second Class Magistrate with special direction to frame a charge under a particular section nor ought the latter to frame a charge under section 254 of the Code if he is not of opinion that he can adequately punish the offence.

ORDER.—When the case was reported to the District Magistrate, because the Magistrate Second Class thought that it was one which he ought not to try as a sentence of whipping which he was not competent to pass, would be the appropriate punishment (the offender being a juvenile offender) the District Magistrate should have treated the report as one under section 346, Criminal Procedure Code, and made such an order as is contemplated in the second para of that section. The Second Class Magistrate ought not to have framed the charge under section 254, Criminal Procedure Code, as he was not of opinion that he could adequately punish the offence. Record and proceeding to be returned with these remarks.

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5 March 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Gambhir.†

Criminal Procedure Code (Act X of 1882), Sec. 439—District Magistrate—Sessions Judge—Revision.

Where no special ground is shown by a District Magistrate for applying to the High Court for an order, under section 437 of the Code of Criminal Procedure, report should be made in the first instance to the Court of Sessions, which has concurrent revisional jurisdiction with the High Court under that section.

ORDER.—As the Court of Sessions has concurrent revisional jurisdiction with the High Court in this matter and no special ground is shown for applying to this Court for an order under section 437 of the Code of Criminal Procedure, the District Magistrate should in the first instance apply to the Court of Sessions.

The practice stated in the case of *Imp.* v. *Realah* (1) and others is one which has been followed by this Court.

**Criminal Ruling* 10 *of* 1890. Criminal Review No. 22 *of* 1890.

†*Criminal Ruling* 11 *of* 1890. Criminal Reference No. 13 *of* 1900. (1) I. L. R., 14 Cal., 887.

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24 March 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Mahadhu.*

Criminal Procedure Code (Act X of 1882), Sec. 193—Assistant Sessions Judge—Sessions Judge.

An Assistant Sessions Judge, who has been directed by Government to *take over charge* of the duties of Judge and Sessions Judge during the temporary vacancy in the office, is not an officer appointed to act as a Sessions Judge and has no jurisdiction to try any case, even as an Assistant Sessions Judge, unless it was made over to him by general or special order under the last para of section 193 of the Code of Criminal Procedure.

PER CURIAM.—Mr. Khareghat was not acting as a Sessions Judge when he tried this case; he tried it, therefore, as an Assistant Sessions Judge, and as it was not referred to him either by a special or general order under the last para of section 193 of the Code of Criminal Procedure, he had no iurisdiction to try it. The convictions and sentences are reversed The case must be retried by the Court of Sessions.

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27 March 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Umeda.†

Forest Act (Act VII of 1878). Sec. 41, Rule 26—Passes—Omission to return Pass—Khandesh District.

There is no rule made under section 41 of the Indian Forest Act, 1878, for the Khandesh District, which provides for the return of passes issued under the Act, and therefore the omission to return one cannot be held to be penal.

PER CURIAM:—There appears to be no rule made under section 41 of Act VII of 1878 for the Khandesh District similar to the one made for the Kanara District (*i. e.*, Rule 12 of the rules made under section 41) which provides for the return of passes issued under the Act and for the substitution of passes of a certain colour for passes of another colour. Under section 4 clause 5 of the rules it is necessary that passes should specify the officer to whom they are to be returned; but in the absence of any substantive provision requiring the holders of passes to return them, the omission to return a pass cannot be held to be penal under the rules. The conviction and sentence must therefore be reversed. The fine, if paid, to be restored.

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2 April 1890. BIRDWOOD & JARDINE, JJ.

In re Amra Nathu.††

Criminal Procedure Code (Act X of 1882), Sec. 517—Disposal of property.

Section 577 of the Code of Criminal Procedure must be limited to the offence actually under investigation. Property used for the commission of any offence not under investigation, or property regarding which no offence under investigation appears to have been committed, cannot be disposed of by an order under the section.

**Criminal Ruling* 12 *of* 1890. Criminal Review No. 21 of 1890. †Criminal Review No. 78 of 1890.
††*Criminal Ruling* 15 *of* 1890. Criminal Application for Revision No. 435 of 1889.

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BIRDWOOD, J:—The Sessions Judge's judgment of the 29th July 1889, and not the report now made, must be the basis of any order that we can now make on the application before us. That judgment implies that the anklets found in the possession of the relations of the deceasd, Hira Gokal, were the property of the applicant, Amra Nathu. The Sessions Judge acquitted him of the offence of giving the anklets to those relations as a bribe to induce them to make no complaint about the death of Hira; but he found that his mother gave the anklets to the relations and he evidently suspected that the applicant was cognizant of the use to which they were being put; and he ordered them to be sold and the proceeds to be credited to Government.

It has been argued on behalf of the Government that this order can be supported under section 517 of the Code of Criminal Procedure, because the Sessions Judge was clearly of opinion that the anklets were property "regarding which" an offence appeared "to have been committed." But if they were given as a bribe, they were given by a person not under trial for so giving them to persons who were not under their trial for receiving them. It does not appear, therefore, how there were any legal grounds on which the Sessions Judge could find that any offence had been committed regarding the anklets. The only offence under investigation before the Sessions Judge was one alleged against the applicant and that offence was not proved. For the purposes of section 517, therefore, the Sessions Judge could only find that no offence appeared to have been committed regarding the anklets. The application of the section must clearly be limited to the offence actually under investigation in an enquiry or trial. Property used for the commission of any offence not under investigation or property regarding which no offence under investigation appears to have been committed cannot be disposed of by an order under the section. The Sessions Judge had no jurisdiction, therefore, to order the property in the present case to be sold and the proceeds to be credited to Government. In the circumstances of the case he should, we think, have allowed the anklets to remain in the possession in which they were found, and left the applicant to assert his right to them by civil suit or otherwise as he might be advised. We reverse the Sessions Judge's order and direct that the anklets be restored to the possession of the relations of Hira.

JARDINE, J.—The order of the Sessions Judge giving the property to Government is in my opinion wrong as no Statute vests the ownership or possession of such property in Government as if it were treasure trove or unclaimed property. It is not distinctly found to have been corruptly received by the possessor as a bribe: it if had been so received,

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the Courts would not aid the briber to get it back: *Blachford* v. *Preston* (1) cited in *Leake* on Contracts under Illegal Contracts; *Story's* Eq. Jur. section 61. I am of opinion then that the Court will fulfil its judicial duty if it returns the property to the person from whom it was taken, leaving any person who claims it under a superior title to the ordinary remedy, when the person in possession can plead any right he may have to retain it.

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24 April 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Gopal *

Penal Code (Act XLV of 1860), Sec. 193—False evidence—Contradictory statements.

The accused was convicted on an alternative charge of giving false evidence by making two contradictory statements,—one in 1886 and the other in 1887. There was no finding that either of the statements was false. On his attention being called, while under examination in 1887, to the contradiction, he said, "If such statement has been made by me in my previous deposition, the same may be true":—

Held, that the accused must be taken to have withdrawn the statement at first made in his later deposition, and that he had the right to do so, for a deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him; and the statement that he finally makes must be taken to be the evidence that he intended to give.

PER CURIAM:—In his deposition of the 23rd August, 1886, the accused said that Ekoba walad Nathu had been in his service for 10 or 15 years and that, before that, he was in the service of Ramchandra Mahadaji. In his deposition of 18th November, 1887, he said that Ekoba was not in the service of Ramchandra Mahadaji during his life-time. For making these contradictory statements, the accused has been convicted, on an alternative charge, of giving false evidence. There is no finding that either of the statements is false. The Magistrate has failed to notice that, in his later deposition, the accused modified the statement made by him therein. On his attention being called to the statement in his earlier deposition of 23rd August, 1886, he said: "If such statement has been made by me in any previous deposition, the same may be true." He, therefore, withdrew the statement at first made in his later deposition and he had the right to do so: for a deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him and the statement that he finally makes must be taken to be the evidence that he intended to give (*cf. Regina* v. *Balkrishna Appashet*, (1) and *Comyn's* Digest, Justice of the Peace. p. 102). If this test be applied to the deposition of the 18th November, 1887, it appears that there was no contradiction between the two depositions.

We must, therefore, reverse the conviction and sentence and we acquit the accused.

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(1) 8 T. R. 79. *Criminal Ruling 16 of 1890. Criminal Application for Revision No. 30 of 1890.
(1) Cr. R. *ante* p. 54.

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22 March 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Wardhan.*

Penal Code (Act XLV of 1860) Sec. 193—False evidence—Alternative charge.

It is not permissible to charge a person in the alternative in that he gave false evidence either before the Chief Constable or the Magistrate, as the one is an entirely distinct offence from the other.

PER CURIAM.—This case has not been properly tried. In the first instance, as the offence of giving false evidence before a Chief Constable falls under the latter part of section 193 of the Indian Penal Code, while the offence of giving false evidence in a stage of a judicial proceeding is an entirely distinct offence falling under the earlier part of section 193, a charge in the alternative that the accused gave false evidence either before the Chief Constable or the Magistrate was improper (see *Imperatrix* v. *Kabhai Ujam* (1) and *Imperatrix* v. *Ramji* (2)). The conviction and sentence should, therefore, be reversed and a fresh trial ordered, at which the procedure laid down in *Imperatrix* v. *Kabhai Ujam* should be strictly followed. Again, the statement taken down in writing by the Chief Constable is not evidence of the statement made by the accused to him. The only evidence of that statement would be the accounts of it given by the persons who heard it made, though the statement in writing could of course be used by the Chief Constable for the purpose of refreshing his memory (see *Imperatrix* v. *Sitaram* (3)). The Magistrate erred in recording the Constable's statement as evidence in this case.

The Court reverses the conviction and sentence and orders that the accused be retried by the Magistrate, First Class.

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16 June 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Ascensao.†

Abkari Act (Bom. Act VI of 1878), Sec. 9—Liquor—Importation.

Under section 9 of the Abkari Act the importation of liquor into a port is not complete till the person importing it has had an opportunity of paying the duty thereon at the Customs house.

THE accused was charged with importing 58 bottles of wine from Goa into the port of Karwar in British India without payment of duty. He was therefore prosecuted under section 9 of the Bombay Abkari Act, 1878, and sentenced to pay a fine of Rs. 15 by the First Class Magistrate of Karwar.

The District Magistrate of Kanara, being of opinion that the conviction was illegal, referred this case to the High Court, stating:—

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*Criminal Reference No. 34 of 1890.

†*Criminal Ruling* 17 *of* 1890. Criminal Reference No. 26 of 1890.

(1) Cr. R., *ante* p. 336. (2) I. L. R., 10 Bom., p. 124. (3) I. L. R., 11 Bom., 657.

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"The accused in his defence has cited para 2 of the Government of India's Notification No. 9, dated 3rd January 1880, published at p. 37 of the Bombay Government Gazette, passed in connection with the Anglo Portuguese Treaty, under the provisions of which, he states, it is clear that the duty could be paid on wines exported from Goa into British India. The British Consul at Goa, who was written to on the subject, is under the impression that, under similar circumstances, European wines, taken from Goa to Bombay by passengers, are allowed to be *imported there on payment* in Bombay *of the duty due.*

"The Commissioner of Customs, Bombay, is also of opinion that the conviction is bad at law, on the following ground: 'The liquor seized in the case under reference is not alleged to have been of Indian manufacture. It was apparently of European Manufacture, and, not having been accompanied by a certificate from a duly authorized Portuguese officer of the nature contemplated in the Notification of the Government of India quoted above, was liable to the payment of customs duty under the provisions of the sea Customs Act, 1878, and the Indian Tariff Act, 1882, and therefore could be legally imported into Karwar, after payment of the duty thereon, in accordance with the provisions of section 9 of the Bombay Abkari Act, 1878. It is true that that section requires that the duty must be paid before importation and that according to the definition of 'import' in section 3, the act of importing was completed as soon as the steamer carrying the liquors arrived in British waters in the port of Karwar. But I think that in cases of this nature the law must be construed liberally, and that it should be held that the liquor became liable to the payment of duty when it reached British India, but that the duty was to be paid in accordance with the provisions of the Sea Customs Act.'

"It appears from the evidence that the accused had no intention of evading the payment of the duty, and that he had offered to pay it. In these circumstances, I think that, no offence was committed against the provisions of the Bombay Abkari Act."

ORDER.—The Court thinks that for the purposes of section 9 of Bombay Act V of 1878 the importation of the liquor in question ought not to be held to have been completed till the accused had had the opportunity of paying the duty thereon at the Customs house at Karwar. The conviction and sentence are, therefore, reversed and the fine, if paid, ordered to be refunded.

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16 June 1890. BIRDWOOD & CANDY, JJ.

Government of Bombay v. Dhago.*

Abkari Act (Bom. Act VI of 1878) Sec. 43 (f)—Liquor—Possessing apparatus—Liability.

*Criminal Ruling 13 of 1890. Criminal Appeal Notice of 1890.

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Where apparatus for manufacturing liquor is found in a house, it is safe doctrine to lay down that the head of the house should be proceeded against: since it is obviously possible in any family that a son may act in contravention of the Act, while the father may be quite innocent, though the material for illicit manufacture may be actually in a room of the house he is living in.

PER CURIAM;—The accused was convicted by the Magistrate, First Class, under section 43 (*f*) of Bombay Act V of 1878 of possessing apparatus for the purpose of manufacturing liquor in contravention of the Act. The Sessions Judge acquitted him on appeal on the ground that it was inexpedient for the officers of the Abkari Department to proceed in such cases against the eldest son in a family while the father was alive. He says:—"I do not think it was absolutely illegal to proceed against the eldest son when the father was alive. But I think it was inexpedient to do so. The head of the house should, it appears to me, be invariably proceeded against." We cannot accept the principle here laid down as a proper one for the guidance of the Sessions Judge in disposing of the appeal before him. The question in the case was whether the accused was, as a matter of fact, in possession of any material, still, utensil, implement or apparatus for the purpose of manufacturing liquor in contravention of Bombay Act V of 1878 or of any rule made under the Act. It is obviously possible in any family that a son may act in contravention of the Act while the father may be quite innocent, though the material for illicit manufacture may be actually in a room of the house he is living in. The question in any such case must be one of fact. It is not a question of civil responsibility but of conduct made penal under the Act. This question of fact, so far as the accused is concerned, the Sessions Judge has not dealt with at all. We must, therefore, reverse his order of acquittal and direct him to rehear the appeal.

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16 June 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Fakeera.*

Cantonement Rules—Rule 59—Public Road—Encroachment—Cantonement Committee—Sanction.

Before a person can be convicted under Rule 59 (3) of the Cantonement Rules, of the offence of encroachment by erecting a building on a public road, it is necessary that the Cantonement Magistrate should have made, with the sanction of the Cantonement Committee, such declaration in respect of the building as is contemplated in that rule. The omission to make such a declaration cannot be cured by a sanction given by the committee after the trial.

PER CURIAM.—The Court reverses the conviction and sentence as there is nothing to show that before the Cantonement Magistrate convicted the accused under Rule 59 of the Cantonement Rules, he had made, with the sanction of the Cantonement Committee, any such declaration in respect of

*Criminal Ruling 19 of 1890. Criminal Reference No. 32 of 1890.

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the building which the accused was making as is contemplated in that Rule. If no such declaration was made, there was no offence against the Rule. The omission to make it cannot be cured by a sanction given by the Committee, after the trial, to the Magistrate's proceedings. The Court notices further that, it was a grave omission on the part of the Cantonement Magistrate to frame no register of the case as required by section 263 of the Code of Criminal Procedure.

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16 June 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Francis Xavier.*

Indian Penal Code (Act XLV of 1860), Sec. 71—Same act—Separate punishments.

It is not legal to sentence an accused person to two separate punishments, for what is substantially the same act, though it falls under two separate definitions of offences.

ORDER.—The Court reverses the conviction and sentence of three months' rigorous imprisonment passed by the Sessions Judge under section 420 of the Indian Penal Code as it was not legal to sentence the convict to two separate punishments for what was substantially the same act though it fell under two separate definitions of offences.

With reference to his remarks at the close of his judgment it should be pointed out to the Sessions Judge that there may be cases of cheating as defined in section 415 which do not come within the provisions of section 420 which relates to Sessions cases of cheating in which the person cheated has been induced to deliver property or to make, alter or destory the whole or any part of a valuable security or any thing which is signed or sealed and which is capable of being converted into a valuable security. Section 415 includes cases in which the person cheated has been simply induced to do or omit to do any thing which he would not do or omit if he were not so deceived.

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19 June 1890. BIRDWOOD & CANDY, JJ.

In re Shivram.†

Criminal Procedure Code (Act X of 1882), Sec. 488—Maintenance—Wife—Adultery.

Where there has been a desertion of the husband for many years, coupled with adultery, and no attempt to seek the husband's pardon for past misconduct, the wife is not entitled to an order for maintenance under section 488 of the Code of Criminal Procedure, merely because, at the time when she makes her application she is not "living in adultery."

PER CURIAM :—We think that the Magistrate has put too literal a construction on the words "living in adultery" in section 488 of the Code of Criminal Procedure. He finds that Parvati ran away from her husband's house 12 years ago with her servant, and that she only returned from Bombay last year; and, then, not to her husband's house. In June

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**Criminal Ruling* 20 *of* 1890. Criminal Appeal No. 115 of 1890.

†*Criminal Ruling* 21 *of* 1890. Criminal Application for Revision No. 59 of 1890.

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last, she became the mother of a child whose father was not her husband. She admits that she has not asked her husband to take her back. In the circumstances, she is not entitled to claim maintenance from her husband on the plea that she is not, at this moment, living in adultery. In application No. 199 of 1887, decided on the 28th November, 1887, we held that adultery subsequent to an order for maintenance disentitles a wife to claim a continuance of the maintenance and entitles the husband to apply for a cancellation of the order. So when, as in the present case, there has been a desertion of the husband for many years, coupled with adultery, and no attempt to seek the husband's pardon for past misconduct, the wife is not entitled to an order for maintenance under section 488 of the Code, merely because, at the time when she makes her application, she may not be "living in adultery." She does not come into Court with clean hands, and the Court may, in such a case, rightly remain passive (I *Bright's* Law of Husband and Wife p. 265). We dispose of the present case with reference only to its own particular circumstances. We do not say that, in no circumstances, could a wife, who has been guilty of adultery, claim protection under the Code. The Magistrate's order must be reversed.

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3 June 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Digambur.*

District Municipal Act (Bom. Act VI of 1873), Sec. 53—Street—Obeying call of nature

To obey the call of nature elsewhere than in a street is not an offence under section 53 of the Bombay District Municipal Act, 1873.

ORDER—As the accused did not obey a call of nature in a street his act is not penal under section 53 of Bombay Act VI of 1873. The Court, therefore, reverses the conviction and sentence and directs the fine, if paid, to be refunded.

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17 July 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Ganpat. Queen-Empress v. Nur Mahomed.†

Arms Act (XI of 1878)—Arms—Spear.

The carrying of a spear is not an offence against section 19 (*e*) of the Arms Act, 1878, because under clause (*j*) of section 2 of the rules under section 27 of the Act, spears are exempted from the operation of the prohibition contained in sections 13, 14, 15 and 16 of the Act.

IN this case the accused was tried by the First Class Magistrate of Nandarbar and convicted under section 19 (*e*) of Act XI of 1898 (India) and sentenced on 7th April 1890 to pay a fine of Rs. 10, in default to suffer rigorous imprisonment for one month.

The District Magistrate, in making the reference to the High Court, stated:—

**Criminal Ruling* 24 *of* 1890. Criminal Review No. 134 of 1890.

†*Criminal Ruling* 25 *of* 1890. Criminal Reference No. 50 of 1890.

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"The accused in this case was arrested for killing a cow with a spear; he has been tried for the offence of mischief and also for an offence under the Arms Act.

Under clause (*j*) of section 2 of the Rules under section 27 of the Arms Act (No. 518 dated 6th March 1879) spears are exempted in Bombay Presidency from the operations of all prohibitions and directions contained in sections 13, 14, 15, 16 of the Indian Arms Act XI of 1879 and therefore the carrying of a spear is no offence. I, therefore, request that the conviction and sentence in this case may be reversed and fine ordered to be refunded to the accused."

ORDER.—For the reasons given by the District Magistrate the Court reverses the conviction and sentence and directs the fine, if paid, to be refunded.

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17 July 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Yakule.*

Evidence Act (I of 1872), Sec. 157—Statement by a witness—Chief Constable—Evidence—Corroboration.

A statement made by a witness to a Chief Constable may be proved, under section 157 of the Indian Evidence Act, in order to corroborate the testimony of a witness. Such a statement, standing by itself, is no evidence on which a conviction can be based.

PER CURIAM:—In the woman Yeshwada's deposition, which is written by the Magistrate with his own hand, and is almost illegible, we can find no statement implicating the accused Yakub in any degree more than she implicates the accused Babaji, who was acquitted by the District Magistrate on appeal. The District Magistrate seems to have confirmed the conviction recorded against Yakub, because Yeshwada had told the Chief Constable that Yakub has assisted Baban, the principal offender, in taking her out of her husband's keeping. But any statement made to the Chief Constable could only be used under section 157 of the Evidence Act, in order to corroborate evidence given by Yeshwada at the trial. If no statement was made by her at the trial to the effect that Yakub had assisted Baban, there was nothing in her evidence to corroborate. All that she really says is that Yakub was with Baban while the latter was taking her away. Similar evidence affecting Babaji was held by the District Magistrate to be insufficient to support his conviction. The statement made by Yeshwada to the Chief Constable, standing by itself, can furnish no legal basis for the conviction of Yakub. We, therefore, reverse the conviction and sentence passed against the accused Yakub and direct that he be set at liberty.

**Criminal Ruling 26 of 1890. Criminal Application for Revision No. 131 of 1890.*

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17 July 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Jiva Jetha.*

Criminal Procedure Code (Act X of 1882), Secs. 234, 235—Joint Sessions Judge—Joint trial—Practice.

The accused were tried at one trial by the Joint Sessions Judge of Ahmedabad on the following charges :—all the accused on a charge under section 401, Indian Penal Code; accused Nos. 3 and 4 on joint charges under sections 328 and 380, Indian Penal Code, accused No. 4 on two separate charges under section 411, Indian Penal Code; accused No. 1 on charges under sections 328 and 380, Indian Penal Code; accused Nos. 1 and 2 on two joint charges under sections 328 and 380, Indian Penal Code. The Joint Sessions Judge tried all these charges together, as section 235, Criminal Procedure Code, seemed to him to favour such a procedure and as the accused did not object to his so doing :—

Held (1) That the trial of all the accused on all the heads of the charge was opposed to section 234, Criminal Procedure Code.

(2) But that though it was unnecessary for the Joint Sessions Judge to try the accused on the separate heads of charges under sections 328, 380 and 411, Indian Penal Code, it was not only permissible, but even necessary to record evidence under those heads in order to prove the charge, under section 401, Indian Penal Code.

ORDER.—It was unnecessary in this case for the Joint Sessions Judge to try the accused on the separate heads of charge (*b*) to (*h*). It was, however, quite permissible to record evidence under those heads when they had once been framed; and it would have been necessary to record that evidence whether the heads of charge (*b*) to (*h*) had been framed or not in order to prove the charge under section 401 of the Indian Penal Code (see *Regina* v. *Shriram Venkatasami* (1)). It would have been sufficient to have recorded a conviction only under that section. The trial of the accused on all the heads was, indeed, opposed to section 234 of the Code of Criminal Procedure. It is clear, however, that in the present case, the accused were in no way prejudiced. It is not necessary, therefore, to set aside the convictions under any of the heads (*b*) to (*h*). The record and proceedings should be returned with these remarks.

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24 July 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Dhavlya.†

District Police Act (Bom. Act VIII of 1867), Sec. 7—Police Patel—Village Mhars—Assisting Public Works Department.

A Police Patel has no authority, under section 7 of the Bombay District Police Act, to order the village Mahars to assist a subordinate officer of the Public Works Department in measuring the high road.

PER CURIAM :—The accused were convicted under clause 1 of section 15 of Bombay Act VIII of 1867 of refusing to obey a lawful order issued by a Police Patel. The order was one requiring the accused, who are village Mahars, to assist a subordinate officer of the Public Works Department in

*Criminal Ruling 27 of 1890. Criminal Review No. 145 of 1890. (1) 6 Mad. H. C. R., 120.

†Criminal Ruling 28 of 1890. Criminal Reference No 60 of 1890.

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measuring the high road. There is no provision in Bombay Act VIII of 1867 which empowers a Police Patel to call the village servants to assist the officers of the Public Works Department. This authority over village servants is defined in section 7 of the Act. He can require them to aid him in performing the duties entrusted to him; and those duties are described in section 6, which does not impose on the Police Patil the duty of rendering assistance to officers of the Public Works Department. It was held in *Regina* v. *Ukha Sav* (1) that a Police Patil could not be legally convicted under section 9 of the Act for neglecting to report an encroachment made by villagers on a public road, as the duty of reporting encroachment on the road was not a duty legally imposed on a Patil by the Act. The order given in the present case cannot, we think, be treated as an order which the Mahars were bound by law to obey. We reverse the conviction and sentence passed against the accused and direct the fines, if paid, to be refunded.

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24 July 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Mukund.*

Abkari Act (Bom. Act V of 1878), Sec. 43 (f)—Apparatus—Possession—Intention.

To support a conviction under section 43 (*f*) of the Bombay Abkari Act, 1878, it is not sufficient to prove that the apparatus in the possession of the accused is such as can be used for the purpose of manufacturing liquor or any intoxicating drug; but it must be proved that he has the apparatus in his possession for that purpose.

IN this case the accused was convicted by the Second Class Magistrate of Bhiwandi for the offence of keeping in his possession materials for manufacturing illicit liquor under section 43 (*f*) of the Bombay Abkari Act.

ORDER—The conviction in this case is opposed to the ruling in the case of *Limda* v. *Koya* (1). We, therefore, reverse the conviction and sentence and direct that the fine, if paid, be restored.

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24 July 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Tanya.†

Evidence Act (I of 1872), Sec. 30—Confession—"made"—"at the trial"—Admissibility of confession.

Section 30 of the Indian Evidence Act is not to be read as if the words "at the trial" were inserted after the word "made" and the word "recorded" substituted for the word "proved".

**Criminal Ruling* 29 *of* 1890. Criminal Application for Revision No. 126 *of* 1890. (7) Bom. H. C., 1868.

(1) I. L. R. 9 Bom., 556. † *Criminal Ruling* 30 *of* 1890. Criminal Appeal No. 209 of 1890.

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Hence, a confession duly made at any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under section 30 of the Evidence Act as against the other accused persons.

ORDER.—It should be pointed out to the Sessions Judge that the construction apparently put by him on section 30 of the Evidence Act is not correct. The section is not to be read as if the words "at the trial" were inserted after the word "made" and the word "recorded" substituted for the word "proved". A confession duly made at any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under section 30 as against the other accused persons.

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30 July 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Durga.*

Penal Code (Act XLV of 1860), Secs. 392, 394—Convictions.

As the offence under section 394, Indian Penal Code, necessarily includes the offence under section 392 of the Code, an accused convicted under both the sections can be convicted and sentenced under section 394 alone.

PER CURIAM.—As the offence punishable under section 394 of the Indian Penal Code necessarily includes the offence punishable under section 392, an accused person who is convicted under both sections can legally be punished only under section 394; and indeed in such a case, it would be sufficient to convict under section 394 alone (see *Reg* v. *Mootkee Kora* (1)). If separate sentences could be passed in such a case, the accused would be sentenced twice for the same robbery. We must, therefore, reverse the sentence passed by the Sessions Judge under section 392, leaving the sentence of 5 years' rigorous imprisonment under section 394 untouched.

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30 July 1890. RESOLUTION IN CHAMBERS.

Letter from the Registrar, High Court No. 1301.

Criminal Procedure Code (Act X of 1882), Sec. 123—Security—Imprisonment—Order

Under section 123 of the Code of Criminal Procedure, a Magistrate cannot make an order for imprisonment in anticipation of default to give security under section 113; but, as, in cases where a prisoner is required to furnish security for good behaviour for a certain period on the expiration of his sentence of imprisonment, the period for which such security is required commences on the expiration of the sentence, if, when it commences, the prisoner does not furnish security, he is at once liable under section 123, to be detained in prison till he does furnish it, no warrant for his detention is necessary.

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6 August 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Bhikajirao.†

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction—First Class Magistrate—District Magistrate.

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*Criminal Ruling 31 of 1890. Criminal Reference No. 53 of 1890. (1) 2 W. R., 1.

†Criminal Ruling 35 of 1890. Criminal Reference No. 55 of 1890.

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The District Magistrate has no jurisdiction to grant the sanction for prosecution under section 193 of the Indian Penal Code, refused by a First Class Magistrate who is not subordinate to the former, as ordinarily no appeal lies from his decision to the former.

THE accused Rajabarav was alleged to have given evidence before Mr. L. N. Ajagamkar, the First Class Magistrate of Ratnagiri, in a murder case, which that officer was inquiring into directly contradictory to what Rajabarao stated before the Chief Constable of Chiplun during the course of police investivagation touching the aforesaid murder.

After the conclusion of the inquiry a motion was made to Mr. Ajagamkar to sanction prosecution of Rajabarao for giving false evidence but was refused. This fact was brought to the notice of the District Magistrate who after perusal of the record of the case granted sanction to prosecute Rajabarao for giving false evidence either before Mr. Ajagamkar or before the Police of Chiplun.

Upon the receipt of this sanction Mr. C. H. A. Hill, Magistrate First Class, had Rajabarao apprehended, and after making inquiry into the case committed him to the Sessions Court for trial on two separate heads of the charge, *viz.*

Firstly, under section 194 of Indian Penal Code for intentionally giving false evidence before the Chief Constable with intent to procure conviction of a capital offence; and

Secondly, under section 193 of the Indian Penal Code with intentionally giving false evidence before the Magistrate Mr. Ajagamkar during the course of a judicial proceeding.

Before the commencement of the trial the pleader for the accused Rajabarao objected to the trial on the ground that there was no proper sanction to prosecute.

The Sessions Judge of Ratnagiri thereupon made the present reference to the High Court, observing—

"Mr. Ajagamkar being a Magistrate of the First Class is for the purposes of section 195 of the Criminal Procedure Code, subordinate to the Sessions Court which ordinarily hears appeals from his decisions: *In re Anant* (1), though for some other purposes he is subordinate to the District Magistrate: *Imperatrix* v. *Perya* (2).

Mr. Ajagamkar having refused to grant a sanction to prosecute, the District Magistrate had no jurisdiction to cancel his order and grant sanction.

The District Magistrate's sanction to prosecute Rajabarao for giving false evidence before Mr. Ajagamkar must be treated as a nullity.

It is not alleged that the prosecution was commenced upon the complaint of the Court concerned as in I. L. R. 13 Bom. 109 and 384.

(1) I. L. R., 11 Bom., 433. (2) I. L. R., 9 Bom., 100.

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This objection was not taken before the Magistrate but it has been taken in the Sessions Court and I am bound to consider it. No notice was issued by the District Magistrate to the accused before granting sanction. It may be that the proper appellate Court might not have interfered with Mr. Ajagamkar's refusal. Leaving out of consideration the order passed by the District Magistrate, what remains is the refusal of the competent Court to grant sanction. Thus the accused is materially prejudiced in this case. Section 537 of the Criminal Procedure Code cannot cure this defect: I. L. R. 6 All. 98.

It seems to me, therefore, necessary to move their Lordships to quash the commitment in so far as it directs the trial under the second head of the charge preferred by the Magistrate.

It was at first doubtful whether any reference was necessary and whether I could not altogether expunge this charge and proceed with the trial of the first charge which does not require any sanction: *Imp.* v. *Ismal, No.* 16 *of the Criminal Rulings of* 1887 *of the Bombay High Court.*

But I think that I cannot omit the charge altogether. The word "after" in section 226 of the Code does not in my opinion include entire omission—*Imp.* v. *Poreshollat Sheik* (1), *Imp.* v. *Appa* (2)—though one head of the charge may be substituted for another provided the two relate to the same transaction: *Reg.* v. *Govind* (3). In the present case no other charge can be preferred in regard to the transaction of giving evidence before the Magistrate to obviate the necessity of sanction. The two charges have been separately framed with a due regard to the Criminal Ruling No. 26 of 1887 and they cover two separate offences. The Sessions Court has no power to omit the charge in regard to any offence, and drop down the trial for that offence. Section 240 of the Code has at present no application.

Sanction is necessary whether the charges under section 193 of Indian Penal Code are separate or alternative: 11 Bom. H. C. 34.

The commitment in regard to the first charge is perfectly legal and I do not feel justified in moving the Hon'ble Court for quashing the commitment *in toto*, as is desired by the pleader for the defence.

The whole of the oral evidence taken by the Magistrate relate to the first charge, so that there is no difficulty of separation of evidence. Mr. Hill being invested with the power to take cognizance of offences upon information (see *Bombay Government Gazette* of 4th July 1889, G. N. No. 3598 of 9th July 1889) could arrest the accused and inquire into the offence of giving false evidence before the Police without a complaint. Moreover, the District Magistrate's action can be legally referred to his powers under sections 191 and 192 of the Code. There is no irregularity

(1) 7 C. L. R., 143. (2) I. L. R., 8 Bom., 200. (3) 11 Bom., H. C. R., 278.

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whatever on the procedure and the evidence recorded and commitment made in regard to the first charge are not vitiated by any defect. Moreover, if there be any irregularity, it has not prejudiced the defence and section 537 of Criminal Procedure Code cures the defect.

In view of the postponement of the trial until receipt of the orders of the Hon'ble Court, and bearing in mind that the offence under either part of section 193 of Indian Penal Code is bailable, and it is doubtful whether section 194 of Indian Penal Code in regard to the statement before the Police would cover the facts to be proved, I have, on the application of the accused, released him on bail.

For these reasons I beg respectfully to refer this case to their Lordships for quashing the commitment in regard to the trial of the charge of giving false evidence before the First Class Magistrate on the ground of want of legal sanction or complaint to prosecute, and to direct that the trial in regard to the charge of giving false evidence before the Chief Constable upon the present commitment in regard to that or any other charge do proceed, or for such other order as they may be pleased to pass."

PER CURIAM:—Under section 195 of the Code of Criminal Procedure, the District Magistrate had no jurisdiction to grant the sanction which had been refused by the Magistrate, First Class, for the prosecution of the accused under section 193 of the Indian Penal Code. As no appeal ordinarily lies from the decision of a Magistrate, First Class, to a District Magistrate, the First Class Magistrate is not subordinate to the District Magistrate for the purposes of the section: *In re Anant Ramchandra* (1). He is subordinate only to the Court of Sessions, which has as yet granted no sanction in the case. The committal of the accused on the second head of the charge framed against them is therefore quashed.

It should be pointed out to the committing Magistrate that, whenever an accused person is committed for trial under section 193 of the Indian Penal Code, the evidence alleged to be false should be set out in the charge.

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14 August 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Hamirmal.*

Penal Code (Act XLV of 1860), Sec. 266—False scales—Fraudulent intention—String not at the centre of the lever.

To support a conviction under section 266 of the Indian Penal Code it is necessary to prove that the accused knew the scales to be false and intended to use them fraudulently; the mere possession of the scales, or their use, with a string not accurately tied at the centre of the beam, so that one scale outweighed the other, but which can be shifted at any time and may sometimes have been accurately tied, will not of itself be sufficient evidence of fraud.

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(1) I. L. R. 11 Bom. 438.

*Criminal Ruling 36 of 1890. Criminal Application for Revision No. 196 of 1890.

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PER CURIAM.—From the Police Patel's evidence in this case, it would appear that the scales used by the accused cannot, with strict correctness, be described as false scales. They are apparently true scales; but no hole has been bored in the beam or lever for the string with which the scales are held when in use. A string is not passed through a hole equidistant from the two ends of the beam, but is tied round the beam and was found not to be accurately tied at the middle point. The result was that one scale outweighed the other, which required "six annas" (whether in silver or copper is not stated) to be put into it to make the scales hang evenly. Such a defect could always be remedied by a readjustment of the string and would be apparent to purchasers whenever the scales were lifted. But even if such scales can be held to be false, it was necessary for the prosecution to prove that the accused knew them to be false and intended to use them fraudulently. There is no distinct finding by the Magistrate that the accused intended to use the scales fraudulently. If any instances had been proved of a recent fraudulent use of the scales there would have been some material for a finding as to fraudulent intention. The mere possession of the scales, or evidence of their use, with a string which could be shifted at any time and might sometimes have been accurately tied at the middle point of the beam, would not of itself be sufficient evidence of fraud (compare *Reg* v. *Kangalee Muduk* (1) and *Reg* v. *Damodhar* (2)). The case should have been more carefully tried; and a fuller statement of the reasons for convicting the accused should have been recorded by the Magistrate. We reverse the conviction and sentence and direct that the fine, if paid, be refunded.

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14 August 1890. BIRDWOOD & CANDY, JJ.

In re Venkatramana.*

Criminal Procedure Code (Act X of 1882), Sec., 476, and Chap. XVI—Penal Code (Act XLV of 1860), Sec. 411—District Judge—Jurisdiction.

A District Judge cannot direct the arrest and prosecution of a person under section 411, Indian Penal Code, as such an order is not warranted by the provisions of sections 195 and 476 of the Code of Criminal Procedure. If, in the hearing of a case before him, he thinks that some one should be proceeded against under section 411 of the Indian Penal Code, he can proceed under Chapter XVI of the Code of Criminal Procedure.

ONE Subbabhat brought a suit upon an hypothecation instalment bond against one Devarbhat in the Court of the Subordinate Judge of Kumpta, alleging that the bond was obtained by the said defendant by theft. The defendant alleged in the suit that the bond was discharged and hence it came into his possession and afterwards he deposited the same with his

(1) 18 C. W. R. 7. (2) 1 B. H. C. R. 181.

*Criminal Ruling 37 of 1890. Criminal Application for Revision No. 212 of 1890.

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mortgagee, the petitioner. The Subordinate Judge allowed the claim of the plaintiff holding that the bond debt was not discharged, the endorsement to the effect on the bond being inadmissible for want of registration. The District Judge in appeal confirmed the decree of the Subordinate Judge and at the same time ordered warrants to be issued against the defendant Devarbhut for prosecution under sections 441, 467 and 471 of the Penal Code and against the mortgagee, the petitioner, against section 411 of the said Code.

The petitioner, thereupon, applied to the High Court.

PER CURIAM.—The Court reverses the District Judge's order directing the arrest and prosecution of the applicant under section 411 of the Indian Penal Code, as that order is not warranted by the provisions of sections 195 and 476 of the Code of Criminal Procedure. It will be open to the District Judge, if so advised, to make a complaint under Chapter XVI of the Code of Criminal Procedure, if the Police have not already proceeded under Chapter XIV.

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14 August 1890. BIRDWOOD & CANDY, JJ.

Queen-Empress v. Vithal Annaji.*

Criminal Procedure Code (Act X of 1882), Secs. 144, 439—High Court—Revision—District Magistrate.

The High Court has no revisional jurisdiction to interfere with an order under section 144, Criminal Procedure Code; the aggrieved person has his remedy by an application to the District Magistrate under the last para but one to section 144, Criminal Procedure Code.

ORDER—Rejected: As this Court has no jurisdiction to interfere under section 439 of the Code of Criminal Procedure with an order made under section 144, and the applicant has his remedy by an application to the District Magistrate under the last para but one of section 144.

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19 August 1890. BIRDWOOD & CANDY, JJ.

In re Jasvantsingji.†

Criminal Procedure Code (Act X of 1882), Secs. 133, 137—Conditional order—Magistrate—Jurisdiction.

Section 133, Criminal Procedure Code, does not apply to an alleged user by one man of his own property so as to cause injury to the property of another.

All that a Magistrate can do under section 137, Criminal Procedure Code, is to make absolute the conditional order passed under section 133 of the Code. Where, therefore, the conditional order passed under section 133 of the Code is one which the Magistrate had no jurisdiction to make under that section, the subsequent order under section 137 of the Code is also illegal.

PER CURIAM.—The Magistrate's order to which objection has been taken in the present application is dated the 10th January 1890; and pur-

**Criminal Ruling. 38 of 1890. Criminal Application for Revision No. 228 of 1890.*
†Criminal Ruling 39 of 1890. Criminal Application for Revision No. 132 of 1890.

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ports to be made under section 133 of the Code of Criminal Procedure. It is in the following terms:—

"Whereas it appears to me that you have caused an obstruction to persons living in the village of Tagdi by erecting a new bund across a water-course by which the natural flow of water has been diverted from its natural course, and floods the crops of the people of Tagdi, and whereas you, the Thakore Saheb, had twice promised to endeavour to settle the matter very soon and amicably, but have failed to make any such attempt, and whereas the obstruction continues and the people of Tagdi have again complained to me, and whereas I have seen the obstruction myself and have seen the obstruction has been newly created, I do hereby direct and require you within the space of one month to remove the obstruction by pulling down the new bund, and allow the water from Pipal limits to follow its former natural course, or to show cause, in my Court of the District of Ahmedabad on the 10th February 1890, why the order should not be enforced."

The Magistrate who, under section 137 of the Code, took evidence in the matter, and made the order absolute, describes it as one "for the removal of an obstruction" in the shape of a bandh which the Thakore Saheb has "erected across a natural water-course" in the village of Pipal; so that during the monsoon rain water is diverted from its natural course, and flows along a road which runs from Pipal to Tagdi, past the village of Tagdi, whence it finds its escape by a culvert under the high road. In this way traffic is impeded, the village is threatened with an innundation, and the culvert becomes choked with silt. Such a passage of the rain water, the Magistrate finds to be unquestionably a public nuisance.

It is thus clear that the grounds upon which the Magistrate has made absolute the conditional order of the 10th January are not the grounds upon which that order was made, as set forth in the order itself; and the case found by the Magistrate to be established against the applicant is, therefore, different from that which the applicant was called on to meet.

The question under section 133 of the Code of Criminal Procedure, arising upon the terms of the conditional order, is whether the bandh is an "unlawful obstruction" in a "channel" which "is or may be lawfully used by the public." Now it is not disputed that the bandh was erected by the applicant on his own land, and that the villagers of Tagdi have no right to use the channel within the limits of Pipal. The effect of what has been done in Pipal may be to cause damage to the villagers in Tagdi; but such damage cannot form the subject matter of proceedings under section 133 of the Code of Criminal Procedure, which does not apply to an alleged user by one man of his own property so as to cause injury to the

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property of another. Whether the applicant diverted the rain water, which ordinarily flowed on his own land, on to the public road and so caused a nuisance, which could be dealt with by an order under section 133, was not the question with which the Magistrate should have dealt under section 317, for that was not the matter dealt with in the conditional order of the 10th January, which alone the Magistrate had jurisdiction to make absolute under section 137. As the conditional order was not one which the Magistrate had jurisdiction to make under section 133, it is reversed.

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28 August 1890 BIRDWOOD & CANDY, JJ.

Queen-Empress v. Annia.*

Penal Code (Act XLV of 1860), Sec. 193—Criminal Procedure Code (Act X of 1882), Sec. 161—False statements—Contradictory statements—Alternative charge.

A witness is not bound, under section 161 of the Code of Criminal Procedure, to answer truly criminating questions.

An alternative charge of an offence under section 193, Indian Penal Code, cannot be permissible in respect of contradictory statements, one of which is made to the Police and another to a Magistrate.

PER CURIAM.—As the answers given by the accused to the questions put by the Police officer would have had a tendency to expose him to a criminal charge, he was not bound by section 161 of the Code of Criminal Procedure to answer them truly. The answers could not, therefore, form the subject of a charge for giving false evidence. Moreover, if those answers could have formed the subject of a charge under section 193 of the Indian Penal Code, this was not a case in which an alternative charge was permissible (*Imperatrix* v. *Kabhai Ujam* (1)). There is no evidence on the record to show that the statement made by the accused to the Magistrate was false. The former contradictory statement made to the Police does not prove the falsity of the second statement, any more than the second statement proves the falsity of the former statement. The case is one in which, an alternative charge not being permissible, a conviction is, in the absence of evidence, impossible. The record and proceedings should be returned with these remarks.

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1 September 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Purshottam. Queen-Empress v. Lal.*

Reformatory Schools Act (V of 1876), Sec. 7—Reformatory—Juvenile offender—Sentence.

In the case of a juvenile offender whom it is desirable to confine in a Reformatory, a Magistrate must, on convicting him, sentence him according to law; and if he sentences him to imprisonment, whether rigorous or simple, he may then make a further order such as is contemplated in section 7 of the Reformatory Schools Act, 1876.

**Criminal Ruling* 40 *of* 1890. Criminal Reference No. 74 of 1890. (1) Cr. R. No. 26.

(1) *Ante* p. 336. **Criminal Ruling* 41 *of* 1890.

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ORDER—The sentence passed by the Magistrate is reversed as illegal. Having convicted the accused he must sentence him according to law; and, if he sentences him to imprisonment, whether rigorous or simple, he can then make a further order such as is contemplated in section 7 of Act V of 1876.

ORDER—The Court reverses the order passed by the Magistrate on the 31th March 1890, as it is no more legal than the order passed by him on the 19th September 1889, which was reversed by this Court on the 26th November 1889. The Magistrate, having convicted the accused, must sentence him according to law; and, if he sentences him to imprisonment whether rigorous or simple, he can then make a further order under section 7 of Act V of 1876.

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4 September 1890. BIRDWOOD & JARDINE, JJ.

Queen-Empress v. Wali Asmal.*

Criminal Procedure Code (Act X of 1882), Sec. 345—Compounding—Acquittal—Retrial.

An accused charged under section 324 of the Indian Penal Code cannot, if the offence has been compounded with the permission of the Court, be again tried on the same facts on a charge under section 323 of the Indian Penal Code, if the composition, which has the effect of an acquittal, is still in force.

THE complainant in this case, one Bagas Ali, alleged that on the 8th April 1890, he was assaulted by Wali Asmal and Umar Suleman and by a third person named Jiva Umar. Wali Ismal (accused No. 1), he said, struck him over the eye and on right collar-bone, with the handle of a *kodali* or hoe; Jiva Umar (accused No. 2) wounded him in the abdomen with the edge of a *kodalo*, and Umar Suleman (accused No. 3) struck him on the back of the right hand with a stick. The Police sent up the case for trial before the Second Class Magistrate, Jambusar, charging all the three accused with voluntarily causing hurt with dangerous weapons (section 324, Indian Penal Code). While the case was pending before the Magistrate, the complainant applied for leave to compromise the charge, which leave was granted by the Magistrate; this had, under section 345, Criminal Procedure Code, the effect of an acquittal. This occurred on the 19th April eleven days after the alleged assault. The wound in complainant's abdomen was not healed until the 12th May, or 34 days after it was inflicted, and during that whole of that interval, it was alleged, the complainant was unable in consequence of the wound to follow his ordinary occupation as a cultivator. The injuries alleged to have been inflicted by accused Nos. 1 and 3 were both cured within twenty days of their infliction. Accused No. 2 was therefore committed to the Court of Sessions at Broach for trial on a charge

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**Criminal Ruling 43 of 1890. Criminal Reference No. 66 of 1890.*

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of voluntarily causing grievous hurt with a dangerous weapon (section 326, Indian Penal Code). The committing Magistrate also committed the other two accused for trial under section 323, Indian Penal Code.

The Joint Sessions Judge of Broach, being of opinion that the latter commitment was illegal, made this reference to the High Court, remarking: "This appears to me to be clearly illegal and opposed to the provisions of section 403, Criminal Procedure Code."

PER CURIAM—The accused, Wali Asmal, Isa and Umar Suleiman Dasu, have already been once tried by a Court of competent jurisdiction for the offence punishable under section 324 of the Indian Penal Code. The offence was, with the permission of the Court before which the prosecution was pending, compounded by the person to whom the hurt was caused, and such composition has the effect of an acquittal under section 345 of the Code of Criminal Procedure. The acquittal still remains in force. Under section 403 of the Code, the accused Wali Asmel Isa and Umar Suliman Dasu are not, therefore, liable to be tried again on the same facts for any other offence for which a different charge from that under section 324 of the Indian Penal Code might have been made under section 236 of the Code of Criminal Procedure. The charge, therefore, under section 323 of the Indian Penal Code, on which they have now been committed in respect of the same facts, which formed the subject of the former charge, is illegal, and is, therefore, quashed.

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4 September 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Sadashiv.*

Cattle Trespass Act (I of 1871), Sec. 22—Compensation—Appeal.

No appeal lies from an order passed under section 22 of the Cattle Trespass Act awarding compensation for illegal seizure of cattle.

IN this case Sadashiv was sentenced by the Second Class Magistrate of Karkal on conviction of the offence of illegal seizure of cattle belonging to one Govind, under section 23 of the Cattle Trespass Act, I of 1871, to pay compensation of Rs. 10 in addition to Rs. 2-2-0 on account of process fees paid by Govind to procure their release. Mr. Ingle, the First Class Magistrate, on appeal, acquitted the accused and directed the fine to be refunded.

The District Magistrate of Kanara, in making this reference to the High Court observed, "I beg to recommend that Mr. Ingle's order of acquittal on appeal be quashed, as on the authority of the ruling in *Queen-Empress* v. *Raya Lakshman* (1) no appeal lies aganist an order for compensation made under section 22 of Cattle Trespass Act, 1871"

*Criminal Ruling 44 of 1890. Criminal Reference No. 77 of 1890. (1) I. L. R. 10 Bom. 230.

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ORDER.—The Court sets aside the proceedings of the Magistrate First Class in appeal as being held without jurisdiction (see *Queen-Empress* v. *Raya Lashman* (1).

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11 September 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Shiva Kashiram.*

District Police Act (Bom. Act VII of 1867), Sec. 31—Nuisance—Dirt.

A person committing nuisance on or close to, and within sight of, any public road, street, or thoroughfare as specially provided for in clause 4 of section 31 of the Bombay District Police Act, 1867, cannot be legally convicted of depositing dirt under clause 3.

PER CURIAM :—The accused committed nuisance within the meaning of clause 4 of section 31 of Bombay Act VII of 1867 and if he did so "on or close to and within sight of a public road," he was liable to be punished under that clause. The conviction under clause 3 of the section cannot be sustained, as, though the act of the accused might perhaps be held to fall within the letter of that clause, yet, as specific provision is made in clause 4 for the precise act of which the accused was guilty, the intention of the Legislature was clearly that such an act should be dealt with under clause 4, not clause 3. As the nuisance is not found to have been committed on or close to and within sight of a public road, the conviction and sentence must be reversed and the fine, if paid, refunded.

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11 September 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Narayan.†

Public Conveyances Act (Bom. Act VI of 1863)—Tonga—Her Majesty's Mails.

A *tonga*, when used for carrying Her Majesty's Mails, is not a public conveyance within the definition contained in section 1 of the Bombay Public Conveyances Act.

ORDER.—A tonga when used for carrying Her Majesty's Mails is not a public conveyance within the definition contained in section 1 of Bombay Act VI of 1863; the Court, therefore, reverses the conviction and sentence and directs that the fine, if paid, be refunded.

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17 September 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Kamru.††

Criminal Procedure Code (Act X of 1882), Secs. 437, 173—Magistrate—Police report—Striking a case off the register—Sessions Judge—Review.

A Magistrate's order directing a case reported to him by the police, under section 173, Criminal Procedure Code, to be struck off, is not a judicial order dismissing a complaint or charging an accused person which can be reviewed by the Sessions Judge under section 437 of the Code.

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*Criminal Ruling 45 of 1890. Criminal Review No. 254 of 1890. (1) I. L. R., 10 Bom., 230.

†Criminal Ruling 46 of 1890. Criminal Reference No. 81 of 1890.

††Criminal Ruling 47 of 1890. Criminal Reference No 83 of 1890.

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IN this case a complaint of theft was preferred to the Police who investigated into the matter and reported to the Magistrate First Class Ratnagiri that the stones complained of were removed by the accused but there was no dishonest intention in the case as the accused asked permission of the complainant's mother to remove the stones. The Magistrate directed the complaint to be written off, and also ordered the stones to be delivered to the complainant.

The Acting Sessions Judge of Ratnagiri, in making this reference, stated: "In the revision application preferred to this Court I found that the proof as to consent or permission of the mother of the complainant was unsatisfactory and this was a fit case for the Magistrate to take steps in the matter. The District Magistrate has brought to my notice the defect of jurisdiction in regard to this order. I think on a second consideration that the District Magistrate's view is correct. There was no complaint before the Magistrate and there could not be legally a discharge unless the accused were put upon their trial."

ORDER.—The Magistrate's order, directing the case reported to him by the Police under section 173, Criminal Procedure Code, to be struck off, was not a judicial order dismissing a complaint, or discharging an accused person, which could be reviewed by the Sessions Judge under section 437 of the Code; the Court, therefore, reverses the Sessions Judge's order of the 2nd August 1890 directing further inquiry under that section.

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7 September 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Krishnaji.*

Criminal Procedure Code (Act X of 1882), Sec. 437—District Magistrate—Ordering further inquiry.

It is competent to a District Magistrate to order a further inquiry under section 437 of the Code of Criminal Procedure, although he may have declined to do so on a previous occasion in the same matter.

THE accused in this case were discharged by the Second Class Magistrate under section 253 of the Criminal Procedure Code on 20th March 1890. On 17th April, the Superintendent of Railway Police asked that the District Magistrate of Satara would have the case retried. On the 29th April, the District Magistrate having perused the papers declined to take further proceedings recording his opinion that there was no ground for interference. The Superintendent of Railway Police being dissatisfied with this order of the District Magistrate again wrote, admitting that there was no case against one of the accused, the Station Master, but asking that the other accused, the Assistant Station Master should be retried. The latter showed cause why he should not be retried, and the District Magistrate on

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**Criminal Ruling 48 of 1890. Criminal Reference No. 82 of 1890.*

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the 3rd June, made an order that he could not, as matters stood, order a retrial. Subsequently, however, certain information appeared to the District Magistrate who, without again calling on the Assistant Station Master to show cause, ordered that he should be retried.

The Sessions Judge of Satara, being moved to make a reference to the High Court, did so, observing: "I am of opinion that the District Magistrate's order for retrial was wrong, for he had no power to review or cancel his previous order refusing to order a new trial. See I. L. R., 10 Bom., 176; I. L. R., 7 All., 572; Cr. R., No. 19 of 1887."

ORDER.—The Sessions Judge to be informed that the High Court sees no reason to interfere; as it was competent to the District Magistrate to order further inguiry under section 437, Criminal Procedure Code.

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30 September 1890. RESOLUTION IN CHAMBERS.

Queen-Empress v. Khandu.*

Sentence—Imprisonment—Consecutive sentences—Practice—Procedure.

The Criminal Ruling of 21st April 1879 that where a person already undergoing a sentence of imprisonment is sentenced to imprisonment which is ordered to commence after the expiration of the imprisonment to which he has been previously sentenced, such imprisonment commences from the time it is ordered to commence, *viz.*, from the expiration of the previous imprisonment, whether by reversal or completion of the punishment, is adhered to after consideration of the case of *Gregory* v. *The Queen* at 15 A. and E. (Q. B.) p. 974, and the Madras High Court Criminal Proceedings No. 201 of 15th February 1879, quoted at Weir's Criminal Rulings, third edition, p. 993.

Where, therfore, a person was convicted on the same day in two separate cases and sentenced to a term of imprisonment in each, and the Court ordered that the sentence in the second case should commence on the expiration of the sentence in the first, and the conviction and sentence in the first case were reversed in appeal after the accused had undergone the whole of that sentence:—

Held, that the sentence in the second case commenced to run after the expiration of the sentence in the first, and not before.

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2 October 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Shivdia.†

Abkari Act (Bom. V Act of 1878), Sec. 43 (e) and (f)—Separate sentences.

The possession of materials for manufacturing liquor and the act of manufacturing liquor are distinct offences punishable, respectively, under clauses (*f*) and (*g*) of section 43 of the Abkari Act, and that, therefore, separate sentences may be passed where an accused is convicted of these offences.

PER CURIAM:—The ruling referred to by the District Magistrate has no application to the circumstances of the present case. The accused had in their possession materials for the purpose of manufacturing liquor in contravention of the Act. That was an offence under the Act. When they

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**Criminal Ruling.* Criminal Application for Revision No. 284 of 1890.

†*Criminal Ruling* 52 *of* 1890. Criminal Reference Nos. 91 and 92 of 1890.

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further proceeded to manufacture liquor in contravention of the Act, they committed a new and distinct offence. The possession anterior to the manufacture was not involved in the offence of illegally manufacturing liquor of which the accused were convicted. They were rightly punished, therefore, for both offences.

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30 October 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Nanaji.*

Criminal Procedure Code (Act X of 1882), Sec, 259—Magistrate—Warrant case—Charge framed—Day of hearing—Absence of complainant—Dismissal of complaint.

A Magistrate having framed a charge against an accused person in a warrant case and appointed a day for hearing, if the complainant does not appear on that day he should hear the evidence for the defence and then decide whether the accused is, or is not, guilty; but that he cannot acquit the accused under section 258 of the Criminal Procedure Code, or discharge him under section 259 of the Code, without hearing evidence for the defence, merely on the ground that the complainant did not appear to prosecute the charge on the day fixed.

The District Magistrate of Nasik in making this reference to the High Court observed:—

"THE accused Nos. 1 and 2 Nanaji *walad* Shadu and Dalpat *walad* Hanmanta were charged under section 323, Indian Penal Code, with voluntarily causing hurt to the complainant. Accused No. 2 was discharged under section 253, Criminal Procedure Code, but a charge was framed against accused No. 1 after all the evidence for the prosecution had been taken. On the day appointed for hearing the evidence for the defence, the complainant failed to appear and the Magistrate for this reason acquitted and discharged the accused under section 258, Criminal Procedure Code. The framing of the charge implied that a *prima facie* case had been established by the evidence against the accused and there was no necessity for the complainant to attend and hear the defence evidence and the Magistrate therefore erred in acquitting the accused.

ORDER.—The Court sets aside the order of acquittal and directs the case to be resumed and completed according to law.

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20 November 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bhika Lala.†

Penal Code (Act XLV of 1860), Sec. 211—False complaint—Police.

A person who makes a false complaint to the Police may be proceeded with under section 211 of the Indian Penal Code; and it is not competent to a Magistrate to refuse to entertain such a case on the ground that the accused had not been afforded an opportunity of proving his original complaint in a Court of competent jurisdiction.

**Criminal Ruling* 54 *of* 1890. Criminal Reference No. 80 of 1890.

†*Criminal Ruling* 55 *of* 1890. Criminal Reference No. 88 of 1890.

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In this case the facts were that one Bhikha Lalla of Olpad having brought a complaint before the Chief Constable of the Taluka against Parshotam and Lala of offences under sections 457 and 380, Indian Penal Code, the Chief Constable on investigation found that the complaint was maliciously false and forwarded the papers to the First Class Magistrate through the Superintendent of Police with a request that the case might be ordered to be struck off the crime register. The Magistrate thereupon ordered that the case should be struck off. The District Superintendent of Police, however, ordered the Chief Constable to prosecute the complainant under section 211 of the Indian Penal Code. The First Class Magistrate, who conducted the proceedings under section 211, Indian Penal Code, discharged the accused on the grounds that the accused had not been afforded a chance of proving his original complaint in a Court of competent jurisdiction, basing his decision on I. L. R., 6 Cal. 496 and 582.

The District Magistrate of Surat, in making this reference to the High Court, observed: "Mr. Darasha based his decision on rulings of the Calcutta High Court, I should be glad to be informed whether it has the approval of the Bombay High Court. In practice it is attended with great inconvenience to all parties concerned."

ORDER.—Of the two cases cited by the Magistrate, First Class, that of *The Government* v. *Karimdad* (1) is not similar to the present; and that of The *Empress* v. *Salik Roy* (2) does not support the view taken by the Magistrate. The prosecution set on foot by the Police is not illegal and clearly the prosecutor ought to be given the opportunity of proving the truth of his accusation that the accused has made a false complaint to the Police. We reverse the Magistrate's order of discharge and direct that the case be enquired into.

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20 November 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Tajbhai.*

Criminal Procedure Code (Act X of 1882), Secs. 432 to 442—Chapter XXXII—Sessions Judge—Reference—District Magistrate.

Where an application is presented to a Court of Sessions under Chap. XXXII of the Code of Criminal Procedure, it has no power to refer the applicant to a District Magistrate, whose Court is one, not of inferior, but of concurrent jurisdiction, with the Court of Sessions, for the purposes of that Chapter.

THE District Magistrate of Surat in making this reference to the High Court, stated:—

"I have the honour to submit for the orders of the High Court an application by Tajbhai Jafarji and Abdul Husen Adamji for examination of a

(1) I. L. R., 6 Cal., 496. (2) I. L. R., 6 Cal., 582.

*Criminal Ruling 57 of 1890. Criminal Reference No. 99 1890.

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record of a Criminal trial under section 438, Criminal Procedure Code. It was originally made, as will be seen by the heading, to the Sessions Court but was subsequently endorsed to me as that Court refused to accept it until it had first been presented to the District Magistrate.

I beg to submit that the application having been made to the Court of Sessions should have been dealt with by it. The terms of section 438, Code of Criminal Procedure, give the Court of Sessions and the District Magistrate concurrent jurisdiction. It is not to be supposed that the Court would refuse to deal with the petition after it had been rejected by the Magistrate since to do so would be to cancel its own jurisdiction altogether. Consequently the action of the Court practically introduces a series of two appeals instead of one, under section 438, Code of Criminal Procedure, to the increase of litigation and to the unnecessary burdening of the already overworked Magistrate's office.

It is within the competence of the Court of Sessions to examine a record of its own motion without a reference to the District Magistrate, and in the same way I submit that it should dispose of petition made to itself for the exercise of the power. The convenience of such a course is manifest not only for the above given reason, but because the District Magistrate during the quarter part of the year is at a distance from head quarters sometimes in foreign states and cannot be reached without expense and delay which may result in an innocent man remaining for some days in prison. The course most likely to secure prompt justice would be for the nearest competent authority to receive the petition."

Upon reading this letter of reference, the High Court desired the Sessions Judge of Surat to make a report, who reported as follows:—

"2. No written order was passed in the matter, but the pleader when he intimated his intention of presenting the application, and the Bar generally, were verbally informed that they should go in the first instance to the District Magistrate and that as a general rule the Sessions Court would not exercise its powers under Chapter XXXII of the Criminal Procedure Code in the case of applications made through pleaders until the applicant had exhausted his remedies in the lower Courts. The absence of a written order was due to the desire of the pleader to take his written application (with a mere alteration in the heading) direct to the District Magistrate, thus saving time and the value of the stamps. The written application did not actually come into the hands of the Court.

3. As a matter of convenience it seems to me very desirable that when applications are made under this Chapter through pleaders, they should come up step by step in the order of the tribunals. It would for instance be inconvenient if a pleader went first to the High Court and finding that

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their Lordships would not interfere then tried the District Magistrate or Court of Sessions and obtained from either of these authorities orders virtually overriding those of the High Court of which of course the District Magistrate or Sessions Judge would be ignorant. Similarly it would be inconvenient if after the Sessions Judge had refused to interfere the District Magistrate interfered in a matter in ignorance that the question had been before the Higher Court.

4. On this point I would solicit a reference to the cases reported at I. L. R. 14 Calcutta 887 and I. L. R. 12 Allahabad 434 as also Criminal Ruling No. 11 of March 1890 of the Bombay High Court.

5. This Court would of course in special circumstances exercise its jurisdiction on an application even when no reference had been made to the District Magistrate and would of course exercise its jurisdiction on its own motion in all cases originating with itself.

6. But I do not propose in ordinary circumstances on the application of a pleader or a party to exercise the discretion vested in me by section 438 until the applicant has been to the District Magistrate, as in my view it would be highly inconvenient, if for instance, I refused to suspend the execution of a sentence and the District Magistrate subsequently suspended it. The course I have adopted does not as the District Magistrate thinks (Vide his para. 2) introduce a series of two appeals instead of one but insures that the two or three appeals which already practically exist should be appeals from the lower to the higher tribunals and not the reverse at the choice of the parties or their pleaders."

PER CURIAM.—The High Court is unable to concur in the view expressed by the Sessions Judge. When an application is presented to a Court of Sessions under Chapter 32 of the Code of Criminal Procedure, it has no power to refer the applicant to the District Magistrate, whose Court is one, not of inferior, but of concurrent jurisdiction, with the Court of Sessions, for the purposes of this Chapter. As to the inconvenience referred to by the Sessions Judge in para 3 of his letter, his attention might well be directed to *Queen-Empress* v. *Pirthi* (1).

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21 November 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Krishna Shet.*

Penal Code (Act XLV of 1860), Sec. 188—Theatre—Proprietor.

A proprietor of a theatre, not in actual possession or management of the theatre at a time when a lawful order promulgated by a public servant was disobeyed, cannot be convicted under section 188, Indian Penal Code.

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(1) I. L. R., 12 All., 434.

*Criminal Ruling 59 of 1890. Criminal Application for Revision No. 279 of 1890.

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PER CURIAM.—As the accused No: 1 Krishna Shet had let the theatre to the accused No. 3 for the purposes of dramatic performances, and as, at the time of the alleged offence, the theatre was not in his possession or under his management, his conviction under section 188 of the Indian Penal Code cannot be sustained. We reverse the conviction and sentence passed upon Krishna Shet *bin* Narayan Shet and direct that the fine, if paid, be restored.

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27 November 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Devki. Queen-Empress v. Malamma.*

Salt Act (Bom. Act II of 1890), Sec. 3 (g)—Salt-water—Purification—Evaporation.

The accused bought some dirty salt in the Bazar, dissolved it in water, removed the dirt therefrom and obtained clear dry salt by evaporating off the water:—

Held, that this was manufacturing salt within the meaning of section 3 clause (*g*) of the Salt Act, 1890.

THE accused, in each of the two cases under reference, were convicted by the Second Class Magistrate of Ankola under section 47 of the Bombay Salt Act (II of 1890) and passed sentences of fine.

The District Magistrate of Kanara, being of opinion that these convictions and sentences were illegal, made this reference to the High Court, stating:—

"The Magistrate appears to have held that the mere act of boiling any kind of salt in water with the sole object of removing impurities and rendering it more palatable, constitutes 'manufacture' in contravention of the law. No enquiry was made whether the salt in question had paid duty or not.

By section 11 no one may manufacture salt without a license from the Collector. 'Manufacture' is defined to *include* every process for the purification or refinement of salt.

I am of opinion that the use of the term 'includes' signifies that any process of refinement or purification of salt *may* amount to manufacture but need not necessarily do so. The Salt Act is fiscal and designed for the protection of the revenue. If, as must be presumed in these cases, the salt had paid duty no loss would result to the revenue by further purification and so the penal clauses of the law do not seem to apply."

PER CURIAM.—The Magistrate does not find that the salt was originally contraband. On the contrary, he distinctly says that there is no proof that the accused separated from earth the three tolas of salt found in her house. And there is nothing to show that her own story is not true. She says that her child poured some water into the pot in which she kept her salt, thus melting it, and that, not wishing to lose the salt, she put

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**Criminal Ruling* 60 *of* 1890. Criminal References Nos. 131 and 132 of 1890.

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the brine on the fire, and evaporated the water, thus producing dry salt. The heating of the brine was certainly a "process" by which the salt was "separated from brine" and fell, therefore, within the definition of "manufacture" contained in section 3 (*g*) of the Bombay Salt Act, 1890. But, in the circumstances of the case, a fine of Rs. 10, with 8 days' rigorous imprisonment in default of payment, was excessive and wholly disproportioned to the character of the offence (see also our judgment in Criminal Reference No. 132 of 1890 of this day's date). We reduce the fine to one anna and award one hour's imprisonment in default of payment of the fine. Any sum levied from the accused in excess of one anna to be refunded.

PER CURIAM.—The accused brought some dirty salt in the Bazar and in order to clean it, dissolved it in water, which she boiled after removing all particles of dirt from it. She thus obtained some clean dry salt. The process by which the salt was separated from the brine falls within the definition of "manufacture," contained in section 3 (*g*) of the Bombay Salt Act, 1890, and as the accused had obtained no license to manufacture salt under section 11, her act is punishable under section 47. But in the circumstances of the case, the fine of Rs. 15 with 10 days' imprisonment in default appears to us to be excessive and wholly disproportioned to the character of the offence, especially as the Act has only come into force recently and contains a new definition of the word "manufacture" which will apparently convert into crimes some perfectly innocent practices connected with the use of salt for domestic purposes. We reduce the fine to eight annas and award one day's simple imprisonment in default of payment of the fine. Any sum levied from the accused in excess of eight annas to be refunded.

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27 November 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Nathoo Lalji.*

Criminal Procedure Code (Act X of 1882), Sec. 233—Charge of one offence—Conviction of another.

The accused, having been summoned to answer a charge of storing wool, was convicted of storing cotton:—

Held, that the conviction could not be upheld as the accused had no proper notice and no proper opportunity of answering the charge of storing cotton.

PER CURIAM:—The accused was summoned to answer a charge of storing wool on the 28th July 1890, contrary to the provisions of section 394 of the City of Bombay Municipal Act, 1888. When he appeared in Court on the 12th September, the day fixed for the hearing, he asked that his godown might be seen by the Municipal Inspector. It was accordingly inspected but no wool was found there. Some loose cotton was, however, found.

*Criminal Ruling 61 of 1890, Criminal Application for Revision No. 313 of 1890.

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Thereupon the accused was convicted of storing cotton on the 12th September, 1890, contrary to the Act.

We think that he was entitled to an acquittal on the charge of storing wool and that he had no proper notice of the charge and no proper opportunity of answering the charge of storing cotton on which he was so summarily convicted.

We reverse the conviction and sentence. Fresh proceedings may be instituted on complaint if necessary.

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27 November 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ladkya.*

Penal Code (Act XLV of 1860), Sec. 304—Sessions Judge—Jury—Charge.

A Sessions Judge, in summing up, should draw the attention of the Jury to both parts of section 304 of the Indian Penal Code and ask them to say explicitly under which part they find the accused guilty.

ORDER.—The Sessions Judge should be informed that, as there are two parts of section 304 of the Indian Penal Code under one of which only is a sentence of transportation for life legal, he ought, in summing up the case, to have drawn the attention of the Jury to both parts of the section and asked them to say explicitly under which part they found the accused guilty. In the present case, however, as it appears that the accused was expressly charged under the first part of section 304, with an intention to kill and as the Sessions Judge accepted the verdict of the Jury as one of guilty of the offence so charged, this Court presumes that the Jury actually found the accused guilty of that offence; and dismisses the appeal.

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1 December 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Maganlal.†

Criminal Procedure Code (Act X of 1882), Sec. 537—Sessions Judge—Appeal—Retrial.

Where the evidence recorded by the Magistrate is as full as the law required, and where there is no irregularity of procedure or defect in the enquiry necessitating retrial, it is not competent to a Sessions Judge on appeal to order retrial. He must consider, on the evidence given before the Magistrate, whether the conviction can be sustained, or the accused is entitled to an acquittal.

PER CURIAM.—The applicant was tried summarily by a Magistrate, First Class, and convicted, under section 411 of the Indian Penal Code, of dishonestly receiving stolen property and sentenced to two months' rigorous imprisonment and a fine of Rs. 10, or in default of payment of the fine to fifteen days' additional imprisonment. He appealed to the Sessions Judge, who has ordered a retrial on the ground that, as the record stands, he is unable to form an opinion whether the applicant ought to

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**Criminal Ruling 62 of 1890. Criminal Appeal No. 343 of 1890.*

†*Criminal Ruling 63 of 1890. Criminal Application for Revision No. 309 of 1890.*

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have been convicted of theft or of receiving stolen property, knowing the same to be stolen, or whether he ought to have been acquitted. The record, however, of the proceedings before the Magistrate is as full as the law requires it to be, and the judgment of the Sessions Judge discloses no ground whatever for the retrial of the accused. The Sessions Judge should have considered whether, on the evidence given before the Magistrate, the conviction could be sustained or whether it ought to be altered, or whether the accused was entitled to an acquittal. There was no irregularity of procedure or defect in the enquiry which made it necessary that the case should be retried. The order in appeal is reversed. The appeal must be reheard and decided.

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4 December 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Nalya.*

Penal Code (Act XLV of 1860), Secs. 494, 497, 498—Bigamy—Adultery—Enticing away wife—Criminal Procedure Code (Act X of 1882), Sec. 199—Magistrate.

An accused was charged by the husband of a woman with offences under sections 494 and 498 of the Indian Penal Code:—

Held, that the complaint under sections 494 and 498, Penal Code, did not involve a complaint under section 497 of the Code, and that the Magistrate, therefore, is not at liberty under section 199 of the Code of Criminal Procedure, to try the accused for an offence under section 497 of the Indian Penal Code.

PER CURIAM:—Neither the husband's complaint that the accused had enticed away his wife with a criminal intent nor his further complaint that his wife had committed bigamy with the accused involved a complaint that the accused had committed adultery with his wife. The Magistrate had, therefore, no jurisdiction under section 199, Criminal Procedure Code, to try the accused for the offence of adultery. We reverse the conviction and sentence recorded against the accused Nalya *Walad* Vithu.

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22 December 1890. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Bhojilal.†

Land Revenue Code (Bom. Act V of 1879), Sec. 214—Occupant—Removing stones and earth with the occupant's permission—Land belonging to Government.

The accused dug stones and removed them from land in the possession of a person having the rights of an occupant under the Bombay Land Revenue Code, with the permission of that person:—

Held, that he could not be convicted under clause (*d*) of Rule III of the rules framed under section 214 of the Code, as such land was not "land" belonging to Government" within the meaning of the clause.

**Criminal Ruling 65 of 1890. Criminal Application for Revision No. 305 of 1890.*
†Criminal Ruling 68 of 1890. Criminal Review No. 318 of 1890.

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ORDER.—The conviction under clause (*d*) of Rule III cannot be substained as the stones dug and removed by the accused were dug and removed from land in the possession of an occupant having the rights of an occupant under the Land Revenue Code. Such land is not land "belonging to Government" within the meaning of the clause. The conviction and sentence are, therefore, reversed, the fine, if paid, to be restored.

1891.

8 January 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lakshman.*

Sessions Judge—Plea—Accused—Statements accompanying the plea.

It is not the duty of the Court of Sessions, at the time of recording a plea, to decide whether any statement which accompanies it is true or false; any such statement must be regarded only as explanatory of the plea.

BIRDWOOD, J.—The accused in this case pleaded guilty to the charge of murdering his wife. Thereupon the Sessions Judge questioned him as to the circumstances; and he said that he had seen her commit adultery for 4 days with one Budappa Wadari, that he expostulated with her mother, but that, on the mother saying that she would get her daughter remarried in his presence, he killed the daughter with an axe. This statement must be read with the plea of guilty and seems to show that the accused did not intend to plead unreservedly to a charge of murder as defined in the Indian Penal Code. He alleged certain grave provocation. It might be that he could not eventually have proved that there was any such provocation as he alleged, or it might even be that the provocation actually alleged was not such sudden provocation as is contemplated in Exception I, to section 300 of the Code. But it is not the duty of a Court of Sessions, at the time of recording a plea, to decide whether any statement which accompanies it is true or false. Any such statement must be regarded only as explanatory of the plea. In the present case, the accused admitted that he had killed his wife, but alleged also that she had provoked him greatly; and he apparently wished to convey the impression that the effect of the provocation continued until his interview with his mother-in-law. He connected that interview with his wife's misconduct, which he says he had witnessed, and apparently wished the Court to believe that he was deprived of the power of self-control by the provocation which he had received. Perhaps his meaning would have appeared more clearly if he had been questioned more fully. Any way, on the record, as it stands, I find it difficult to distinguish the case from *Netai Luskar* v. *Queen-Empress* (1) and *the Queen-Empress* v. *Sakharam* (2), though, no doubt, in

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*Criminal Appeal No. 388 of 1890; Confirmation Case No. 28 of 1890.

(1) I. L. R., 11 Cal., 410. (2) I. L. R., 14 Bom., 564.

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of those cases, no plea was actually recorded till after the accused had made his statement. In the present case, the accused pleaded guilty of murder before he made any statement. I think, however, that, in the circumstances, the statement must be looked to rather than the formal plea, as showing the real nature of the plea. I take it that the accused wished to admit only that he had been guilty of the offence of culpable homicide not amounting to murder. And I would, therefore, annul the conviction and order a new trial on the charge of murder.

PARSONS, J.—The accused in this case was brought before the Court of Sessions on a charge of murder by causing the death of his wife Satan. The charge was read out and explained to him and he was asked whether he was guilty of the offence charged or claimed to be tried. He pleaded guilty; the plea was recorded and he was convicted thereon. He was not, however, convicted directly on the plea, but after an enquiry held by the Sessions Judge "in order to see if it was right and proper to convict the accused on his plea." This inquiry included an examination of the accused and an interrogation of the witnesses for the prosecution by the Court. There is no provision in the Code for such an enquiry and it appears to me that if such an enquiry is necessary it should take the form of a trial and be conducted as such. If in his examination the accused had openly and clearly admitted his guilt there might be no reason for our interference. The accused, however, does not admit that he is guilty of murder, on the contrary he says that he killed his wife under provocation, having seen her committing adultery. Considering the plea with this statement there seems reason to believe that the charge was not properly explained and that the accused did not really intend to plead guilty of murder but only to admit that he killed his wife. At any rate seeing that the accused in the subsequent enquiry withdrew the plea of guilty and made a defence which was in effect a plea of not guilty of murder; the Sessions Judge ought to have tried the accused on the charge of murder. It was wrong to convict on the original plea because the Sessions Judge considered that there was nothing to support the allegation of the accused as to the provocation he had received. Such a finding could only have been arrived at after a regular trial. I concur in reversing the conviction and ordering the accused to be retried.

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12 January 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Mehman.*

Village Police Act (Bom. Act VIII of 1867), Sec. 61—Police—Arrest—Warrant.

The Police have no power to arrest without warrant for an offence under section 61 of the Bombay Village Police Act.

**Criminal Ruling* 1 *of* 1891. Criminal Reference No. 152 of 1890.

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In this case the accused was convicted by the Second Class Magistrate of Chikli, of obeying the call of nature in a street, and sentenced under section 61 of the Bombay Police Act, VIII of 1867, to a fine of Rs. 5. The accused was seen committing the offence and at once arrested without warrant by the Police and brought before the Magistrate.

The District Magistrate of Surat, in making this reference remarked:—"In this, it appears to me, the Police were not justified, since the Act nowhere provides that they may arrest without warrant simply for an offence under section 61."

Order.—The District Magistrate should be informed that a conviction is not invalidated by the action of the Police and this Court will not interfere. He should issue orders and prevent such illegal arrests in future.

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15 January 1891. Birdwood & Parsons, JJ.

Queen-Empress v. Budhu.*

Workman's Breach of Contract Act (XIII of 1859)—Repayment of advance—Court Fees—Court Fees Act (VII of 1870).

An accused was ordered under section 2 of the Workman's Breach of Contract Act, 1859, to repay the sum advanced to him, and was also ordered under section 31 (1) of the Court Fees Act, 1870, to repay to the complainant the Court fee paid on his petition of complaint under the Act of 1859:—

Held, that the latter order as to repayment of the Court fee was illegal; for such repayment could only be ordered "in addition to the penalty imposed" and in this case no penalty had been or could be imposed till the accused was found to have disobeyed the first order, *viz.*, that relating to repayment of sum advanced to him.

Order.—The Court reverses the order for the repayment to the complainant of the fee paid on his petition, as, under clause 1 of section 31 of the Court Fees Act, 1870, such an order can legally be made only "in addition to the penalty imposed upon" an accused person who has been convicted of a non-cognizable offence; and in the present case no penalty was imposed upon the accused person, who was merely ordered to repay the advance he had received. A penalty could only have been imposed upon him under Act XIII of 1859 if he had failed to obey that order. But he was not tried for any such alleged failure.

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19 January 1891. Birdwood & Parsons, JJ.

In re Borku.†

Magistrate—Confession—Recording of Confession—Custody of Police.

The omission of the Magistrate, before whom a confession is made, to record the circumstance that the accused was not then in the custody of the Police, cannot invalidate the confession, if the requirements of the Criminal Procedure Code are complied with by the Magistrate.

**Criminal Ruling* 2 *of* 1891. Criminal Review No. 349 of 1890.

†*Criminal Ruling* 3 *of* 1891. Criminal Appeal No. 369 of 1890.

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PER CURIAM:—We think that, as regards the accused Ganpat, the decision of the Court of Sessions must be sustained, as the case against him rests on the evidence of a single witness who was disbelieved by the Sessions Judge.

As regards accused Nos. 2 and 3, the Sessions Judge acted on a wrong view of the law in rejecting their confessions. The omission of the Magistrate before whom the confessions were made to record the circumstance that the accused were not in the custody of the Police at the time could not invalidate the confessions, if the requirements of the Code of Criminal Procedure were complied with by the Magistrate when he recorded them. The Sessions Judge should either have accepted the confessions, or, if he thought it necessary, called for evidence to satisfy himself as to their having been voluntarily made. We must order the retrial of these two accused persons.

We can find no evidence on the record beyond the allegation of accused No. 1 himself to show that his confession was extorted from him by the villagers. No doubt he was beaten by them; but they may have beaten him because they believed in his guilt, and not with any other object. His confession has, we think, been rejected without sufficient enquiry. Moreover, he is implicated by the confessions of accused Nos. 2 and 3, which can be taken into consideration as against him with the other evidence on the record. We order his retrial also. If any fresh evidence is to be adduced before the Court at the trial, care should be taken to give the accused due notice of the names of the witnesses and the nature of the evidence to be given, so as to give them due opportunity to meet it.

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22 January 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ragho.*

Abkari Act (Bom. Act V of 1878), Sec. 43 (d)—Fees, payment of—Toddy trees, tapping of.

There is no provision in the Bombay Abkari Act, 1878, which authorizes a Magistrate who convicts an accused person under section 43 (*d*) of the Act to order the payment by him of any fee that may be leviable in respect of trees tapped by him without a license.

ORDER.—There is no provision in Bombay Act V of 1878 which authorizes a Magistrate who convicts an accused person under section 43 (*d*) to order the payment by him of any fee that may be leviable in respect of the trees tapped by him without a license. The Court therefore reverses the Magistrate's order directing the payment by the accused of a tapping fee of Rs. 3. The fee if paid to be refunded.

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*Criminal Ruling 4 of 1891. Criminal Review No. 10 of 1891.

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12 February 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lallubhai.*

Reformatory Schools Act (V of 1876), Ss. 7, 8—Youthful offender.

A youthful offender was sentenced to imprisonment and in appeal the Sessions Judge under Government Resolution 3903 (Judicial Department of 21st July, 1890) and under section 7 of the Reformatory Schools Act, 1876, ordered his detention in a Reformatory School:—

Held, that section 7 of the Act applied only to the Court by which the youthful offender was sentenced; that the order of the Sessions Judge was illegal; and that the proper procedure to be adopted in such a case was that laid down in section 8 of the Act.

ORDER.—Section 7 of Act V of 1876 applies only to the Court by which the youthful offender is sentenced. The order, therefore, of the appellate Court directing that the accused in this case, who had been sentenced by the Magistrate to two years' rigorous imprisonment should be detained in the Reformatory for 2 years and 8 months is illegal and we reverse it. The proper procedure to be adopted is that laid down in section 8 of the Act.

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12 February 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Gopala.†

Criminal Procedure Code (Act X of 1882), Secs. 517, 523—Money produced in Court—Disposal, order of—Magistrate, discretion.

Where no offence appears to have been committed regarding the money produced in a case, the Magistrate is entitled to refrain from making any order under section 517, Criminal Procedure Code, but, if necessary, proceedings may be taken under section 523 of the Code.

IN this case the accused was convicted by the Second Class Magistrate of Karmala, who sentenced him to four months rigorous imprisonment and a fine of 20 rupees, and ordered that Rs. 67 produced by the complainant before the Police should be returned to him after the period of appeal. On appeal, the Sub-Divisional Magistrate quashed the conviction and sentence but made no order as regards the 67 rupees and left the parties to a settlement otherwise than in a criminal Court.

The District Magistrate of Sholapur, in making the reference to the High Court, said: "The Sub-Divisional Magistrate should in my opinion have either ordered the money to be returned to the person by whom it was produced before the Police or if he had any doubts as to the ownership of the money he ought to have proceeded under section 523 of the Criminal Procedure Code, and I submit that the money having once been produced in Court, the appellate Magistrate was bound to make some order as to its disposal."

ORDER.—As no offence was committed regarding the money produced in this case, the Magistrate rightly refrained from making an order under section 517, Criminal Procedure Code. Proceedings can be taken if necessary under section 523.

**Criminal Ruling 6 of 1891. Criminal Application for Revision No. 367 of 1890.*
†Criminal Ruling 7 of 1891. Criminal Reference No. 29 of 1891.

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12 February 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Balu Nasir.*

Penal Code (Act XLV of 1860), Sec 382— Criminal Procedure Code (Act X of 1882), Secs. 393, 439—Whipping Act (III of 1874), Sec. 3—Whipping—Sentence—Enhancement.

The accused was convicted under section 382, Indian Penal Code, and was sentenced to whipping which was duly administered:—

Held, that the sentence was legal and could not be reversed; and that it could not be enhanced under section 439 of the Code of Criminal Procedure by the addition to it of a term of imprisonment as the offence of which the accused was convicted was the first offence under section 382 of the Indian Penal Code, and that it could not be enhanced by the infliction of an additional number of stripes, as, under section 393 of the Code of Criminal Procedure, no sentence of whipping can be executed by instalments.

PER CURIAM.—We are asked in this case to enhance the sentence passed by the Assistant Sessions Judge on the ground that it was wholly inadequate. The accused was sentenced to whipping; and the sentence has been executed. It was a legal sentence and cannot, therefore, be reversed. It cannot legally be enhanced by the addition to it of a term of imprisonment, as the offence under section 382 of the Indian Penal Code of which the accused was convicted was the first offence of the kind of which he had been convicted. Nor can we enhance it by adding to it an additional number of stripes, for, under section 393 of the Code of Criminal Procedure, no sentence of whipping can be executed in instalments. Moreover, the sentence that was passed, *viz.*, 30 stripes, was the *maximum* that could be passed under section 392 of the Code of Criminal Procedure.

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19 February 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Hanma.†

Workman's Breach of Contract Act (XIII of 1859), Sec. 2—Contract to carry wood—Artificer, workman—Magistrate's power to reconsider the order once made.

A person who contracts only to convey wood is not an artificer, workman or labourer within the meaning of the Workman's Breach of Contract Act, 1859.

When a Magistrate has made an order in the first stage of a proceeding, under section 2 of the Workman's Breach of Contract Act, 1859, for the repayment to the complainant of money advanced by him to an artificer, workman or labourer, it must always be open to him to consider at the further stage of the proceeding, when it becomes necessary for him to inflict a penalty under the section, for failure to comply with the order, whether the order was legal and justifiable.

IN this case the First Class Magistrate passed an order under section 2 of Act XIII of 1859 for repayment of an advance of Rs. 50 made to defendant by complainant and further granted a period of 15 days for compliance with this order. On the expiration of that period and after taking evidence that the order had not been obeyed, the Magistrate on

*Criminal Ruling 8 of 1891. Criminal Application for Revision No. 45 of 1891.
†Criminal Ruling 9 of 1891. Criminal Reference No. 32 of 1891.

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the strength of a Madras High Court ruling which he had discovered in the interval, stayed further proceedings and referred the complainant for redress to a Civil Court.

The District Magistrate of Kanara being of opinion that the order passed by the First Class Magistrate was illegal, made this reference to the High Court, observing :—

" I am of opinion that this proceedure was irregular and *ultra vires*. The Magistrate had apparently no option but to take the steps prescribed by the law for the enforcement of his order whether the ruling he cites be applicable to the case in point (and this is more than doubtful so far as can be gathered from the very meagre record) the time for taking it into consideration had passed. I venture to suggest that the Magistrate's proceedings be quashed *ab initio* and that he be ordered to ascertain by evidence whether in fact the cartman, defendant, did contribute his personal labour in carrying out the terms of his contract and then to pass such order as may be right and proper."

ORDER.—The Court thinks it unnecessary to interfere. When a Magistrate has made an order in the first stage of a proceeding under section 2 of Act XIII of 1859 for the repayment to the complainant of money advanced by him to an artificer, workman or labourer, it must always be open to him to consider at the further stage of the proceeding, when it becomes necessary for him to inflict a penalty under the section for failure to comply with the order, whether the order was legal and justifiable. We think, therefore, that, in the present case, it was open to the Magistrate to consider whether his order for the refund of Rs. 50 to the complainant was a proper order and we think further that the Magistrate's final decision was right. The accused had contracted to convey wood in his carts for the complainant. It might be necessary for him in carrying out such a contract to perform some manual labour in loading and unloading the carts. But such labour would necessarily be subsidiary to the general purposes of the contract and the written agreement between the parties is only one for the conveyance of wood. There is no express agreement to perform any personal labour. A person who contracts only to convey wood is not an artificer, workman or labourer within the meaning of Act XIII of 1859 (see *In Re Keshav Ramchandra Ranade*, (1); *cf. Caluram* v. *Changapa* (2) and the case therein cited). The Magistrate, therefore, rightly refused to enforce his order for the refund of the advance by any penalty under the Act.

The Record and proceeding to be returned with these remarks.

(1) *Ante* p. 349. (2) I. L. R. 13 Mad., 351.

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23 February 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Taja.*

Public Conveyances Act (Bom. Act VI of 1863), Sec. 22—"Stand to ply," meaning of.

The word "stand" in section 22 of the Bombay Public Conveyances Act should be understood in its popular sense as the expression "stand to ply" have not been defined in the Act.

ORDER.—The questions referred to us by the Presidency Magistrate under section 432 of the Code of Criminal Procedure is whether the accused persons who are apparently drivers of public conveyances have contravened the provisions of section 22 of Bombay Act VI of 1863 by driving slowly as they are accused of driving along a road for the purpose of picking up a fare. The question is whether a driver who acts in such a manner has made himself liable to the penalty provided by the section for drivers or other attendants of any public conveyance who stand to ply for hire at any place or places other than the stands or places appointed for the purposes. The Act contains no definition of the expression "stand to ply." In the absence of any definition extending the meaning of the word "stand" it should be understood in its popular sense and the only question before the Magistrate is therefore one of fact, not of law in regard to which we are not competent to express opinion under section 432 of the Criminal Procedure Code.

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23 February 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Toulman.†

Criminal Procedure Code (Act X of 1882), Secs. 244, 245—Magistrate—Complainant and his witnesses—Examination—Acquittal.

When a Magistrate without examining the complainant and his witnesses, acquitted the accused, the High Court reversed the order of acquittal and directed the Magistrate to enquire into the case according to law.

ORDER.—The Magistrate has acquitted the accused, without examining the complainant and witnesses for the prosecution, as required by section 244 of the Code of Criminal Procedure. The Court, therefore, reverses the order of acquittal and directs the Magistrate to enquire into the case according to law.

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14 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Abdul. ††

Criminal Procedure Code (Act X of 1882), Sec. 260, 263; 362,—Presidency Magistrate—Warrant Cases—Procedure.

The provisions of Chapter XXII of the Criminal Procedure Code do not apply to trials before Presidency Magistrates. A warrant case must be tried by a Presidency Magistrate in

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**Criminal Ruling* 10 *of* 1891. Criminal Reference No. 34 of 1891.

†*Criminal Ruling* 11 *of* 1891. Criminal Review No. 11 of 1891.

††*Criminal Ruling* 12 *of* 1891. Criminal Application for Revision No. 41 of 1891.

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the manner provided by Chapter XXI of the Code, subject only to the special provisions of section 362 as to the method of taking down the evidence.

PER CURIAM.—Section 263 of the Code of Criminal Procedure occurs in Chapter XXII and applies, therefore, only to cases tried summarily in which no appeal lies. Adultery is not one of the offences referred to in section 260 and the Magistrate could not, therefore, legally try the present case summarily. He should have followed the procedure laid down in Chapter XXI of the Code for warrant cases. We are of opinion that the accused has been prejudiced by the omission of the Magistrate to frame a charge against him and to call upon him to enter upon his defence and to produce his evidence. We notice also that the Magistrate has not required the alleged marriage between the complainant and Rahimat to be strictly proved as he should have done. We reverse the finding and sentence and order the accused to be retried. As Mr. Hamilton has already formed an opinion on the merits of the case, the retrial should be by another Presidency Magistrate.

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5 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Kaji Sultan.*

Criminal Procedure Code (Act X of 1882), Sec. 435—District Police Act (Bom. Act IV of 1890), Sec. 43—District Magistrate—Order—High Court—Revision—Jurisdiction.

The High Court has no jurisdiction to interfere with an order duly made by a District Magistrate under section 43 of the Bombay District Police Act, 1890.

ORDER.—Application is rejected as this Court has no jurisdiction to interfere with the District Magistrate's order duly made under section 43 of the District Police Act IV of 1890.

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5 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. John Paul.†

Presidency Magistrate—Jurisdiction—Coroner's inquiry—Coroner's Act (IV of 1871).

The jurisdiction of a Presidency Magistrate is not ousted by Coroner's inquiry.

The Second Presidency Magistrate of Bombay in referring this case, stated: "John Paul and Krishna Apa have been charged before me for causing the death of two persons by a negligent act. The prosecution which is initiated by the Bombay, Baroda and Central India Railway Company wish me to deal leniently with the accused and elect to proceed under section 101, Indian Railway Act, 1890. The accused have already been committed for trial to the High Court by the Coroner under section 304A, Indian Penal Code. The High Court has, however, decided that a commitment by the Coroner does not oust the Magistate's jurisdiction.

***Criminal Ruling 13 of 1891. Criminal Application for Revision No. 23 of 1891.**
†Criminal Ruling 14 of 1891. Criminal Reference No. 36 of 1891.

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I have the honor to inquire whether I am competent to dispose of this case under either of the sections quoted above or whether I am bound to follow the Coroner's lead and commit the case to the High Court."

ORDER.—Inform the Presidency Magistrate that, as he is not ousted of his jurisdiction because the Coroner has held an inquiry into the cause of death and drawn up an inquisition under Act IV of 1871, he has jurisdiction to deal with the case according to law. He is in no way bound by the Coroner's proceedings.

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9 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ramchandra.*

District Municipal Act (Bom. Act VI of 1873), Sec. 84—Octroi duties—Entries in shipping bills and manifests.

A person who imports timber by sea into the Thana Municipal District is not bound by the entries in shipping bills and manifests as to its weight, for the purposes of calculating the octroi duty but is entitled if he disputes the said entries to demand a fresh weighment or measurement at the place of importation.

PER CURIAM:—We are unable to concur in the ruling of the Magistrate that the applicant was bound by the entries in the shipping bills and manifests, Exhibits C, D, E, and F. He was liable to pay octroi duty on the timber imported by him only according to the rules fixed by the Government for each cart load or *bhandi* imported, and if he contested the correctness of the entries in the shipping bills he had the right to demand that a fresh weighment or measurement should be made by the Municipal authorities at the place of importation. As, however, he did not do this and as he adduced no evidence at the trial to show that the weighments and measurements in respect of which the duty was levied were incorrect, we cannot interfere with the Magistrate's decision and must reject the application.

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11 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Santan.†

Cantonement Rules—Rule 9—Privy—Building a privy.

A person who fails to construct a privy, according to a notice issued to him by a Cantonement Magistrate under Rule 9, cannot be convicted of any offence under that Rule because (1) the Rule does not make failure to comply with any notice punishable and (2) it does not authorize a Cantonement Magistrate to require any person to construct a privy of any particular kind or indeed any privy at all.

PER CURIAM:—The accused has been convicted of a breach of Rule 9 in Chapter III of the Cantonement Rules in having failed to construct a double *chowpat* privy in compliance with a notice purporting to be issued

*Criminal Ruling 15 of 1891. Criminal Application for Revision No. 389 of 1890.

†Criminal Ruling 16 of 1891. Criminal Application for Revision No. 48 of 1891.

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to him by the Cantonement Magistrate of Poona under that rule and requiring him to build such a privy within seven days. But Rule 9 does not authorise the Cantonement Magistrate to require any person to construct a privy of any particular kind or indeed any privy at all. The notice, therefore, was an illegal one, and failure to comply with it was no offence. Moreover, the conviction is illegal, as Rule 9 does not make a failure to comply with any notice punishable. It may be that the accused's privy does not comply with the requirements of Rule 9. If that is so, he should have been proceeded against for an offence under that Rule. We reverse the conviction and sentence and acquit the accused of the offence of which he has been convicted and direct that he be set at liberty.

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12 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Virbaiji.*

Abkari Act (Bom. Act V of 1878), Secs. 53, 44, 43, 45, 46—Servant's offences—Master's liability.

Per *Birdwood*, J.—The holder of a license under the Bombay Abkari Act can be held to be criminally liable under the second para of section 53 of the Act for an offence committed by his servant only, when such an offence if committed by the master, would have been a breach of the conditions of his license.

Per *Parsons*, J.—The second para of section 53 of the Bombay Abkari Act applies only to acts which would be offences under sections 43, 44, 45, or 46, if these acts are done by a person when actually in the employ or acting on behalf of a holder of a license.

BIRDWOOD, J.—It is admitted by the learned Advocate General that the conviction of the appellant Nadarsha cannot be sustained. There is no evidence on the record to show that he manufactured any liquor in contravention of Bombay Act V of 1878.

As regards the appellant Virbaiji, the evidence is, we think, too meagre to justify her conviction under section 43 (*e*) of the Act. In his judgment, the Magistrate says that certain pots on which her name was marked were found in the room where the accused Palanji, who has not appealed against the sentence passed upon him kept a still for the manufacture of country liquor. But this statement is not borne out by any evidence on the record; and it is alleged by Virbaiji that the pots were actually found in the verandah of her house. Bottles of date liquor were found in a box in one of the rooms of the house with some clothes on which her name was marked. Assuming that these clothes were hers, and that they had not been given away by her daughter-in-law to another woman, as she alleges, still we cannot, from this circumstance alone, even when we take into consideration the probability that she must have been aware that Palanji was engaged in illegally manufacturing country liquor in the house, draw

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**Criminal Ruling 7 of 1891. Criminal Appeal No 32 of 1891.*

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the inference that she either joined him in manufacturing the liquor or abetted the manufacture of it. The mere omission to give information against Palanji would not be an " illegal omission " within the meaning of section 107 of the Indian Penal Code; for there is no law which bound her to give such information.

It has been contended, however, that under the second paragraph of section 53 of Bombay Act V of 1878, Virbaiji, who is the holder of a license for the sale of liquor under the Act is criminally liable for any offence committed by her servant Palanji against the Act. No doubt the paragraph, in terms, provides that the holder of a license, permit or pass under this Act shall be responsible, as well as the actual offender, or " for any offence " committed by any person in his employ or acting on his behalf under section 43, 44, 45 or 46 as if he had himself committed the same, unless he shall established that all due and reasonable precautions were exercised by him to prevent the commission of such offence. But apparently the holder of a license can be held, under this provision, to be criminally liable for an offence committed by his servant only when such offence, if committed by the master, would have been in breath of any of the condition of his license. The provision applies only to " the holder of a license. " It shows when a license holder, as such, can be punished for the act of his servant or agent. In effect, it provides that a license holder can be convicted of a breach of his license, even though he is not personally guilty of the breach himself. He cannot plead that a servant employed by him for the purposes of his license was the real offender (see *Queen-Empress* v. *Ramchandra Matadin*, (1)). The offences to which the paragraph relates are, therefore, offences in breach of a license and not offences generally in contravention of the Act for which penalties are provided by sections 43 and 44. These two sections relate to offences in contravention of the Act as well as to offences committed by holders of licenses. The two other sections (sections 45 and 46) referred to in section 53 relate only to offences which can be committed by holders of licenses, permits or passes. Now the offence punishable under section 43 (*e*) of which Palanji was convicted was not an offence which, if committed by his employer, Virbaiji, could have been dealt with as an act in breach of any of the conditions of her license to sell liquor. It follows that the proviso to section 53 has no application to her case. We reverse the conviction and sentence recorded against the appellants and direct that the fines, if paid, be refunded.

PARSONS, J :—I concur in reversing the convictions. There is no evidence against the accused No. 3, and the accused No. 1 can only be

(1 I. L. R., 15 Bom., 45.

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convicted if clause 2 of section 53 of Bombay Act V of 1878 applies to her case. The Advocate General who appeared for the Crown admitted that this clause could not be construed so as to make the holder of a license, permit or pass liable for every offence under section, 43, 44, 45 or 46 of the Act that any person in his employ or acting on his behalf might commit. He would confine its application to such offences only as the license holder could prevent by the exercise of due and reasonable precautions. Such a construction appears narrow and strained and I cannot adopt it, although apparently there is so little difference between the result of that construction and that which I am about to adopt that the decision in any particular case may be practically the same. It appears to me that the proper construction of the clause is to apply it to those acts only as would be offences under section 43, 44, 45 or 46 of the Act if those acts are shown to have been done by a person when actually in the employ of a holder of a license, permit or pass or acting on his behalf. Under this construction the Act will make the holder of a license, permit or pass responsible for all the acts of his servants, which are offences under section 43, 44, 45 or 46 by reason of their contravening the Act or any rule or order made under the Act or any license, permit or pass obtained under the Act, committed by them when actually in his employ or when acting on his behalf as if he had himself done those acts; but for offences committed by them when not so employed or acting, he will not be responsible. This appears to me to be the only proper and reasonable construction of the clause, namely, to emphasise the words "in his employ or acting on his behalf," for it would be contrary to all principles of justice to make one person responsible for the acts of others committed at a time and place when and where owing to their not being in his employ or acting on his behalf he might not have any knowledge of what they were doing and even if he had, would have no power of control over, or interference with, their actions. In the present case, the accused No. 2 manufactured liquor in his own room, apparently on his own account, and certainly at a time when he was not employed or engaged in the service of the accused No. 1. The clause, therefore, does not apply and accused No. 1 is not criminally responsible for his act.

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12 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Budhunbhai.*

Criminal Procedure Code (Act X of 1882), Sec. 203—Magistrate—Complaint—Dismissal.

Where an accused has been summoned to appear before a Magistrate, proceedings have commenced under Chapter XVII of the Code of Criminal Procedure; and the Magistrate can-

**Criminal Ruling 18 of 1891. Criminal Reference No. 4 of 1891.*

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not dismiss the complaint under section 203 of the Code which applies only to cases falling under Chapter XVI where there has been no issue of process.

IN these cases the Magistrate summoned the parties including the accused for what he termed "preliminary enquiry" under section 202, Criminal Procedure Code, and after examining these persons merely recorded a remark that "he dismisses the complaint for want of proof and therefore no further action is necessary." No order whatever had been recorded as to acquittal or discharge of accused.

The District Magistrate of Ahmednagar in making this reference observed:—"This procedure is in my opinion highly irregular. If a Magistrate has reasons to doubt the truth of a complaint he may postpone the issue of process to compel the attendance of a person complained against and enquire into the matter himself (under section 202, Criminal Procedure Code) but he cannot summon a person complained against unless there is a *prima facie* case against him nor can he, after procuring the attandance of such person by issue of summons, dispose of the matter and release the person without recording an order of discharge, acquittal or conviction as the case may be."

PER CURIAM.—As the accused was summoned before the Magistrate to answer a charge, there was a proceeding against him within the meaning of Chapter XVII of the Code of Criminal Procedure. The Magistrate's order under section 203, which can only be made in cases falling under Chapter XVI, where there has been no issue of process, was, therefore, wrong. The Court reverses it and directs the Magistrate to try the case according to law.

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19 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lakshmibai.*

Criminal Procedure Code (Act X of 1882), Secs. 367, 423, 424—Magistrate—Conviction—Sentence—Judgment cannot be written by a clerk.

It is not open to a Magistrate to affirm a conviction but to reverse the sentence: a conviction must always be followed by a sentence.

A Magistrate should always write a judgment himself; he cannot get it written by a clerk.

THE accused was convicted of an offence punishable under section 76 of Act VII of 1878 and sentenced to pay a fine of Rs. 15.

On appeal the First Class Magistrate of Ratnagiri delivered the following Judgment:—"The appellant is a woman and she might not know the rules and she might not have intentionally done any wrong. The value of the trees attached is about seven rupees which the Forest Department is to get and I think it is quite sufficient. I therefore uphold the conviction but reverse the fine of Rs. 15."

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*Criminal Ruling 19 of 1891. Criminal Reference No. 47 of 1891.

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The Sessions Judge of Ratnagiri, in making this reference, stated:—"Section 423, Criminal Procedure Code, deals with the powers of an appellate Court in disposing of an appeal, and I cannot find therein the power given to an appellate Court to reverse a sentence at the same time upholding the conviction. No doubt Mr. McCallum could have reduced the sentence—but the absolute reversal of it, while upholding the conviction, appears to me to be illegal.

"It is also to be noticed that Mr. McCallum's Judgment is written by a clerk. Section 367, Criminal Procedure Code, applies ('so far as may be practicable' section 424, Criminal Procedure Code) to judgments of appellate Courts other than High Courts, and prescribes that the judgment 'shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court.'"

ORDER.—As the Magistrate First Class did not, on the hearing of the appeal, reverse the convitcion, it was incumbent on him, if he disapproved of the sentence passed by the Magistrate Second Class to pass some other sentence, even though a nominal one. The Court reverses the order of the Magistrate First Class on appeal reversing the sentence of fine passed by the Magistrate Second Class and directs him to pass a legal sentence. The Magistrate should, at the same time, he informed that, under sections 367 and 424 of the Code of Criminal Procedure, his judgment should have been written by himself and not by his clerk.

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19 March 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Lakhmichand.*

Promise—Failure to keep it—False representation—Criminal liability.

Where a person makes a promise intending at the time to keep it, his subsequent inability to do so does not render him criminally liable for false representation.

PER CURIAM:—The Joint Sessions Judge has found, and we see no sufficient reason to dissent from his finding, that the accused had no intention not to pay for the bales of cotton when they purchased them. In accordance with that finding, we must acquit the accused; for the representation on which they purchased the goods, whether it was a promise to pay immediately on delivery or a promise to pay in a few days, was not a false representation. They made a promise which, at the time of their making it, they intended to perform. For their subsequent inability to perform it they cannot be held criminally liable (see illustration (*g*) of section 415 of the Indian Penal Code). We do not think that it is proved in the case that the accused made the representation that they had received orders from Jivraj Balu and Gokal Madhowji to buy cotton; and, even if they made any

*Criminal Appeal No. 390 of 1890.

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such representation, it is clear that they in no way represented that these persons would pay or be responsible for the price of the goods. The accused pledged their own credit and that alone. We find it difficult to believe that the accused ever promised to pay cash on delivery. The conduct of the complainants throws the greatest doubt upon their allegations that the accused made such a promise. We think that the goods were purchased on short credit; but be that as it may, the promise when made was intended to be kept; and that being so, there was no false representation by which the accused fraudulently or dishonestly induced the complainants to deliver the property. We, therefore, reverse the findings and sentences recorded by the Joint Sessions Judge and acquit the accused of the offences of which they have been convicted and direct that they be set at liberty.

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1 April 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Jodhraj.*

Criminal Procedure Code (Act X of 1882), Sec. 514—Bond—Construction.

The accused bound himself to appear on the 17th January, 1890, or until the disposal of the case. X executed a bond as surety for the accused's appearance "at the aforesaid Court on the aforesaid date," but the bond was not in accordance with Form III or Form XLII, prescribed by Schedule V of the Code of Criminal Procedure, there being no provision in it for the continued attendance of the accused until otherwise directed by the Court or for the accused's attending "on every day" of the inquiry. The accused did not appear on the 3rd June 1890 to which day the hearing was adjourned:—

Held, that the surety-bond must be construed and as, according to the grammatical construction of the bond, X did not bind himself to secure the attendance of the accused on any date other than the 17th January 1890, X's bond was not forfeited.

PER CURIAM:—The applicant became surety for the appearance before Magistrate of a person charged with an offence under the Indian Penal Code. The accused person bound himself by his own recognizance on the 15th January, 1887, to attend at the Magistrate's Court on the 17th January, at 10 o'clock A.M., and until the disposal of the case. The applicant gave his guarantee that, "at the aforesaid Court, on the aforesaid date," the accused person should be present at the enquiry into the aforesaid charge and that he should be present to answer the charge. The form of surety bond adopted is not in accordance with either Form III or Form XLII, prescribed in Schedule V of the Code of Criminal Procedure. There is no express provision in the bond requiring the accused person to be present on the date fixed and also to continue to attend until otherwise directed by the Court, such as is contained in Form III: and there is no provision for his attending "on every day" of the enquiry, such as is contained in Form XLII. Though the accused person bound himself to attend till the disposal of the case, the applicant according to the plain

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*Criminal Ruling 22 of 1891. Criminal Application for Revision No. 330 of 1890.

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grammatical construction of the bond given by him, did not bind himself to secure the attendance of the accused person on any date subsequent to the 17th January 1887. It was, however, for his failure to secure the accused's attendance on the 30th June, 1890, on which date the case came on finally for hearing, that his bond was forfeited and he was required to pay a penalty of Rs. 1,000. Whether the applicant understood his liability to extend till the final disposal of the case or not, he is entitled to claim that his liability shall be determined by the express terms of the instrument by which that liability was created. The bond must be construed strictly; and it does not bind the applicant to cause the attendance of the accused on any day subsequent to that mentioned in that part of it which he has signed. This being our view as to the construction of the bond, it is unnecessary for us to consider the further question whether the applicant was not discharged from his liability by the indefinite postponement of the case by the Magistrate and by the arrangement made by the Magistrate with the accused that he should attend on four days' notice given to his pleader of which postponement and arrangement no information whatever was given to the applicant. We reverse the order of the Magistrate declaring the applicant's bond forfeited and inflicting a penalty of Rs. 1,000 thereunder on him. The penalty, if paid, to be refunded.

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15 April 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Madhavdas.*

Criminal Procedure Code (Act X of 1882), Sec. 147—Magistrate—Religious procession.

A Magistrate is not authorized, under section 147 of the Code of Criminal Procedure, to pass an order prohibiting a religious procession, where the right to prevent the procession is not found to exist.

THE facts will be found stated in the following extract from the Judgment of the lower Court. The nature of the quarrel is as follows:—

The Hindus say that from all time the Palki procession has passed the Kari's house and adjacent musjid without entirely abating the music that the "wajantree's" or shrill sounding bugles associated with Hindu worship of all kinds, has alone been stopped. The Mahomedans, on the other hand, say that from all time which the procession has passed their priest's, the Kari's house, musjid, music of every description has been absolutely hushed, and until the procession has gone some distance past the musjid, strict silence has been enforced upon and observed by the Hindus.

The Mahomedans further allege that before the procession of December 28th the leading Hindus came to them and said that no matter which

*Criminal Application for Revision No, 81 of 1891.

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might have been the practice of the past year, they this year intended playing the "torchus" and "qans" (cymbals) in front of the kari's musjid.

In consequence of this threat they admit that they have set themselves to prevent the passage of the *Palki* past their Kari's musjid."

Under these circumstances the Magistrate decided "I am totally unable with the evidence recorded by me to decide what are the respective rights of the Hindus and Mahomedans with regard to this *palki* procession and it only remains for me to finally forbid its further progress until a decision of a competent Civil Court is obtained".

ORDER.—The Magistrate has not found that a right to prevent the *palki* procession exists. Indeed he says that he is totally unable to decide as to the respective rights of the Mahomedans and Hindus with reference to the procession. His order prohibiting the procession is, therefore, not authorized by section 147 of the Code of Criminal Procedure and is reversed.

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16 April 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Savla.*

Sessions Judge—Surgeon—Notes—Evidence of the Surgeon.

A Sessions Judge is not authorized to allow a surgeon to describe the *post mortem* appearances merely from the knowledge acquired by him from a perusal of the notes made by another surgeon.

PER CURIAM:—It should be pointed out to the Sessions Judge that he wrongly admitted the evidence of Doctor Sargent in this case, as the witness had no personal knowledge of the matters deposed to by him. The *post mortem* examination of the bodies of the deceased, Radha and Janki, was made by Doctor Davidson, whose notes ought not to have been produced at the trial, as they were not admissible as evidence. There is no provision of law which authorized the Sessions Judge to allow Doctor Sargent to describe the *post mortem* appearances merely from the knowledge acquired by him from a perusal of those notes.

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23 April 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Manji.†

Magistrate—Complaint—Refusal to proceed—Malicious feeling—Complaint made after six years—Limitation.

A Magistrate is not at liberty to dismiss a complaint merely because the complainant is actuated by malicious feelings in making the complaint, nor again, is it open to him to dismiss it, if the offence complained of appears to have occured six years ago.

ORDER.—We are of opinion that the Magistrate First Class had dismissed the complaint in this case on insufficient grounds. It may be,

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* Confirmation case No. 4 of 1891.

†*Criminal Ruling.* 24 *of* 1891, Criminal Application for Revision No. 5 of 1891.

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as stated by him, that the complainant was "actuated by malicious feeling" in making her complaint. But that is not a legal ground for refusing to enquire into a complaint of an offence: *In re Ganesh Narayan Sathe* (1). Nor again could the Magistrate rightly refuse to enquire into the offence because it was alleged to have been committed six years ago; there being no period of limitation prescribed by law for a prosecution for the offence alleged against the accused. Nor are the further reasons relied on by the Magistrate First Class and the District Magistrate sufficient in law to justify a refusal to proceed with the case, if the acts alleged against the accused, if established by evidence, constitute the offence charged. We reverse the order of the Magistrate First Class and direct him to proceed according to law.

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23 April 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Ratnia.*

Village Police Act (Bom. Act VIII of 1867), Secs. 6, 15—Police Patel—Summons—Lawful order.

A Police Patel has authority to summon a person to appear before him in reference to an offence of which he can take cognizance, since section 6 of the Bombay Village Police Act imposes on him the duty of detecting and bringing offenders to justice and such a summons signed by him is a lawful order issued by him personally within the meaning of section 15 of the Act, the refusal to obey which is an offence triable by the Patel.

IN this case one Krishna charged the accused in this case with having used abusive language to him on the night of 23rd September 1890. The Police Patel issued a written summons directing him to appear before him on the next day at 10 a. m. The accused disobeyed the summons and proceedings were thereupon instituted against him under part 3 of the first part of section 15 of the Village Police Act. The Police Patel convicted and sentenced him to pay a fine of eight annas.

The District Magistrate of Thana, in making this reference remarked: "there is no provision in the Village Police Act empowering a Police Patel to issue a summons in such a case and so the legality of his proceedings appears to be doubtful. Assuming that as the Police Patel is empowered to try a case he may be justified in issuing a summons for compelling the attendance of the accused, the offence of disobeying a summons falls under section 174, Indian Penal Code, and as such the proper course was to have the accused presented before a Magistrate having jurisdiction to try the case."

ORDER.—Under section 6 of Bombay Act VIII of 1867, the duty is imposed on the Police Patel to detect and bring offenders in his village to Justice. He has, therefore, we think, authority to issue a summons to any

(1) I. L. R., 13 Bom., 590, 598. **Criminal Ruling* 25 *of* 1891. Criminal Reference No. 73 of 1891.

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person accused of an offence, of which he can take cognizance, to appear before him to answer the accusation. If the summons is signed by the Patel himself, as in the present case, it is a lawful order issued by him "personally," within the meaning of section 15, clause 1, of the Act. Refusal to obey such an order would be an offence under that clause which the Patel is empowered to try. We see no reason for interfering with the conviction and sentence. The record and proceedings should be returned, with these remarks.

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30 April 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Vankatesh.*

Village Police Act (Bom. Act VIII of 1867), Sec. 15—Non-cognizable offence—Police Patel—Order to attend—Lawful order.

A Police Patel is not authorized to order the accused to attend at his office, in a case of an offence of which he cannot take cognizance; and the refusal to obey such an order is not punishable under section 15 (1) of the Bombay Village Police Act, 1867.

IN this case one Venkatesh Ganesh Naik was fined Rs. 2 by the Police Patel of Ankola, specially empowered under section 15 of the Village Police Act (VIII of 1867) for disobedience of his lawful order personally given. It appears that the accused was warned by the Patel not to hawk his wares in the public street and so obstruct the passers-by; that the accused resented the admonition; and that when the Patel told him to attend at his office presumably for further investigation into his case, accused declined to go. He was subsequently taken by a Police Constable and was convicted and fined for breach of the order to go to the Chowky.

The District Magistrate of Kanara made this reference to the High Court observing: "I can find no authority conferred by law on the Police Patel to deal with cases of obstructing the public road, nor does it appear that the accused's refusal or omission to attend at the Chowky as directed will amount to an offence. The Patel's proceedings seem to be *ultra vires* and the form in which he has recorded them is not the prescribed one. It is not clear whether any evidence was taken in the case. The Patel seems to have acted from beginning to end on his own personal knowledge and impulse."

ORDER.—The Court reverses the conviction and sentence for the reasons stated by the District Magistrate and directs the fine, if paid, to be refunded.

**Criminal Ruling* 26 *of* 1891. Criminal Reference No. 76½ of 1891.

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8 May 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Ganesh.*

Abkari Act (Bom. Act V of 1878)—Toddy—Breach of license—Keeping the toddy stored in the fields.

A licensee who keeps the *toddy* at the place where he has drawn it, for some days and does not convey it at once to the shop or to the distillery, cannot be convicted of a breach of the condition of his license under the Abkari Act, 1878.

PER CURIAM:—Clause 3 of the license provides that the licensee shall convey the entire quantity of the toddy drawn by him under this license to the shop or to the distillery, by a direct route, and shall not convey any toddy drawn under this license to any other place. The applicant has been convicted because he did not convey the toddy he had drawn at once to the shop or to the distillery, but kept it at the place where he had drawn it for some days. The Magistrate says "he" (the applicant) "had no business to store the toddy. His offence was aggravated by his keeping it stored till it was stale. He should have taken it collected from the trees into a cart straight off." We cannot so construe this part of the license. We do not find that it prescribes any particular time for the conveyance of the toddy but only defines the places to which and the route by which the toddy must be conveyed. Except as controlled by the hours fixed for the conveyance in the latter part of the license the time of conveyance appears to be left entirely to the option of the licensee. At any rate tnere is no obligation imposed on him under it to convey the toddy at once, or as soon as drawn, as the Magistrate appears, to hold: *Queen-Empress* v. *Rajaram* (1). We reverse the conviction and sentence, acquit the applicant, and direct the fine, if paid, to be restored to him.

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27 May 1891. SARGENT, C. J. & JARDINE, J.

Queen-Empress v. Mahomed.†

Criminal Procedure Code (Act X of 1882), Sec. 397—Concurrent Sentences—Distinct Offences.

Where an accused is sentenced to imprisonment and afterwards another sentence of imprisonment is passed upon him for a different offence, it is not legal to make the second sentence run concurrently with the first, such an order being opposed to the provisions of section 397, Criminal Procedure Code.

ORDER.—The Court agrees with the District Magistrate's opinion that the sentences are too severe.

The prisoner having on the 16th February, 1891, been sentenced to two years' rigorous imprisonment the Magistrate ought not to have directed that the sentence of one year's rigorous imprisonment passed the following

*Criminal Application for Revision No. 157 of 1891. (1) *Ante* p. 290.

†*Criminal Ruling* 27 *of* 1891. Criminal Reference Nos. 85 and 86 of 1891.

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day should be concurrent therewith. Section 397 of the Criminal Procedure Code directs that the latter sentence shall commence at the expiration of the former. The Court now reduces the sentence of two years rigorous imprisonment to one year and that of one year to six months; the latter to commence at the expiration of the former.

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27 May 1891. SARGENT, C. J. & JARDINE, J.

Queen-Empress v. Alu Kala.*

Penal Code (Act XLV of 1860), Secs. 411, 414—Stolen property—Continuous transaction—Separate sentences.

The accused was convicted under sections 411 and 414, Indian Penal Code, regarding the same property and was sentenced to separate punishment for each offence:—

Held, that the acts of the accused were parts of one continuous transaction and could not be considered as distinct offences.

Section 414 of the Indian Penal Code applies only where there is no actual receipt of the property.

THE accused was charged under sections 411 and 414, Indian Penal Code, with dishonest reception and concealment and disposal of two bullocks valued at Rs. 40 belonging to Jeysing Bechar, having reason to believe that they were stolen. The accused did not satisfactorily account for his possession of the animals alleging that he purchased them from certain men without earnest money or any writting on the payment of Rupee one every month. The accused was sentenced to undergo rigorous imprisonment for two months on each head of charge; and the sentences were directed to be consecutive.

The District Magistrate of Ahmedabad, in making this reference, stated : " The circumstances of the case are such that only one sentence should have been passed and following the ruling in *Empress* v. *Sukharam* (1) the District Magistrate considers that the sentence under section 414 must be set aside."

ORDER.—There being evidence of prisoner's receipt of the stolen property, the offence properly falls under section 411 of the Indian Penal Code. The acts of the prisoner must be held to be parts of one continuous transaction and cannot be considered as two distinct offences. Section 414, the Court thinks, applies only where there is no actual receipt. The Court now reverses the conviction under section 414 of the Indian Penal Code and sentence of two months rigorous imprisonment in respect thereof.

**Criminal Ruling* 28 *of* 1891. Criminal Reference No. 99 of 1891. (1) *Ante* p. 449

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27 May 1891. SARGENT, C. J. & JARDINE, J.

Queen-Empress v. Shivram.*

Criminal Procedure Code (Act X of 1882), Sec. 4 (a)—Complaint—Report made by a village officer in his executive capacity.

The report made by a village officer to a Mamlatdar in his executive capacity, regarding a theft of Government property, is not a complaint within the meaning of section 4 (*a*) of the Criminal Procedure Code.

ORDER.—The report of the village officer on 17th November, 1890, was made to the Mamlatdar in his executive capacity as shown both by its epistolary form and by the nature of the Mamlatdar's proceedings on it upto the time of his issuing the summons on 17th March, 1891. It was not, therefore, a complaint within section 4 of the Code of Criminal Procedure upon which alone the Mamlatdar, who was a Second Class Magistrate without the special powers of section 191, could act; and the proceedings have therefore been throughout without jurisdiction: section 530 clause (*k*). The Court must therefore quash the conviction and sentence and direct the fine, if paid, to be restored.

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27 May 1891. SARGENT, C. J., & JARDINE, J.

Queen-Empress v. Purshotam.†

Criminal Procedure Code (Act X of 1882), Sec. 346—Second Class Magistrate—Sub-Divisional Magistrate—Submitting a case.

Where a Second Class Magistrate submits a case, under section 346 of the Code of Criminal Procedure, to the Sub-Divisional Magistrate, the latter is not at liberty to return the papers to the former on the ground that the case is within the jurisdiction of the former, but is bound to dispose of the case in one of the ways prescribed by the section.

ORDER.—It is as unnecessary as it would be inconvenient for this Court to determine on the facts whether the case put forth by the complainant falls under section 420 of the Indian Penal Code or not.

The Second Class Magistrate to whom the original complaint was made was of opinion that the case came under section 420: and was thus beyond his jurisdiction. He therefore returned the complaint with the requisite endorsement under section 201 of the Code of Criminal Procedure.

The complainant, thereupon, applied to Mr. Wiltshire, a Magistrate having jurisdiction whose duty it was to have dealt with it as provided in Chapters 16 and 17 of that Code. Mr. Wiltshire is reported to have refused to exercise jurisdiction. But he recorded an order to the effect that the case fell under section 417 of the Indian Penal Code. Since then the trial was commenced in the Court of a Second Class Magistrate who, being of opinion on the fact that the case fell under section 420, stayed proceedings and submitted the case, under section 346 of the Code of Criminal Procedure,

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**Criminal Ruling* 29 *of* 1891. Criminal Reference No. 95 of 1891.

†*Criminal Ruling* 30 *of* 1891. Criminal Reference No. 98 of 1891.

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to the Sub-Divisional Magistrate, Mr. Wiltshire. That officer has returned the case on the grouud that he had no authority to review his order already described, which merely gave opinion that the facts of the case brought it under section 417 of the Indian Penal Code. The Court thinks that in so ruling Mr. Wiltshire was wrong as he was bound to dispose of the reference under section 346 of the Code of Criminal Procedure in one of the ways prescribed by that section. It is stated in the reference now made to this Court that the Second Class Magistrate has since submitted the case under that section to the District Magistrate. As the District Magistrate is competent to dispose of the case in one of the ways prescribed in section 346, the Court sees no sufficient reason for interference and therefore returns the record and proceeding to the District Magistrate for a proper order to be made.

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28 May 1891. SARGENT, C. J. & JARDINE, J.

Queen-Empress v. Tatia.*

District Police Act (Bombay Act IV of 1890), Secs. 34, 36—Police Constable—Transfer—Not-obeying the order of transfer—Withdrawal from duty.

A Police officer who, having been transferred from one place to another, disobeys the order and remains performing his duties at the former place pending reply to a petition addressed by him to his superiors, does not commit "a withdrawal from the duties" within the meaning of section 34 of the Bombay District Police Act, 1867.

THE accused was convicted at a summary trial by the First Class Magistrate of Satara under section 36 of Bombay Act IV of 1890. The accused who was a Police Constable received an order transferring him, on which he petitioned the Superintendent of Police to be allowed to remain where he was, as he was building a house. He was, however, told that he should join his new post and then apply for leave. He then addressed the Superintendent in English, his previous petitions having been in Marathi, but his application was returned as not presented through the proper channel. This was on the 12th January and on the 31st idem, a criminal charge under the District Police Act was laid against the accused.

The Sessions Judge of Satara in referring this case to the High Court remarked:—"Section 34 of Bombay Act IV of 1890 directs that 'no police officer under the rank of Assistant Superintendent shall resign his office or withdraw himself from the duties thereof', except under certain conditions, and section 36 provides the penalty for such an authorized resignation or withdrawal, and for neglect of orders or violation of duty.

"Accused appears to have performed his usual duties until he was brought before the Magistrate, so that the only fault he would seem to have committed would be that he disobeyed the order to join at once. And as

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**Criminal Ruling* 31 *of* 1891. Criminal Reference No. 87 of 1891.

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the reply to his English petition was that it had not been sent through the proper channel, he might well think that the vernacular order for his immediate transfer was not absolute.

"The case seems to be one which might, more properly, have been dealt with departmentally."

ORDER.—For the reasons stated in the accompanying Judgment, the Court reverses the conviction and sentence passed against the accused Tatia *bin* Bandu and acquit the said accused and directs that he be set at liberty.

JUDGMENT.—The evidence as to the effect that the prisoner remained at Satara where he was performing the duties of a police officer and did not take up his duties at Wai as directed to do.

This did not constitute a "withdrawal from the duties," of the office at Wai so as to amount to an offence under section 34. As this was the only offence complained of, the Court must reverse the conviction and sentence.

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9 July 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Bhilya.*

Fine—Amount—Magistrate—Discretion.

A Magistrate is not justified in inflicting heavy fines on poor persons, on the mere supposition that they are backed up by influential persons.

ORDER.—The Court thinks the fine of Rs. five hundred on people like ordinary Bhils without any capital are *prima facie* excessive: and it appears that these high amounts were inflicted because the Magistrate thinks that there may possibly be some backer up of the criminals and that these may some time or other pay the fines. Such a consideration is in the opinion of this Court quite irrelevant. The Magistrate was precluded by section 63 of the Penal Code from inflicting an excessive fine. This provision is mentioned in Lord Macaulay's report as taken from the Bill of Rights. It is also apparent from that Report that the intention of the framers of the Code was that the fines excessively disproportioned to all possible means of the criminals should not be inflicted. The Court reduces the amounts of fines to Rs. 50 and the imprisonment in default of payment to fifty days' rigorous imprisonment in the case of each of the convicts.

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9 July 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Bapu.†

Criminal Procedure Code (Act X of 1882), Secs. 239, 109—Separate trials.

It is not legal to carry on a joint trial of two persons who are required to show cause why they should not execute bonds under section 109, Criminal Procedure Code.

**Criminal Ruling* 34 *of* 1891. Criminal Review No. 252 of 1891.

†Criminal Reference No. 121 of 1891.

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IN this case the two accused were brought before the First Class Magistrate of Haveli for requiring security for good behaviour under section 109, Criminal Procedure Code, by the police alleging that they had no ostensible means of subsistence and that accused No. 1 was previously convicted. The two accused were tried together and discharged under section 119, Criminal Procedure Code.

ORDER.—Return record and proceeding with the remark that the accused should not have been tried together: *Queen* v. *Abdul Kadir* (1).

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9 July 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Satawa.*

Penal Code (Act XLV of 1860), Sec. 406—Criminal Breach of Trust—Accepting money from a vaccinator for allowing the lymph to be taken—Refusal to do so afterwards.

The mother of a child recently vaccinated accepted two annas from the vaccinator under a promise to take the child to another village where the vaccinator wanted to take lymph out of the baby, and she subsequently refused to take the child there at the instance of her husband:—

Held, that she could not be convicted of criminal breach of trust, under section 406 of the Indian Penal Code.

PER CURIAM:—On reading the evidence and judgment we concur with Mr. Davidson, the District Magistrate, that the record discloses no offence. It appears that the accused Satawa is the mother of a baby which had been recently vaccinated. The vaccinator wanted to get lymph out of this baby for vaccinating another child in another village (Rampoor). He gave her two annas on her promise to take the baby and go with him to Rampoor that afternoon. She did not fulfil her promise and the Magistrate, Mr. Narsingrao Divatia, thinks that dishonest intention is proved by her denying when accused before him that she ever received the two annas. He has not inquired into the truth of excuse given by the woman at the time, which was that the baby was taken ill with fever. It appears, however, from the evidence of the peons who went to fetch her and the baby, that her husband angrily and positively refused to let them go. When the peon persisted he ordered them off his premises. In so acting he was within his rights; and the Magistrate who has not noticed this evidence in his judgment ought to have held that at all events Satawa would not have been justified in taking the baby to the other village for the vaccinator's purposes in direct defiance of her husband's wishes. If the vaccinator had asked for a return of the two annas, which he admits he never did, he would probably have got it. It does not appear that the vaccinator had taken the reasonable precaution to ascertain the wishes of the father before he made the arrangement with the mother. We, therefore, quash the conviction and sen-

(1) I. L. R., 9 All., 452. *Criminal Reference No. 122 of 1891.

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tence. The sentence of Rs. 15 fine is excessive in our opinion considering the means of the people. The Magistrate says that the refusal of Satawa is the first instance of its kind and he inflicted the fine as a warning to the neighbourhood not to thwart the work of the vaccinators. But it is obvious that those operations will become unpopular if paternal rights are disregarded.

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9 July 1891. BIRDWOOD, JARDINE & PARSONS, JJ.

Queen-Empress v. Jiva.*

Penal Code (Act XLV of 1860), Secs. 307, 325—Throwing wife out of a window.

The accused threw his wife from a window, about 6 feet high; but the fall was broken by a weather-board fixed just below it, and resulted in the fracture of knee-pan and in several small wounds:—

Held, that the accused's act came within the provisions of section 325 and not of section 307 of the Indian Penal Code.

Per *Parsons*, J.—When a man voluntarily does a highly dangerous act and causes hurt the intention and the knowledge with which he must be presumed to have acted is not the intention to cause and the knowledge that he was likely to cause only the hurt actually caused. The intention or knowledge, as the case may be, must be presumed from the nature of the act itself and not from the result.

JARDINE, J.—I am of opinion on the evidence that the assessors took the right view of the facts, and that it is not safe to conclude that the prisoner acted with the intention or knowledge of a murderer. The injury caused was slight, the drop was not high and there was a weather-board below the window. Indeed the evidence about the form of the window and its distance from the weather board and the ground is not clearly recorded. I would alter the conviction to one of grievous hurt under section 325 of the Indian Penal Code and the sentence to one year's rigorous imprisonment.

PARSONS, J.—I am of opinion that when a man voluntarily does a highly dangerous act and causes hurt the intention and the knowledge with which he must be presumed to have acted is not the intention to cause and the knowledge that he was likely to cause only the hurt actually caused. I think the intention or knowledge, as the case may be, must be presumed from the nature of the act itself and not from the result. In the present case the appellant threw his wife out of the window of their room which was on the first floor of the house over a shop. This was a highly dangerous thing for the appellant to do. It was a mere accident that she fell on her knee and sustained only a fracture of her knee cap. It was quite as probable that she should fall on her head in which case she would undoubtedly have been killed. In that case the act of the appellant would certainly have been culpable homicide and it might have amounted to murder. I would therefore convict the appellant of an offence

*Criminal Appeal No. 89 of 1891.

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under the latter part of section 308 of the Indian Penal Code which section I consider applies to his case.

Section 325 provides the same maximum punishment as section 308 and I would not have differed from my learned colleague so as to make a reference to a third Judge necessary, were it not that he considers one year's rigorous imprisonment sufficient punishment. I consider that an altogether inadequate punishment for a man who is proved to have voluntarily caused grievous hurt to his wife by throwing her out of a window and so breaking her leg. For such an offence I consider the sentence of four years' rigorous imprisonment passed by the Joint Sessions Judge not one bit too severe. I would alter the conviction to one under section 308 and maintain the sentence.

JARDINE and PARSONS, JJ.—As we are divided in opinion we direct that the papers be laid before Mr. Justice *Birdwood*, under section 429 of the Code of Criminal Procedure.

BIRDWOOD, J.—I have considered the evidence in this case and am of opinion that the conviction recorded by the Joint Sessions Judge under section 307 of the Indian Penal Code must be altered to one under section 325.

I see no reason for doubting the correctness of the finding of the Court below that the accused threw his wife from a window. The evidence of the wife must, I think, be preferred to the statements of the accused himself. But the window appears to be only about 6 feet from the ground, and the fall was broken by a weather board fixed just below the window. In the circumstances it may be doubted whether the accused did the act with the intention of killing his wife or causing her such bodily injury as was likely to cause death or with the knowledge that he was likely by the act to cause death. The effect of the fall was, however, to fracture the wife's knee-pan and to cause a contused wound on the chin and a contusion over the right elbow. The injuries are described by the Assistant Surgeon as serious. A severe sentence is, I think, called for. The only mitigating circumstance in the case is that the accused is only 17 years old. While altering the finding of the Court below to one of guilty under section 325 of the Indian Penal Code I would reduce the sentence to three years' rigorous imprisonment.

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16 July 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Nathu.*

District Municipal Act (Bom. Act VI of 1873), Sec. 84—Magistrate—Cess—Discretion to enquire into earnings of accused—Assessment by Municipality no proof per se.

*Criminal Ruling 35 of 1891. Criminal Reference Nos. 119 and 120 of 1891.

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Where in a prosecution for the recovery of a tax the defence is raised as to the proper amount to be paid, the Magistrate is bound to determine the question of the liability of the accused including that part of the liability which depends on the amount of the earnings. It is nowhere provided in the Act or in the Rules that the statement of the Municipality is to be accepted as proof of the amount of the earnings.

JARDINE, J.—It appears from the blue-book of the Ahmedabad Municipality that cess rates for the removal of sullage water is sanctioned by Government in the Resolution No. 1886, dated the first June, 1888, are in force at Ahmedabad. There is no question before us regarding the legality of this cess and at the argument we assumed it to be legal. The question before us is whether the trying Magistrate adjudicating under section 84 of the Bombay District Municipal Act VI of 1873 as amended by Bombay Act II of 1884 in a prosecution of a cess-payer by the Municipality for the recovery of arrears of the cess was right in inquiring into and determining whether the amount of cess claimed by the Municipality was proper or whether it was too high. The District Magistrate has referred these cases to this Court, being of opinion that such inquiry and decision were beyond the Magistrate's province. It appears from the Rules that this cess is imposed on families: the amount varies from Rs. 24 in class A to Re. 1 in class F according to the earnings of the family. Class A, for example, are families earning more than Rs. 10,000 a year and Class F are families earning under Rs. 200 a year. It is a further description of all these classes A to F that they are families "having no *khalkuwas* but possessing *khalkundies* or preferring to keep tubs for their exclusive use." "Families earning as classified above and having on *khalkuwas* or *khalkundies* and not preferring to keep tubs in theirs houses for their exclusive use to throw sullage water out of their houses into tubs put in streets by the Municipality to pay half of the above rates." It has already been determined by this Court on previous references in these cases that it is the duty of the Magistrate under section 84 to determine whether the family prosecuted comes under this further description, which is essential to liability. In the present case it has been urged for the Municipality that it is not the duty of the Magistrate in a contested case to determine that part of the liability which depends on amount of earnings but to accept the claim made by the prosecuting Municipality as conclusive proof of what the family earns. I am of opinion that this distinction cannot be sustained. The prosecution cannot succeed unless the whole liability as made up by the two parts of the description of class is proved or admitted. There is no provision in either the Acts or the Rules that the claim or the certificate of the Municipality to be accepted as proof of the amount of earnings. If the Legislature had so intended it would have expressed its in-

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tention in appropriate language as has been done in Bombay Act V of 1879 section 149 and by the Governor-General in Council in Act I of 1890, section 3. Again it has been contended that the valuation of earnings made by the Municipality was meant to be final and beyond dispute in the Magistrates' Court, because neither the Acts nor the Rules contain any provision for objection or appeal by the cess payer as there is in the City of Bombay, where Bombay Act III of 1888, sections 217 to 219, make all clear and confer finality on the decision in appeal. The same procedure was adverted to in *Manessur Dass and another* v. *The Collector and Municipal Commissioners of Chupra* (1). The absence of any such arrangements at Ahmedabad seems to me to leave the whole decision about disputed liability in the Magistrate's hands: in fact, there is no other competent authority. It is said that a committee of the Municipality does hear objections and this practice commends itself as reasonable in the absence of any definite provision by bye-law or otherwise but this voluntary action cannot affect the jurisdiction of the Magistrate conferred by Statute. For these reasons I am of opinion that we ought not to interfere with the Magistrate's decisions.

PARSONS, J.—The cess in question, which, I assume, has been legally imposed as a tax in the town of Ahmedabad, is payable at varying rates according to the amount of the earnings of a family and its possessing *khalkuwas* or *khalkundies*. Neither in the Bombay District Municipal Acts of 1873 and 1884 nor in the bye-laws framed thereunder, is there any machinery provided by which the amount of the earnings of a family or the question of its possession of *khalkuwas* or *khalkundies*, can be determined by the Municipal authorities, nor is there any mode provided by which a person assessed to pay the cess in question at a certain rate can contest that assessment before a Municipal or other civil authority. Moreover, no power is given to the Municipality itself to collect the cess. In order to recover the arrears of the cess it is enacted in section 84 of the Act that the Municipality may lay an information before a Magistrate. It is obvious, therefore, that the Magistrate before whom the information is laid must, before he makes an order enforcing payment, satisfy himself that the information is a just one on the merits, and that the person informed against is liable to pay, the amount sought to recovered from him. He can only order payment of what is proved to be actually and legally due.

This was the ruling of this Court in References Nos. 138 to 141 of 1890, *The Municipality of Ahmedabad* v. *Jamna Punja* and others, decided on the 29th January 1891. In that case the Magistrate had passed an order without enquiring into the question of possession of *khalkundies* which was in dis-

(1) I. L. R., 1 Cal., 409.

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pute and upon the decision of which the amount of cess recoverable depended. We directed him to so inquire. Here the Magistrate has enquired into the amount of the earnings of the family, that is, into a question upon which the amount of cess recoverable depends. I am of opinion that he was perfectly right in so doing. The enquiry was one held with jurisdiction to enable him to ascertain the extent of the legal liability of the person informed against. I concur, therfore, in declining to interfere, and in returning the papers in these references.

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3 August 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Ramchandra.*

Magistrate—Complaint—Dismissal.

It is not competent to a Magistrate to refuse to enter a complaint or to dismiss it summarily on the ground that if entertained, it would tend to bring hundreds of similar complaints and would also stir up old religious ill-feelings.

PER CURIAM.—On the 8th January last the petitioner complained to Mr. Lucas, a Magistrate of the First Class, against certain persons for rioting and other kindred offences. That officer without examining the complainant, dismissed the complaint. His order begins "I refuse to take notice of this complaint for the following reasons." He states that there has been ill-feeling at Raver between the Hindus and the Mussulmans and goes on "To take up this complaint would inevitably lead to the bringing of hundreds of similar complaints by both Hindus and Mahomedans and the old quarrel and old ill-feeling would thrive with increased activity." He thought also that in this state of feeling, a conviction would be impossible. The complainant next went to the District Magistrate, Mr. Loch, who could have ordered further inquiry under section 437 of the Code of Criminal Procedure. He pointed out the omission to examine the complainant and directed Mr. Lucas to pass a legal order. The latter sent for the complainant, took from him on solemn affirmation a statement that his complaint was true and then recorded an order dated the 24th April which concludes: "I therefore now *legally* dismiss the complaint for the above reasons under section 203, Criminal Procedure Code." The reasons are those specified above. The complainant's pleader argues that this is not a legal dismissal and cites the two cases of *Ganesh Narayan Sathe* in the 13th Volume of our Reports. To prevent any further delay or denial of justice we sent for the record which is now before us.

Following the decisions in *Ganesh Narayan Sathe's* case we must set aside the dismissal. The present case closely resembles that of the *Queen*

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*Criminal Application for Revision No. 263 of 1891.

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v. *Adamson* (1), where Lord Chief Justice *Cockburn* accounts for the Justices declining jurisdiction because they very likely thought looking at the whole matter that it was undesirable for the interests of the borough that the prosecution should go on. In this way they had "acted upon a consideration of something extraneous and extrajudicial" and "had not exercised their discretion upon the facts presented to them." Therefore the Court quashed their order and compelled them to hear and determine the matter. The *Queen* v. *Adamson* is discussed in *Ganesh Narayan Sathe's* case where its principle is applied in the Judgment of the Full Bench delivered by the learned Chief Justice to a complaint improperly dismissed by a Magistrate who speculated on the motives of the complainant. Any attempt to determine them, says the Chief Justice, would open-out a very wide and speculative field of inquiry. The same may be said about determinations relating to the ultimate consequences of a judicial Act. The law imposes no obligation on a Magistrate from whom an injured person, demands justice, to foresee what belongs to the future: *lex neminem cogit ad impossibilia*, and there is another maxim of the law which should be remembered *actus legis nemini facit injuriam*.

The Judgment of the Full Bench makes Magistrate's duty clear and simple under the broad rule laid down. "The affairs of men are best regulated by broad rules such as exclude all subtle disputes, all doubtful unsatisfactory inquiries:" per *Best*, C.J. in *Fox* v. *The Bishop of Chester* (2). For these reasons we must return the complaint and direct the District Magistrate by himself or by any Magistrate subordinate to him to make further inquiry into that complaint, applying the law as interpreted by this Court. The delay and denial of justice which have occured are to be regretted. The solemn decisions of this Court have not been followed although they appear in the reports and have been included in the series of rulings which are sent, month by month, to Magistrates for their guidance in matters of law.

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6 August 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Pedru.*

Cantonements Act (XIII of 1889), Sec. 27—Indian Penal Code (Act XLV of 1860), Secs. 64, 67—Sentences.

The special provisions contained in sections 13 and 14 of the Bombay Act III of 1867 having been repealed by the Cantonements Act, 1889, the general provisions contained in sections 64 to 67 of the Indian Penal Code apply by virtue of section 40 of the Code to sentences passed under section 27 of the Cantonements Act, 1889.

Criminal Rulings dated 8th August 1870 and 3rd December 1885 under the Cantonements Act, 1867, are no longer applicable.

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(1) L. R., 1 Q. B. D. 201. (2) 6 Bing. 20.

**Criminal Ruling* 36 *of* 1891. Criminal Review No. 288 of 1891.

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ORDER.—"The special provisions for levy of fines contained in section 13 and 14 of Bombay Act III of 1867 having been repealed by Act XIII of 1889, the general provisions contained in sections 64, 65, 66 and 67 of the Indian Penal Code apply, by virtue of section 40 of that Code to sentences passed under section 27 of Act XIII of 1889. The rulings of this Court of the 8th August 1870 and of the 3rd December 1885 under Bombay Act III of 1867 are therefore no longer applicable." The record and proceedings are therefore returned.

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6 August 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Dagdu.*

Whipping Act (VI of 1864), Sec. 2—Sentence—Whipping—Fine.

Where an accused is sentenced to whipping, it is not competent to also sentence him to pay a fine; such a double sentence being opposed to the provisions of section 2 of the Whipping Act, 1864.

PER CURIAM:—The Sessions Judge has referred this case being of opinion, that on a true construction of section 2 of the Whipping Act VI of 1864, the sentence on conviction under section 379 of the Indian Penal Code to 15 stripes and fine of Rs. 10 was illegal. He is of opinion that if a whipping is inflicted no other punishment as prescribed by the Penal Code is allowable and that as the whipping has been inflicted the fine should be annulled. The point does not appear to have been decided in any reported case. It would appear, however, that in section 2 of the Whipping Act, which contains no mention of section 53 of the Penal Code, the word "punishments" is used in a somewhat different sense to the word "punishments" in the preceding section, and may be interpreted to mean the total of punishments awarded, *i.e.*, in the case under section 379, imprisonment and fine. This construction seems supported by the opinion of the Judges in *Reg.* v. *Genu* (1) and that of *Peacock* C. J. in *Nassir* v. *Chunder* (2) where he construes section 2 as meaning that in lieu of giving the thief the punishment provided by the Penal Code, *viz.*, three years imprisonment and fine, he may be punished with whipping. For these reasons we set aside the part of the sentence imposing fine and direct that the fine be refunded.

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10 August 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Bali.†

Magistrate—Juvenile offenders—Punishment.

In cases where boys are charged with some offence, the Magistrate before whom they are brought for trial, should very carefully determine whether the affair charged was merely a hoax and should not lightly send them to long terms of imprisonment.

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*Criminal Reference No. 186 of 1891. (1) 5 Bom., H. C. R., 83 c. c.
(2) Ben., L. R. F. B., Vol. at p. 964. †Criminal Review No. 304 of 1891.

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JARDINE, J.—This case was called for in order that we might consider the sentence of two years' imprisonment, the accused Bali being a boy of 14, never before convicted. The conviction is for house-breaking by night. The evidence is stated by the Magistrate of the Second Class, Mr. Vinayak Nilkant, who gave opinion as follows:—"Order.—Accused Bali *bin* Mahadu, aged 14, of Galsadi, is sent up by the Police on charges of having committed house breaking by night and theft in a dwelling house, punishable under sections 457 and 380, Indian Penal Code. The facts of the case as far as could be ascertained from the complainant, Surchand Khemchand, who is a blind man, and witnesses, are briefly:—That, on the morning of the 20th April 1891, the complainant's wife observed that the back door of her house was chained from outside. She, therefore, went to that side by other route and she observed that the doors of the compound walls were opened and some of the articles were missing, and the back door was chained. The property missing consisted of three pots, worth Rs. 3-12, and clothes, 12 annas. The woman at once informed her husband (the complainant), who informed the Rakhwaldar. The Rakhwaldar and the Police Patel then made enquiries, and caused a search of the missing property. The property was at last found in the bed of a small stream outside the village. The accused Bali, who was all along with the party, was asked casually by the Patel as to who committed the theft. The accused at once answered that he himself committed the act on the previous night. The boy was very mischievous and the Patel believed that the boy was likely to commit the act and was telling the truth. He was sent to the Chief Constable, together with the property. The accused Bali, when he was brought before the Court confessed his guilt unreservedly. He had a laughing countenance all the while. Though the complainant is blind, he is able to walk alone in the village. He states before the Court that the property found in the stream belongs to him, but it is not possible that he could thoroughly recognise the property. The witnesses, however, who where his neighbours, deposed that the property belonged to the complainant. There being no evidence in the case except the statement of the accused, and as I observed that the complainant was blind and the accused merely a mischievous boy, I thought it advisable to visit the village and to satisfy myself whether the accused really committed the crime. On the 22nd April I arrived at Gulsadi at about 8 P. M. The accused was also taken there. The villagers were then collected and in their presence I asked the accused to show how he climbed over the walls and removed the articles. To the astonishment of all, he climbed up the walls in a few seconds and pointed out the spots when the pots and clothes were found. I have thus satisfied myself as to the conduct of the accused. The accused's uncle Narayan Gopal states that the accused is

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always troublesome in his house and to the villagers. As regards the identification of the property, the complainant's wife was also examined, and the evidence shows beyond doubt that the property belongs to the complainant. The following facts appear then to have been proved, *viz.*, that the property before the Court belongs to the complainant; that the complainant's house was broken into by the accused by climbing over the walls of the compound, and the property was taken away. That it was merely thrown out in an open space shows that the accused had not any serious object in doing the act. From his face and the way in which he committed the act, the accused seems to be a mischievous boy. I think the act of the accused amounts to house-breaking by night with intent to commit theft and theft in a dwelling house. A charge was accordingly framed and read over to the accused. The accused adheres to his previous confession, and has no witnesses to offer. Considering the evidence and the circumstances of the case, I find the accused guilty of both the offences mentioned in the charge, *viz.*, house breaking by night with intent to commit theft and theft in a dwelling house, punishable under sections 457 and 380, Indian Penal Code, and considering the value ofthe property stolen, he wouldhave been adequately punished by this Court. But Iam of opinion that as theaccused is merely a boy of 14, he should be kept in a reformatory rather than be punished in the ordinary way. Accordingly, under the provisions of section 349, Criminal Procedure Code, I submit these proceedings together with the accused to the subdivisional Magistrate First Class, Sholapore, for passing the necessary orders. The property is also sent herewith." Mr. Justice *Jardine* continuing said: It is plain from this finding that although this Magistrate convicted the boy of theft, which implies dishonesty, he did not believe the boy was dishonest, but only mischievous. The boy has no father. The uncle says, he is always troublesome, and that seems to be the reason why he was sent to the Chief Constable and treated as a criminal with the rigour of the law. There are indications that the uncle was content to get rid of him: and the result of the sentences is to impose the charge and the expense of the boy on the State. No previous mischief done by the boy is even suggested except that he likes to chase the village cattle, which many boys would be glad to do. The uncle says he is "bramisht," which means senseless or deficient in sense. There is no evidence that the boy had ever received domestic chastisement before he was treated as a felon. He is more truthful than most persons, as several witnesses say that he told them the moment they asked him how it was that he had taken the pots. It is plain from his conduct that he acted out of boyish fun and mischief. The Native Magistrate says that "the accused had not any serious object in doing the Act." It was, therefore, wrong

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to convict him of theft. This was pointed out by subdivisional Magistrate, Mr. Doderet, before whom the case came under section 349 of the Code of Criminal Procedure. That gentleman took the same view of the facts as was taken by the other Magistrate, and in a clear judgment has stated what he finds as facts and how the Penal Code applies. There was no dishonest intention; the taking was only with a view to annoy The judgment runs as follow:—"The Subordinate Magistrate has erred in convicting the accused of theft in a dwelling house, as it is pretty clear that the taking of the property was not dishonest but merely with a view to annoy the complainant. His act comes under section 457, Indian Penal Code, and he is guilty of the offence of house-breaking by night, as his entry into complainant's house was with a view to annoy him by depriving him of the use of his cooking pots. The accused had no intention to cause "unlawful loss" to complainant. His placing the pots in the *nullah* and his conduct in at once confessing clearly point to this, and the Magistrate has held that 'the accused had no serious object in doing the act.' Under section 457, Indian Penal Code, the accused is sentenced to simple imprisonment for two years, and should be confined in a reformatory. He will be confined two years further for the offence under section 224, Indian Penal Code, and as he is now 14, he will be released when he is 18 years old, and the requirements of Circular No. 54 printed at page 38 of the High Court Circulars, will be complied with." Except on one matter of legal principle I do not quarrel with the above statement of facts and law. The trespass on the house becomes a "criminal trespass" under the definition in section 441 of the Penal Code if the boy had an intent to "annoy," even though he has been acquitted of an intent to commit theft; and it has not been suggested that he intended to commit any other offence or to intimidate or insult. The boy, no doubt, chuckled over the perplexity and discomfort the blind man would suffer when he awoke and found his cooking pots and clothes gone. In commenting on section 441, Mr. Mayne notices that the word "annoy" is not defined in the Code. The expression, by its own force, he says merely convey the idea of a certain discomposing effect upon the mind, but in the section must, however, refer to acts of illegal annoyance, and probably conveys no more than the two words which precede it. Strictly speaking, the acts done by this boy perhaps come within the words of the penal section, and this is what Mr. Doderet has found. The next and more important question is, whether, under all the circumstances, they come within the mischief and real meaning of the criminal law, but should have been left to the domestic forum. I incline to think they do not. The slight harm the boy meant or did was too small for the law to punish. It

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was all a practical joke, the more excusable because done by a boy. There was no criminal mind in the ordinary sense. A nominal punishment and a caution were all that were required from the Magistrate. But we are sitting as a Court of Revision, and must look at the matter as one of law and see how it stands on authorities. There are not many in the English Reports and are likely to be fewer as a recent statute allows Magistrates in many cases of first offence to discharge with a caution in order to save from the indignity and contamination of the prison. As a rule people in England do not complain to Magistrates about jokes and hoaxes where no real harm was done or meant, and where there was no danger. The Magistrates would probably not convict, neither would juries who are not required to give any reasons for their verdict, and who believe that you cannot put old heads on young shoulders. The times when a girl of thirteen was burned and a conclave of Judges solemnly determined that a boy of ten ought to be hanged, are now passed. As the principle *de minimis non curat lex* applies, I do not suppose that in their lenient treatment of children and practical jokes, the Magistrates and juries in England break the law. Indeed, Mr. Mayne in commenting on the Indian Penal Code in the sections about cheating and forgery, takes the same view. He distinguishes practical jokes from offences. "To constitute an indictable offence the act must be fraudulent and injurious. Writing a spurious invitation to dinner might be very culpable as a hoax, but would not be a fraud upon any one." The learned writer quotes no case, but it happens that there is one very nearly in point but decided so long ago as to have dropped out of the books, *viz.*, *The King* v. *Emerton*, (2 Showers 20). It was an information for deceit, by writing a letter in the Lord Chief Justice *Rainsford's* name, to get Sir *Robert Vyner* to come to Brentford. After verdict, it was moved in arrest of judgement that it was a private letter and only designed to draw a man to a certain place, and no inconvenience arises therefrom; there was no wrong or injury done to any particular person. The Attorney-General argued that at common law it was not material whether the act was detrimental to same one or other. The Court were divided and no judgment was passed, *Scroggs*, C. J., and *Twisden*, J., holding that there was an offence; *Wylde* and *Jones*, JJ., that it was not. The opinion given by Mr. Justice *Wylde* seems, however, to be what would now be held sound in principle and in accordance with the lenity of the law. He said :—" Suppose I have a mind to a man's company, I write a letter to him in another man's name to bring him thither, because he would not come for my sending: is this an offence? No mischief is intended, nor does any ensue: the statute is made to make counterfeiting an offence,

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if any evil follows thereupon; therefore it was not so at the Common Law. Suppose I would have a Judge come to me at Brentford who will not come upon my request, I therefore write to him from another Judge; will an indictment lie thereupon? Surely, no; it is only a lie, *in scriptis*." The report adds, "So it rested and no judgment in the cause." The view of the law expressed by Mr. Justice *Wylde* and now adopted by so learned an authority on Indian Law as Mr. Mayne has been broadly followed in Bengal by Sir *W. Comer Petheram* and Mr. Justice *Beverley* in what I think was a more serious matter than the present, the prisoner being a grown up man who set the police to work by a lying story. He had lent a woman a shawl, and then, without actually naming her, complained that he had been robbed of it; and so the police searched her house, and found it there and made her answer their questions. This action of theirs was held by the Court to be unjustified (*Golam Ahmed* v. *Kazi* (1)). *Petheram*, C. J. in giving judgment said: "No doubt, that is a very wrong thing for any man to do. In the first place, it is wrong to tell lies, and in the second place, it is extremely wrong to take up the time of Government servants by putting them to useless enquiries under circumstances of this kind; but I do not myself think that such conduct comes within the meaning of this section (182), or amounts to anything more than a hoax for which no punishment is provided by the Code. Under these circumstances, we cannot make a crime when it is not made one by the Code or provide a punishment for it." In commenting on this case in *Queen-Empress* v. *Ganesh Khanderav* (2), we did not excuse every hoax as such. We said "There are many acts of deceit and folly which are criminal because of their dangerous results, and by no means to be excused as hoaxes." "No man from fear of consequences to himself has a right to make himself a party to committing mischief on mankind." *Queen-Empress* v. *Maganlal* (3). Muchless may one endanger or injure another or the common weal out of mere frolic or amusement. I have not been able to find other cases on the subject of hoaxes and jokes, and I suppose that form of fun is not common in India, or that people do not complain of it. In England the joke often takes the form of breaking into a room to annoy the occupant, and boys sometimes do something more by entering a conservatory and eating the fruit. But in India the Authors of the Penal Code took a more serious view. In Lord Macaulay's Report, in the discussion of criminal trespass, I find the following reasons given:—"There is no sort of property which it is so desirable to guard against unlawful intrusion, as the habitation in which men reside, and the buildings in which they keep their goods." "But criminal trespass may also be aggravated by the end for which it is committed. It may

(1) I. L. R., 14 Calc., 314. (2) I. L. R., 13 Bom., 512. (3) I. L. R., 14 Bom., 132.

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be committed for a frolic. It may be committed in order to a murder;" and "house-breaking by night" may be committed "for the purpose of playing some idle trick on the inmates of a dwelling:" These quotations show that the Code was drafted so as to check even frolic-some house-breakings, which may often lead to mischief: and the boy being above twelve years of age is presumed to know the law. The next question is, whether the boy is to be excused under section 95 of the Penal Code. In Lord Macaulay's Report it is stated this section "is intended to provide for those cases which, though from the imperfections of language they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and are for the most part dealt with by the tribunals, as innocent." Mr. Mayne aptly comments that the section is valuable as allowing the Judge a means of evading the strict letter of the law. The words of the section are these: "Nothing is an offence by reason that it causes, or is intended to cause, or that it is known to be likely to cause. any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." Without construing the word "complain" as meaning only complaints to the authorities, I think it does not mean the first expression of annoyance, but rather more deliberate action taken when the facts and excuses are somewhat known. The blind man made no complaint against the boy. He is a mischievous boy, and probably the uncle and the Patel were both glad to get rid of him from the village by putting him in the hands of the Chief Constable. I do not think many persons would complain of such an act done by a mere troublesome boy: the house-breaking was not by breaking a door or digging through a wall, but only by climbing a wall and entering under the roof. At the Universities of Oxford and Cambridge, and the public schools at home, I believe burglaries are sometimes done by the students on each other by breaking into rooms with intent to annoy; but no one, whether of ordinary sense or temper or not, ever thinks of complaining to the Magistrates, or even informing the authorities. I am personally inclined to bring this boy within the exception, as the law never could have intended that parents and guardians should escape their duties, and boys be deprived of parental guardianship for pranks like these. There is a danger to them in the society they meet in the prison, and even among the young convicts in a reformatory. It is a serious thing to brand a boy so early with the mark of a felon. What weighs with me also is, that when you set the criminal law in motion against a boy or a girl, you cannot tell when it will stop. The effect of its harshness and the terror it causes is seen in this boy's case. We called for another case in which the boy had been convicted, under section 224 for escaping from lawful custody and sentenced by Mr. Doderet

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to two years' imprisonment, and committed to confinement in a reformatory. It appears that when remanded to custody for the night by Mr. Vinayak Nilkant, Magistrate of the Second Class, the boy was in charge of a police sepoy and a ramoosee, who both went to sleep. He ran away and managed to get off the handcuffs, which the Second Class Magistrate finds, were too big for his little hands. That Magistrte recorded that for this escape the boy deserved a severe punishment. We were of opinion that there is no reason for severity, and we have at our last sitting remitted the remaining part of that sentence. But the present case has not been argued, and as my learned colleague does not adopt the view that there has been no offence, and as the Magistrate who had to deal with the facts thought proper to convict, I do not press my opinion to an acquittal; but we reduce the sentence to one of three weeks' rigorous imprisonment. As the boy has been in confinement since the 15th May, he will be liberated on receipt of this Court's order. To get rid of the convictions, it is open to the boy or his friends to petition the Governor in Council for a pardon. I am of opinion that in administering the criminal law, especially to fatherless children and other helpless persons, the Courts should ever bear in mind that the Sovereign whose Justice we dispense is *parens patriae*. Again, *Lex Angliae est lex misericordio*. The authorities are not bound to prosecute of their own motion for every petty offence as was remarked by that great jurist, Lord *Stowell*, in dealing with petty infractions of the Revenue Laws. The passage shows, I think, how the law should be administered:—"This Court cannot take on itself legislative functions; it must administer the law as it stands, certainly with such qualifications as the law permits. The Court is not bound to a strictness at once harsh and pedantic in the construction of statutes. The law permits the qualifications implied in the ancient maxim *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of the penalties should be inflexibly severe. If the deviation were a mere trifle which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked:" *The Reward*, (4).

PARSONS J.—The trial has been too perfunctory to enable me to determine whether the intention of the accused in entering the complainant's house and removing his cooking pots was to play a trick or hoax upon the complainant. The accused was not asked his intention; he was only asked if he had stolen the things, and he said "yes". In the opinion of the Magistrate who tried the case the accused had

(4) 2 Dodson Ad. R., p. 269.

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committed the offence of theft. The Sub-Divisional Magistrate to whom the case was submitted under section 349, Criminal Procedure Code, thought that the intention of the accused was merely to annoy. The procedure, however, of the latter Magistrate has been very irregular. He has ignored the decision of this Court contained in *Queen-Empress* v. *Mahadu* (1) he has recorded no judgment as required by section 367 of the Code; and he has passed a sentence which is not in accordance with section 8, and the rules framed under section 22 of Act V of 1876. Accepting, however, his finding that the intention of the accused was merely to annoy the complainant, the sentence of two years' imprisonment, which will have the effect of shutting up the accused in a reformatory till he is 18 years old, is far too severe and uncalled for a punishment for such an offence committed by a boy only 14 years old. A whipping in the way of school discipline would have been the most appropriate sentence. As the accused has been in gaol since the 15th May, I consider that he has been sufficiently punished; and I concur in reducing the sentence to one of three years' rigorous imprisonment, cancelling the order of confinement in a reformatory.

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20 August 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Dollatta.*

Cantonement Rules, Rule 74—Owner—Letting a house to prostitutes—Keeper of the house.

The owner of a house who lets it to prostitutes but does not himself live in it or exercise control over the inmates is not a "keeper of a house or place of public resort or entertainment," within the meaning of Rule 74.

GAINU *walad* Bapu, Butler, and other residents of the locality known as "Bachuke-Arda" in the Wadabhoy Bootee street, complained to Cantonement Magistrate that the prostitute nuisance in that *arda* had become intolerable and cited five persons, (among them the accused Wowlata *walad* Sheth), as owning houses which are either "brothels or inhabited by riotous and tumultuous prostitutes." The said accused No. 1 was described as "a *mhar* horse keeper of the Sisters of St. Mary's Home near Panch Honds in the city" and his house was described as a "brothel kept by Yelli wherein she herself and other women resorting thereto carry on the trade of prostitution." The occupants of the other four houses complained against in somewhat similar terms and it was added that European Soldiers and Natives consort these and parade the lane using indecent words and singing indecent songs which was an intolerable nuisance to the locality. The petitioners, therefore, prayed that proceedings may be

(1) Cr. R., 38 of 1888; *ante*, p. 387.

**Criminal Ruling* 38 *of* 1891. Criminal Reference No. 139 of 1891.

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adopted against the five house owners named in the petition (accused included) under Chapter X of the Criminal Procedure Code and an order passed "suppressing or removing the trade of prostitution which is an actual discomfort amounting to positive nuisance to the neighbourhood from the locality called Bachuke-arda." Gainu Bapu then on solemn affirmation complained against "these people or each other persons who have prostitutes in their houses" whose names were given in his former petition. Summons then issued under Rule 74, Cantonement Rules, Chapter III. At the trial evidence was produced to show that accused had been told that his tenants (Yelli and Sunti) were prostitutes and carried on the profession; that soldiers and others resorted to this house in a drunken state and caused disturbances and annoyance to the people; that it was suggested to him that they should be turned out; but he said that he would not do so unless his rent was paid. A *panch* of the caste-people was formed and he was told the same by the *panch*. The accused admitted that the women Yetti and Sunti lived in his house and that he knew they were prostitutes but denied being told that the women were prostitutes and that he should remove them.

Major E. W. Newnham Smith, Cantonement Magistrate, First Class, passed the following order:—"I have no doubt that accused allowed prostitutes to live in his house and that he knew of this as he was told to turn them out. Under the circumstances I hold accused to be guilty. As venereal diseases are frequent in Cantonement among the soldiers and as I wish to put down these houses of ill-fame I inflict a summary sentence. Sentence: fined Rs. 20: default 8 days' hard labour."

The District Magistrate of Poona, in making this reference to the High Court, stated:

"The conviction and sentence appear to me of doubtful legality. In the first place I have some doubt whether in the Rule 74 the word "house" is to be taken in connection with the qualifying words "of public resort or entertainment." If so, there is no evidence to show that this house was different from other houses unless it is held that every house in which prostitutes live is *ipso facto* a place of public resort.

"In the second place it is doubful whether the 'keeper' can be applied to the owner and landlord, unless he himself resided there, or at any rate had something to do with the management of the house, eventhough it is proved that he was aware of the character of his tenants, and had been warned against them.

"The more appropriate law, if the Magistrate wishes to put down a house of ill-fame, would have been Chapter X of the Criminal Procedure Code."

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PER CURIAM.—The question arising under Rule 74, Chapter III of the Poona Cantonement Rules, is whether the accused comes within the meaning of the words "keeper of any house or place of public resort." The only facts alleged are that he is the owner and that he lets the house to two women who are prostitutes; the house is used for prostitution. But there is nothing to show that the accused lives in the house or has any control over the inmates. Following the Judgment of the Court of Queens Bench in *The Queen* v. *Stannard* (1) and *The Queen* v. *Barret* (2) we are of opinion that the house was not kept by the accused. To make landlords, lessors and their agents responsible for disorderly houses they are named in the English Statutes 48 & 49 Vict. c. 69, section 13. We must, therefore, reverse the conviction and sentence.

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31 August 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Ramchandra.*

District Municipal Act (Bom. Act VI of 1873), Sec. 21; (Bom. Act II of 1884), Sec. 32—Tax—Sanction—Tax not due before sanction.

A tax can only be made payable from the date of its levy being sanctioned by Government under section 21 of the Bombay District Municipal Act.

A tax is generally payable at the expiration of the period for which it is declared payable, unless a rule has been framed under section 32 of the Act specifying the date on which it is payable.

JARDINE, J.—On admitting these petitions we gave notice to the Government and the Municipality of Tasgaon: and as both have been represented at the hearing the question of the validity of the enhanced house tax has been fully argued. The objections urged will be considered in their order.

The house tax was imposed by a rule made by the Municipality on the 15th October 1875. It is admitted that the approval of the Governor-in-Council has never been given to the rule so made. Under Bombay Act VI of 1873, section 14, and Bombay Act II of 1884, section 32, the rule is without effect and the levy of the tax illegal. The approval given by the Government of Bombay, before the Municipality made this rule, to some general proposals submitted by Mr Moore, the Collector of Satara, is not the same thing as an approval of the Rule made by the Municipality.

A second objection is that the resolution of the Municipality to enhance the house-tax, passed on the 11th December 1889, in special general meeting, was illegal because the proposal was not mentioned in the written request for that meeting as section 27, clause 7 of the Act of 1884 requires. Although the Governor-in-Council sanctioned the enhancement on the 15th

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(1) 33 L. J. M. C. 61. (2) 32 L. J. M. C. 36.

**Criminal Ruling* 39 *of* 1891. Criminal Application for Revision Nos. 243, 244 and 245 of 1891.

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August, 1890, it is argued that whether sanctioned or not, the resolution retained its inherent defect, and *Joshi* v. *The Dakor Town Municipality* (1) has been cited. It appears, however, that some indication of the business had been given, eleven out of twelve commissioners were present: and I think it must be assumed, under the circumstances, that the permission of the presiding authority was either expressely or tacitly given: *Hiralal* v. *The Thana Municipality* (2).

The third objection is that the enhanced part of the tax cannot be legally levied because the sanction of the Government was obtained some months after the beginning of the official year. It is admitted that neither the Municipal Resolution nor the Government sanction specifies the date when the original tax or the enhanced tax becomes due. In *Bates* v. *The Municipal Commissioners of Bellari* (3) and *Lemon* v. *Damodraya* (4) it was held by the High Court of Madras that the liability did not arise in such circumstances until the beginning of the next official year. I think we should follow these rulings as the Municipality has not, while imposing the liability, followed the provisions of the law, which says in section 32, clause *h*, that it shall make a rule prescribing the times of levying taxes. The Act of 1873 contained the same provision. The Rule requires the approval of the Governor in Council. It is a requirement which ought to be strictly obeyed.

A fourth objection is that the Managing Committee of the Municipality had no delegated authority to prosecute in these cases. It is unnecessary to deal with this point, as we must quash the orders of the Courts below on the other grounds mentioned in our Judgments and direct the return of the penalties and taxes levied.

PARSONS, J.—On the 9th of July last in Criminal Revision Application No. 136 of 1891 we ruled that a tax came into operation only from the date of its levy being sanctioned by Government under section 21 of the Bombay District Municipal Act. In the present case, therefore, the demand for payment of the house-tax at the enhanced rate for a period prior to the 15th August 1890, was illegal. The demand for payment of the house-tax made before the end of the year for which the tax was imposed was also illegal; since neither by the Act nor by the rules of the Municipality is the tax made payable in advance. The Act is silent as to the time at which taxes are payable but in section 32 (*h*) it gives power to a Municipality to frame rules prescribing the times and mode of levying or recovering the same. The rules of the Municipality in question are filed in the case. No. 45 is as follows:—

(1) I. L. R., 7 Bom., 399. (2) P. J., 1891, 84. (3) 7 Mad. H. C. R., 249.
(4) I. L. R. 1 Mad., 158.

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"The taxes, tolls, and other imposts to be levied under the District Municipal Act and the times of collections of the same shall be those specified in Appendix B to these Rules."

No. 47 provides that "all the taxes, tolls and other imposts shall be payable on demand. If any person refuses to pay any town duty or toll legally due, the officer or other person duly authorised to receive the same may detain a portion of the goods or property in respect of which such town duty is demanded, sufficient to cover the amount, or the conveyance, upon which the toll is due; provided that immediate application be made for process for the recovery of the same under section 84 of the District Municipal Act."

The construction of these two rules is clear. A tax is legally payable on demand only at the time at which it is specified to be payable in Appendix B. By some strange omission, however, an Appendix B has never been framed, and no time, therefore, has been specified for payment of taxes. At the most then a tax can be payable duly at the expiration of the time for which it is declared to be payable. For instance in the case of this house-tax for which a payment of Rs. 2 a year is imposed on a house, the tax is only payable at the end of the year for which it has been imposed, it cannot be demanded in advance or at any time before the expiration of the year. The demand, therefore, made in December for a payment of tax which would fall due only at the end of the Municipal year is illegal. Such being my opinion it is unnecessary for me to discuss the other contentions raised in the case. I would only add that I am not disposed to assent to the proposition that a tax or an enhanced tax can only take effect from the beginning of an official year. This point, however, does not arise in the present case and for the above reasons, I concur in reversing the order of the Magistrate and directing the taxes and penalties, if paid, to be refunded.

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8 September 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Balu Miya.*

Salt Act (Bom. Act II of 1890), Secs, 3, 47—Principal—Agent—Liability of principal for acts of agent.

Where a principal has no knowledge or connivance in the illegal act of the agent he cannot be held liable under section 47 of the Bombay Salt Act, 1890, for the acts of the agent done on his own account.

JARDINE, J.—I do not think the language of section 3, clause (*o*), of the Bombay Salt Act, 1890, ought, *prima facie*, to be interpreted so as to impose penalties under section 47 on an innocent principal whether there has

**Criminal Ruling 40 of 1891. Criminal Application for Revision No. 281 of 1891.*

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been no knowledge of or connivance in the act of his agent. This would be contrary to a general principle of criminal law expounded in *Cooper* v. *Slode* (1) and in the *Queen* v. *Tolson* (2).

I find nothing in the Act requiring us to assume that the words are meant to include a wholly innocent principal. As the language is so dissimilar, it would be unreasonable to construe them as imposing the same criminal liability on holders of permits as is imposed by section 53 of the Bombay Abkari Act V of 1878. No such inference is permissible as in *Betts* v. *Armstead* (3), and the circumstances of a permit-holder shipping salt are very different to those of the keeper of licensed premises in *Bond* v. *Evans* (4), whose servant tolerated gaming therein. By adopting a strict construction, the ordinary meaning can be given to section 3, clause (*o*) consistent with the principle laid down in these cases.

We must, therefore, quash the convictions and sentences.

PARSONS, J.—The Magistrate has felt himself bound under the provisions of clause (*o*) of section 3 of the Bombay Salt Act, 1890, to hold the applicant criminally liable for the act of his agent, Undir, though he finds as a fact that the latter "for ends of his own and probably (though not certainly) unknown to his principal added surreptitiously 13 bags to the cargo." That clause, however, only enacts that a removal of salt by an agent shall be deemed a removal by the principal if it is made "on that person's account." In the present case the applicant had obtained a permit for the removal of 720 maunds of salt from the salt work and he appointed Undir his agent for the removal of that quantity. The surreptitious addition by the latter of 13 bags for ends of his own cannot be held to be a removal of those bags on account of the principal. It is not shown that the applicant directed his agent so to act or meant that he should so act or in any way ratified the act. It was an illegal act done by the agent on his own account and for it the applicant cannot be held criminally liable: see *Cooper* v. *Glade* (5). I concur in reversing the conviction and sentence.

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10 September 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Abdul.*

Criminal Procedure Code (Act X of 1882), Sec. 439—Revision—High Court—Jurisdiction.

Although section 439 of the Code of Criminal Procedure does give the High Court power to call for cases not only on judicial information but also "which otherwise come to its knowledge," yet, in most circumstances, it is a right practice that Judges should be moved in open Court.

(1) 6 H. L. C., 793. (2) L. R. 23 Q. B. D. 168. (3) L. R., 20 Q. B. D. 771.
(3) 21 Q. B. D. 249. (5) 6 H. L. C., 793. *Criminal Application for Revision No, 26 of 1891.

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JARDINE, J.—We were first moved to send for and review this case by a letter from the Government of Bombay which we considered in chambers. The Court replied that any application that might be made in Court would be taken into consideration. This Bench was afterwards moved by the Advocate General to call for the case, although section 439 of the Code of Criminal Procedure does give the High Court power to call for cases not only on judicial information but also "which otherwise come to its knowledge." Yet, in most circumstances, it is a right practice that Judges should be moved in open Court: publicity is thus secured and a fuller hearing of the reasons which move the Government in the interest of the public order or a private party in his own. It is, therefore, desirable that motions of this kind should be made in the usual manner, however wide the powers of the Judges may be to interfere on knowledge otherwise acquired. Moreover, this procedure has been approved by the Supreme Government as the most convenient as will be seen in the correspondence about the *Fuller case*. Since when, I believe, the practice of the High Courts has been uniform.

The present case is one which the Local Government might well bring to the notice of this Court in revision. The Magistrate found that the prisoner deliberately cut off his wife's nose with a penknife. He sentenced him to the longest imprisonment he could inflict, *viz.*, two years. The prisoner was liable under section 326 of the Penal Code to transportation for life or imprisonment for ten years. The Government move on the ground that the inflicted punishment is inadequate. Without prejudicing the prisoner by further comment on the facts, it is necessary to say that in a case of such gravity the Magistrate would have exercised a proper discretion, if he had sent the prisoner for trial by the High Court.

Mr. Sitaram who appears for the prisoner takes the objection that the High Court has no power to order a committal, the case not being one excluded from the jurisdiction of the Magistracy. He relies on an interpretation of section 423 B of the Code of Criminal Procedure which supports his contention. It is found in Mr. Justice *Brodhurst's* Judgment in *Queen-Empress* v. *Sukha* (1). The learned Judge was of opinion that the words in section 423 B "order him to be ... committed for trial" must be confined to persons triable exclusively by the Court of Sessions. With all respect, it appears to us that this is a construction which narrows the plain meaning. "We are to look to the words in the first instance, and where they are plain we are to decide on them. If they are doubtful, we are then to have recourse to the subject matter:"

(1) I. L. R. 8 All., 14.

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The King v. *The Inhabitants of Hodnet* (2). There is no limitation in the words: and in our opinion none can be implied in the subject matter. The powers of the High Court, under sections 435 and 439, have been extended by the Code of 1882 as pointed out in *Queen-Empress* v. *Chagan* (3) *cf. Queen-Empress* v. *Maganlal* (4). We can call for records to satisfy ourselves of the correctness and propriety of the proceedings. The infliction of an inadequate punishment is undoubtedly an impropriety which the jurisdiction in revision is intended to remedy. In the most serious cases to which the rules about enhancement by the High Court itself do not apply, a provision that the High Court may direct a new trial before a Court having greater powers than any Magistrate seems beneficial to the public and fair to the prisoner. A Magistrate is not to determine every case he is competent to try. He is required by section 254 to consider whether such punishment as he can inflict is adequate: if not, he can commit the prisoner to the higher Court under section 210 or 347. In the case of the corrupt Magistrates (I. L. R. 13 Bom. p. 598) learned Judges of the Full Bench remark that the object of a Code of Criminal Procedure is to provide a machinery for the punishment of offenders. Of course, punishment means adequate punishment. Thus in affirming the jurisdiction of this Court, we give effect to the reason of the Code.

We now quash the conviction and sentence and direct the Magistrate to commit the prisoner for trial by the High Court.

PARSONS, J.—I concur in reversing the finding and sentence and in ordering the accused to be committed for trial.

Section 435 of the Code of Criminal Procedure gives the High Court the power of calling for and examining the record of any proceeding before any inferior Court for the satisfying itself as to the correctness, legality or propriety of any finding, sentence or order and section 439 confers on it in such cases the discretion of exercising any of the powers conferred on a Court of appeal by Sections 195, 423, 426, 427 and 428. One of the powers conferred by section 423 is "to reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial." I am unable to concur in the opinion expressed by *Broadhurst* J. in the case of *Queen-Empress* v. *Sukha* (5), that "the appellate Court referred to in section 423 can in an appeal from a conviction only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session." Such an interpretation

(2) I. T. R., 96 p. 101. (3) I. L. R., 14 Bom., p. 341 (4) I. L. R., 14 Bom., 18.
(5) I. L. R., 8 All. 14.

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necessitates the interpolation of words in section 423 which, to judge from their insertion in section 436, were designedly omitted therefrom. The words used in section 423 are clear and unambiguous and give to an appellate Court the power to order an accused to be committed for trial when it considers that that was the proper procedure to have been adopted in the case. It is only a qualified jurisdiction which is conferred by section 28 on a Magistrate to try an offence which is shown in the eighth column of the second schedule to be triable by him. Section 207 lays down the procedure to be adopted, not only where the case is triable exclusively by a Court of Session or High Court, but also where the case, in the opinion of the Magistrate, ought to be tried by such Court. Section 254 is still more restrictive, for it provides that the Magistrate shall try an accused person only for an offence which, in his opinion, can be adequately punished by him. These two sections show that a Magistrate has to exercise a discretion in the matter of every case that is brought before him and his proceedings in the exercise of this discretion are clearly subject to examination and review by a superior Court either on appeal or in revision.

In the present case, the accused one night tied his wife by her arms and legs to a bedstead and then with a penknife cut off the whole of the soft parts of her nose and a portion of her upper lip. The excuse he gives for his act is that she confessed that during his absence in Calcutta sometime previous she had had an intrigue with another man and that since his return she had twice run off to the house of her sister and that she said she would run away again. There is no evidence of her infidelity but she admits running away from him. For his offence which is one punishable under section 326 of the Penal Code with transportation for life or imprisonment upto ten years and fine, he has been sentenced to two years' rigorous imprisonment by the Presidency Magistrate, W. R. Hamilton, Esquire, who remarks as follows.—

"The accused is not a criminal but an honest working man who feels himself grossly wronged by his wife's misconduct and has unfortunately punished her in a cruel way."

Beyond this extraordinary remark there is nothing on record to show the reasons which may have induced the Presidency Magistrate to form the opinion that he could adequately punish the offence committed by the accused. In my opinion the sentence is wholly inadequate for such a fiendish act which is found by the Magistrate to have been deliberately committed by the accused apparently for the sole reason that the complainant would not live with him as his wife. As the sentence is the

(1) I. L. R. 8 All., 14.

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utmost that the Magistrate could pass, it follows that the offence was one that could not be adequately punished by the Presidency Magistrate. He had, therefore, no jurisdiction to try the accused but was bound in law to have committed him for trial to the High Court.

I may add that according to my experience invariably cases of cutting off a woman's nose are throughout the Presidency committed to the Court of Sessions and punishment awarded is much more than two years' rigorous imprisonment.

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11 September 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Dhamba.*

Criminal Procedure Code (Act X of 1882), Sec. 286—Evidence—All persons present at the commission of the offence should be examined—Public Prosecutor—Burden of proof—Judge's duty to sift out the truth.

Every witness who was present at the commission of the offence ought to be called; even if the witnesses give different accounts it is fit that the jury should hear their evidence so as to enable them to draw their own conclusions as to the real truth of the matter.

The duty of producing the evidence *prima facie* devolves on the Public Prosecutor; and though this burden of the prosecution is not to be thrown on the Judge there is an obligation upon the Judge not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the utmost into the truth of the matter before him.

ORDER.—The Court postpones dealing with this case until it receives a report from the Sessions Judge as to the reason why the witnesses who depose to seeing the homicide take place and the other important witnesses who gave evidence before the Magistrate were not called and examined in the Court of Session. "Every witness who was present at a transaction of this sort ought to be called: and even if they gave different accounts, it is fit that the Jury should hear their evidence, so as to draw their own conclusions as to the real truth of the matter." This ruling of Mr. Justice *Patterson* in *Reg.* v. *Holden* (1) has been followed by this Court: at the same trial the learned judge himself called an important witness for the furtherance of Justice whom the prosecution had refrained from calling. This Court has frequently ruled that it is the duty of the Sessions Judge to secure a full investigation of the facts.

On the receipt on the report, their Lordships recorded the following Judgment on the 8th October 1891.

PER CURIAM:—On perusal of the record of this trial, we are of opinion that the witnesses who deposed to seeing the homicide take place and the other important witnesses who gave evidence before the committing Magistrate ought to have been called and examined in the Court of Session in order that all the facts might be brought before the Judge and Jury. This Court has several times followed the ruling of

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**Criminal Ruling* 41 *of* 1891. Criminal Review No. 364 of 1891. (1) 8 C. & P., 610.

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Mr. Justice *Patterson* in *Reg.* v. *Holden* (2) that "every witness who was present at a transaction of this sort ought to be called, and even if they gave different accounts, it is fit that the Jury should hear their evidence, so as to draw their own conclusions as to the real truth of the matter." The duty of producing the evidence *prima facie* devolves on the Public Prosecutor. As said in the case of *Dhanoo* v. *Kazi* (3) "he is bound to produce all the evidence in his power bearing upon the charge. It is *prima facie* his duty accordingly to call those witnesses who from their connection with the transactions in question must be able to give important information. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief, that, if called, they could not speak the truth." The Public Prosecutor is to aid the Court discovering the truth: *Reg.* v. *Kashinath Dinkar* (4). The burden of the prosecution is not to be thrown on the Judge: *Queen* v. *Page* (5). At the same time there is an obligation on a Sessions Judge "not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the utmost into the truth of the matter before him:" Per *Melvill* J. in *Reg.* v. *Tukaram* (6). This view appears to have received legislative sanction in section 540 of the Code of Criminal Procedure and section 165 of the Indian Evidence Act.

In *Reg.* v. *Holden*, *Patterson* J. himself called an important witness for the furtherance of justice, whom the prosecution had refrained from calling.

We have also to notice that the requirements of section 289 do not appear, so far as the record shows, to have been observed. The prisoner should have been called on for his defence after the Public Prosecutor had summed up and the defence should have been noted on the record which otherwise is not complete: *Reg.* v. *Gopal Hajjam* (7) and see also *Reg.* v. *Asanoola* (8); and laid before the Jury in the Judge's charge which is not to be confined merely to the case for the Prosecution.

Again the requirements of section 342 of the Code which enable a prisoner to give explanations were not observed. There was no general questioning. We do not at present pass any order in the case but merely return the record as neither the Crown nor the prisoner has moved this Court. But at the same time we must lay stress on the necessity, in trials before a Court of Session, of strict observance of the careful provisions of the Code of Criminal Procedure which are intended to secure a full investigation of the facts and that they will be laid properly before the Jury who are to Judge between the views propounded for the prosecution and the defence.

(2) 8 C. & P. 610. (3) I. L. R., 8 Cal., 121. (4) 8 Bom., H. C. 153. (5) 2 Cox. C. C. 221. (6) *Ante*, p. 53. (7) 15 W. R., 16. (8) 13 W. R., 15.

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7 October 1891. BIRDWOOD & PARSONS, JJ.

Queen-Empress v. Marigawda.*

Penal Code (Act XLV of 1860), Sec. 466—Forgery—False original—True copy.

A person who is bound to give a true copy cannot be convicted of forgery merely because the original of which he gives a true copy contains a statement which is false and is known or believed by him, to be such.

JARDINE, J.—It appears that these appellants have been convicted of forgery under section 466 of the Indian Penal Code. The act charged against them is admitted by them, *viz.*, that they prepared a true copy of an entry existing in a Death Register. This act is done continually by officers whose duty it is to give and certify true copies of official documents. The appellants were not charged with the forgery of the original register, nor does it appear proved that they were aware that the original entry had been forged. The *mens rea* and ground of conviction consist in their knowledge that the statement in the Register, Ex. C., about the year of the death was untrue in fact, and the Court below appears to have assumed that these appellants ought therefore not to have given a true copy at all. We are of opinion that this is bad law. It is not suggested that the copy was different from the original or was other than a true copy. The facts charged and proved do not amount to forgery and the convictions cannot be sustained. We reverse the convictions and sentences and acquit the appellants and direct that they be set at liberty.

PARSONS, J.—I concur. The accused have been convicted of the offence of forgery in that they dishonestly prepared a copy of an entry in a village death register knowing that the entry was false. It is admitted that the copy prepared by the accused was a true copy of the entry and, if the entry was false in any particular, it is not shown that they had anything whatever to do with the making of it. They were not charged with or found guilty of, committing any wrongful act in respect of it. As the Patel and the Kulkarni respectively of the village, the accused were bound to give a copy of the entry on application. It cannot be forgery on the part of such a person to give a true copy of a document which contains a statement which he knows to be false, even though he may also know that the copy is about to be tendered in evidence before a Court. It is his duty to give a true copy of the document as it stands and if he does that duty and gives a true copy, he cannot be held to be guilty of forgery because there is a false statement in the original. The conviction, therefore, of the accused cannot in law be supported on the facts of the case.

Criminal Ruling 42 of 1891. Criminal Appeals Nos. 204 and 245 of 1891.

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8 October 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Ganoo.*

Criminal Procedure Code (Act X of 1882), Sec. 123—Security for Good Behaviour—Failure—Term of imprisonment.

Where a person is ordered to execute a bond that he would be of good behaviour for a certain period of time, the period of imprisonment in default thereof ought to be of the same duration as the period for which the security is demanded.

THE Cantonement Magistrate of Poona, having found that the accused was an old offender and had no ostensible means of livelihood, ordered him to execute a bond in the sum of Rupees thirty with one surety for the same amount that he would be of good behaviour for the period of six months under section 109, Criminal Procedure Code, and in default, to be kept in rigorous imprisonment for three months.

ORDER.—The Court returns the record and proceeding with the remark that the period of imprisonment in default ought to have been the same as the period for which the security was demanded, as appears from the language of section 123 of the Code of Criminal Procedure and of the form of warrant No. 14 in the Appendix to the Code.

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9 October 1891. JARDINE & PARSONS, JJ.

Government of Bombay v. Sheikh Mahomed.†

Criminal Procedure Code (Act X of 1882), Secs. 199, 200—Complaint—Examination of complainant.

The word 'complaint' as used in section 199 of the Code of Criminal Procedure must be taken as including not only a written complaint, but also the examination of the complainant at any rate prior to the issue of process.

JARDINE, J.— I am of opinion that although the written complaint made by the husband only specifies sections 366, 368, 379, 380 and 497 of the Indian Penal Code, the allegation made therein that the accused "led her (complainant's wife) into his house and kept her" suggests with sufficient plainness the existence of an offence under section 498. This is made clearer by the further statement made by complainant when examined on the complaint under section 200 of the Code of Criminal Procedure that the accused had used inducement. The Magistrate had, therefore, jurisdiction to frame a charge under section 498 and the Sessions Judge was wrong in holding that the proceedings were bad and in acquitting the prisoner without going into the merits. Thus we give due effect to the real intention of section 199 of the Procedure Code. We now reverse the order of acquittal passed in appeal and following the procedure laid down in *Queen-Empress* v *Ganesh Khanderao* (1) we direct that the appeal of the prisoner be retried by the Sessions Judge.

**Criminal Ruling* 43 *of* 1891. Criminal Review No. 406 of 1891.

†*Criminal Ruling* 44 *of* 1891. Criminal Appeal No. 214 of 1891. (1) I. L. R., 13 Bom. 515.

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PARSONS, J.—I concur. The words used by the complainant in the written complaint produced by him to the Magistrate—" that the accused has taken and kept her (*i.e.*, complainant's wife) in his house " are of themselves sufficiently wide to include a charge under section 498 of the Penal Code, although only section 497 is specifically mentioned. The complainant, moreover, in his examination by the Magistrate prior to the issue of process places the matter beyond all doubt by stating first that the accused " has kept her hidden and has enticed her away " and secondly that " he has taken her with intent to commit adultery" I am of opinion that the word complaint used in section 199 must be taken to include not only the written complaint but also the examination of the complainant at any rate prior to the issue of process and I do not understand that there is anything in the decision of the case of *Queen-Empress* v. *Deokinandan* (1), opposed to this view.

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19 November 1891. JARDINE & PARSONS, JJ.

Queen-Empress v. Chand.*

District Police Act (Bom. Act IV of 1890), *Sec.* 36—*Absence without leave.*

A Police officer who absents himself from the duties of his office for a day without leave commits an offence under section 36 of the Bombay District Police Act, 1890. It is not necessary for a conviction under the section that the withdrawal must be permanent.

ORDER.—We reverse the order of the acquittal as we are of opinion after hearing the accused that he absented himself from the duties of his office for a day without having obtained leave and went to a distant town. The Magistrate considered this absence to be temporary only, and that to justify a conviction, under section 36 of the Bombay Police Act IV of 1890, the withdrawal must be for good. We think this view of the law to be wrong. We convict the accused under section 36 and sentence him to pay a fine of Re. 1 or in default suffer one day's simple imprisonment.

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19 November 1891. JARDINE & PARSONS JJ.

Queen-Empress v. Gaiba.†

Criminal Procedure Code (Act X of 1882), *Secs.* 112, 117, 118, 239—*Evidence—Joint trial.*

An order to execute a bond for good behaviour cannot be made under section 118 of the Code of Criminal Procedure, in the absence of any evidence; sections 117 and 118 of the Code prescribe inquiry and proof that it is necessary that the person arraigned should execute a bond.

Where more persons than one are called upon to show cause why they should not execute bonds for good behaviour, each person arraigned should be tried separately.

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(1) I. L. R., 10 All., 39. **Criminal Ruling* 45 *of* 1891. Criminal Appeal No. 225 of 1891.
†Criminal Reference No 182 of 1891.

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In this case five persons were jointly called upon under section 112, Criminal Procedure Code, to show cause why they should not be ordered to execute bonds for good behaviour under section 118 of the Code. They showed no cause, and the Magistrate, thereupon, without recording any evidence made the orders.

The Sessions Judge of Nasik in making the present reference remarked:—" I am of opinion that the bonds should be cancelled as from beginning to end of his proceedings, the Magistrate had no legal evidence before him. Section 117 directs the Magistrate to '*inquire into the truth of the information*' and if necessary to take '*further evidence*'—which implies that there must ordinarily be some. It might be argued that the absence of any attempt to show cause against the execution of a bond is analogous to a plea of guilty in a criminal trial and that therefore no evidence is necessary. But no specific act being questioned the analogy is far from perfect."

Order.—The Court concurs in the opinion of the Sessions Judge that an order to execute a bond for good behaviour cannot be made under section 118 of the Code of Criminal Procedure in the absence of any evidence. That section and section 117 prescribe inquiry, and proof that it is necessary that the person arraigned should execute a bond.

The Court has already ruled that each person arraigned should be tried separately, see *Queen-Empress* v. *Bapu* (1). The Magistrate's orders are set aside.

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27 November 1891. Jardine & Parsons, JJ.

Queen-Empress v. Kanji.*

Abkari Act (Bom. Act V of 1878), Secs. 16, 18—Toddy—Selling—Liquidating a debt—Breach of license.

A licensee obtained certain pots from a *kumbhar* (potter), and liquidated the debt for the said pots by handing over to him some toddy:—

Held, that as the *toddy* was not sold but was given in liquidation of a debt there was no breach of the license which provided that the licensee " shall not receive wearing apparel, or ornaments, or any consideration, except coin, for any *toddy* he may sell."

Order.—Inasmuch as the pots were delivered to the accused on the 16th October and the toddy was delivered by the accused to the Kumbhar on the 20th October, it cannot be said that the accused received the pots for any toddy he sold. The toddy was not sold for the pots but was given in liquidation of the debt which the sale of the pots had created: there has been no breach of the clause of the license which provides that " he shall not receive wearing apparel or ornaments or any consideration except coin for any toddy he may sell." We dismiss the appeal.

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(1) *Ante* p. 556. **Criminal Ruling* 47 *of* 1891. Criminal Appeal No. 215 of 1891.

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21 January 1892. JARDINE & TELANG, JJ.

In re Ebrahim.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Criminal Proceedings—Civil litigation.

In cases arising under section 195, Criminal Procedure Code, it is advisable to postpone criminal proceedings until the civil litigation, out of which the sanction came into existence, has come to an end.

THE facts were that a suit was brought against the applicant on the Original Side of the High Court by Todd, Durant and Co. to recover Rs. 3500 as damages and interest consequent upon a breach of contract dated 19th February 1891, alleged to have been entered into by the applicant for sale to him of 200 tons of rapeseed. By this written statement in the said suit, the applicant Ebrahim denied the contract and also the signature appended thereto. The learned Judge who heard the suit passed Judgment in favour of the plaintiffs and held that the said contract was duly made by Ebrahim and that the signature thereto was his signature: and further gave sanction to prosecute Ebrahim for an offence under section 193, Indian Penal Code. The decree was sealed on the 7th January 1892, and on the 11th Ebrahim filed an appeal against it. When the proceedings against the applicant were taken up before the Chief Presidency Magistrate of Bombay, the applicant applied for a postponement till the final disposal of the appeal on the ground that he had preferred an appeal against the original decree and in the memorandum of appeal he had also included the sanction matter. The learned Magistrate having refused to grant the postponement applied, the applicant preferred the present application to the High Court under its extraordinary jurisdiction.

PER CURIAM:—We have consulted Mr. Justice *Parsons* and find that he gave no sanction under section 195 of the Code of Criminal Procedure but acted under section 476. The learned Judge has also expunged from his decree his order directing the complaint. The difference between proceedings under sections 195 and 476 has been discussed in *Queen Empress* v. *Rachappa* and *Queen Empress* v. *Irappa*, (1) and *Queen Empress* v. *Shankar*, (2). We are of opinion that the proceedings of the Chief Presidency Magistrate are subject to the superintendence of this Court and may be made the subject of an application for exercise of the jurisdiction in revision to this Division Bench. Since the criminal proceedings were directed, an appeal has been made from the decree in the civil suit out of which they arose. Mr. Jardine's reasons for applying here is said to be that the Chief Presidency Magistrate has declined without an order from this Court being first issued to postpone the course of the criminal in-

*Criminal Application for Revision No. 26 of 1892. (1) I. L. R., 13 Bom., 109. (2) I. L. R., 13 Bom., 384.

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quiry until the appeal is heard and determined. We have not the Magistrate's record before us and we do not think it necessary to call for it at this stage. The question of postponement is, we consider, one within his own judicial discretion. We may add that this Court has, in cases arising under section 195 of the Code of Criminal Procedure, several times acted on the principles found in *Queen* v. *Ingham* (3), and *Rex* v. *Ashburn* and *Rex* v. *immons* (4) and postponed criminal proceedings until the civil litigation had come to an end.

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27 January 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Govind.*

Sanction—Perjury—Asking a witness in the course of his examination to show cause why he should not be committed for an another offence—Practice.

G. was discharged on a charge of murder by a Magistrate. After G's evidence had been recorded in the trial of certain persons for giving false evidence, the Sessions Judge asked him certain questions as to his liability to be committed to the Sessions Court on a charge of murder and under section 436 committed him :—

Held, (1) that the consequence to public justice would be very serious, if a witness, during the course of his deposition, and before being absolved from his oath were liable to be suddenly called upon to show cause why he should not be committed for some other distinct and serious crime of which he had been discharged ;

(2) That the questions put to him could not be considered to be the beginning of these special proceedings authorized by section 436, Criminal Procedure Code ;

(3) That the Police and Magistracy were not precluded by an order of discharge from receiving a charge if in their judgment there was sufficient reason for holding that the discharge had been made on a wrong view of the facts.

PER CURIAM:—The applicant Govind Mangba was on the 3rd November 1891 committed for trial by Mr. Ingle, a Magistrate of the First Class in the Canara District, on a charge of murder, pursuant to an order of the Sessions Judge dated the 30th October under section 436 of the Code of Criminal Procedure. He presented a petition to this Court without delay and the Court ordered that he be admitted to bail and called for a report upon the procedure under which he was called on to show cause against the committal, in order that this Court might satisfy itself as to whether he had had a proper opportunity so to do. It now appears from examination of the record by the light of the report that on the 24th October Govind Mangba was under examination as a witness at a trial of certain persons for false evidence then being held in the Court of Session. Long before that date he had been discharged of the murder after a long inquiry held by Mr. Ingle. The Sessions Judge's order states that during this trial for false evidence he had full opportunity as complainant therein of showing cause why the commitment

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(3) 14 Q. B. D., 396. (4) 8 C. and P., 50.

**Criminal Ruling* 3 *of* 1892. Criminal Application for Revision No. 448 of 1891.

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should not be made. No other opportunity is mentioned. We are of opinion that whatever opportunity he may have had during the course of that trial, he was not under any obligation to use it until called upon by the Sessions Judge to shew cause. The record does not shew that the Sessions Judge made any such call. The Judge did, while Govind was under examination as a witness, put some questions to him and the witness made answers. The first answer is that he was not aware of his liability to be committed to the Court of Session upon the evidence recorded by Mr. Ingle. Then he pointed out reasons why he should not be committed, stating that the High Court had considered all the evidence and had sanctioned the prosecution of the persons then under trial who had given evidence against him. He also mentioned what evidence he himself had called in his defence before Mr. Ingle and suggested other evidence in his favour. It appears from the record that on the 30th October the Judge directed Govind to be present to hear the judgment in the case of false evidence and then had him arrested and sent to Mr. Ingle to be committed. There is no record of any proceeding against Govind between the 24th October when as a witness he made the above answers and the 30th October when he was arrested.

Section 436 provides that before the Sessions Judge makes an order directing the commitment for trial of an accused person whom he considers improperly discharged by the Magistrate; the accused must have an opportunity of shewing cause why the commitment should not be made. Where this requirement has not been obeyed, the orders have sometimes been reversed. See *Queen* v. *Kanjomalai Padayachi*, (1) and *Empress* v. *Khamir*, (2). We are of opinion that the questions whatever they were which the Judge put to the witness (for they are not recorded) did not amount to a call to show cause. The duty of Govind as a witness was paramount to all other obligation: and it would be very dangerous to assume of any examination of a witness in another trial that it is the beginning of the special proceeding authorized by section 436. The consequences to public justice would be very serious if a witness called at a trial were, during the course of his deposition and before being absolved from his oath as a witness, suddenly called upon to show cause why he himself should not be committed for some other distinct and serious crime of which a Magistrate had discharged him. The delicate duty of the Judge in dealing with the reasons given by a Magistrate for discharging an accused person would be in danger of imperfect fulfilment if the Judge were allowed to mingle such a proceeding with the trial of the different case before him. There was in the present case no apparent

(1) I. L. R., 6 Mad., 372. (2) I. L. R., 8 Cal., 662.

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necessity for the procedure adopted. The evidence about the murder is said to have been bulky and conflicting, and Mr. Ingle gave weight to the prisoner's evidence on the defence of *alibi*. The Police and the Magistracy were not precluded by Mr. Ingle's order of discharge from reviving the charge against Govind if in their judgment as guardians of the public order there was sufficient reason for holding that the discharge was made on a wrong view of the facts. There seems to have been no reason for haste.

On the ground that Govind did not get opportunity to show cause against the order, we set aside the order of the Sessions Judge dated the 30th October 1891 and we quash the commitment.

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28 January 1892. JARDINE & TELANG, JJ.

In re Mahadhu.*

Criminal Procedure Code (Act X of 1882), Sec. 528—Transfer—Notice—Personal allegations.

It is highly inexpedient to transfer a case from one Magistrate to another after the prosecution has closed and the defence has begun, without giving notice to the complainant or recording any reasons for such transfer.

When personal allegations are made against a trying Magistrate in support of an application to transfer, a District Magistrate need not interfere unless such allegations are clearly established.

PER CURIAM:—We called for the record of this case on its being shown to us that the District Magistrate had used his power under section 528 of the Code of Criminal Procedure to transfer the case after the prosecution had closed and the defence begun and without giving notice to the complainant or recording any reasons. We can only partly infer what the District Magistrate's reasons may have been. The order of transfer has been supported here by Mr. Pirozshaw Mehta on grounds most of which are personal to the Magistrate who was trying the case. But out of respect for the due administration of justice this Court will not interefere on such grounds unless they are very clearly established: see, *Shankar's case* (1) and *Krishtochunder Ghose's case*, (2). We decline to infer any bias on the Magistrate's part from the mere refusal of adjournments or other exercise of discretion. The omission to act on section 526A of the Code of Criminal Procedure may have been an oversight; and the intimation to the accused that he would be put in police custody appears, so far as we can judge from the vague statements, to have been made in consequence of a contempt of Court evidenced by indecorous tone of speech. We must also add that the allegations do not show that the Magistrate has any bias in favour of the complainant from kindred or other cause. In

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(1) 6 Bom. H. C., 11. (2) 2 W. R., 58.

**Criminal Ruling* 4 of 1892. Criminal Application for Revision No. 17 of 1892.

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weighing what the accused may have to urge, a District Magistrate should require any reasons personal to the Magistrate to be as clearly shown to him as this Court would require.

The record does not enable us to say whether the application about examining the Magistrate as a witness was made *bona fide* or otherwise or whether it was a proper reason for the transfer.

Under the circumstances we think the ends of justice will be best met by our setting aside the District Magistrate's order of transfer and directing him to rehear the accused's petition for transfer after giving notice to the complainant and considering the reason urged by the light of these remarks.

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4 February 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Ganu.*

Forest Act (VII of 1878), Secs. 25, 67 (2)—Forest officer—Ranger—Compensation—'Such officer' meaning of.

The conviction of an accused under section 25 of the Forest Act, 1878, is not illegal, for the reason that the officer who accepted the compensation is not an officer empowered to do so.

In section 67 (2), the words "such officer" mean an officer empowered.

IN this case, the four accused were found, by the Range Forest Officer of Karjat, grazing a flock of 800 sheep in the Reserved Forest of Pimpalwadi, the said forest being closed against grazing of sheep. The ranger impounded the sheep, made a *panchnama* of the damage and collected the amount (Rs. 37-8-0) from the accused's master (who was owner of the sheep) under section 67 (amended) of the Indian Forest Act. He then proceeded to prosecute the accused before the Third Class Magistrate, who convicted the accused and sentenced them to pay a fine of Rs. 10 each under section 25 of the Indian Forest Act, and assigned half the fine as reward to the parties who detected the case.

The District Magistrate of Ahmednagar, being of opinion that the convictions and sentences were illegal, made this reference to the High Court, stating; "The Forest Ranger not being an officer empowered by Government, had no authority to accept compensation for the Forest offence committed, but having done so he had no right to prosecute the accused. The compensation having been received from their master must be considered as having been paid on account of the accused, who under clause (2) of amended section 67 of the Forest Act forthwith became entitled to relief from any further proceedings. The Magistrate regarded the compensation as having been paid by the accused and was therefore bound to discharge them. Under the circumstances above stated the sentence was illegal. The

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*Criminal Ruling 6 of 1892. Criminal Reference No. 9 of 1892.

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irregularity of the Forest Ranger's procedure does not affect the justice of the case, for the purpose of which the compensation should be held to have been legally received, he having acted in good faith under departmental orders mistakenly issued by the Divisional Forest Officer."

ORDER.—The District Magistrate states in his reference that the Forest Officer who accepted the compensation was not an officer empowered so to do. The case, therefore, does not come within clause 2 of section 67 of Bombay Act VII of 1878 as amended by Act V of 1890, section 13. The Court interprets the words "such officer" in that clause as meaning an officer empowered. The proceedings are, therefore, good in strict law and the Court returns the record and proceeding. The Court is further of opinion that, under the circumstances, the proper course of the District Magistrate is to represent them to the Local Government.

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4 February 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Dagadi.*

Indian Penal Code (Act XLV of 1860), Sec. 298—Wounding the religious feelings.

he accused, while his caste people were sitting to dine at complainant's house called out in the hearing of all that they would be eating cow's flesh if they took food without them, which made them leave their dishes untouched:—

Held, that the accused could not be convicted under section 298, Indian Penal Code.

THE accused in this case were convicted and sentenced by the Second Class Magistrate of Junner, under section 298, Indian Penal Code, for uttering any word in the hearing of any person with intention to wound his religious feelings, in that the accused while his caste-people were sitting to dine at complainant's house came and uttered in the hearing of all, the expressions that they would be eating cow's meat if they took the food without him, which made the guests leave their dishes untouched and returned home and thus wounded religious feelings of the complainant and his guests.

PER CURIAM:—The prisoners were sentenced to imprisonment on conviction under section 298 of the Penal Code on the following facts found in the judgment. They wished the complainants who belong to the same caste to admit a certain woman to their company and finding the castemen at a feast they called out that if they the castemen feasted without the woman, their act would be like the eating of cow's flesh. This was certainly a rough appeal to the relgious feelings of the caste-people then met together. But the gist of the offence defined in section 298 is "the deliberate intention of wounding the religious feelings" and we think it impossible to infer this intention from the words used on which words the convictions are based. Such a penal enactment must be strictly construed. We now reverse the convictions and sentence.

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*Criminal Review No. 11 of 1892.

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8 February 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Ranchod.*

Abkari Act (Bom. Act V of 1878), Secs. 17, 47—Mere possession—Liquor—Duty, non-payment of.

Mere possession of country liquor on which no duty has been paid is not irrespective of the quantity fixed under section 17 of the Bombay Abkari Act, punishable under section 47 of the Act.

PER CURIAM:—The question argued is whether the possession of liquor on which duty has not been paid is, irrespective of quantity, punishable under section 47 of Bombay Act V of 1878. The Magistrate held and the Government Pleader argues the same that as a retailer may not sell any such liquor, the words "any larger quantity of country liquor than may legally be sold by retail" under section 17 apply. This argument stated in another form is that these words include the following "any country liquor in quantity less than may legally be sold under section 17 when the duty on such has not been paid." We think that at first sight such an inclusion would be contrary to the ordinary meaning and in conflict with the principle of construing a penal statute strictly. Section 47 appears to deal with cases where the *quantity* of the liquor possessed exceeds the maximum fixed under section 17. We concur with Mr. Manekshah who has argued as *amicus curiæ* against the conviction that if the Legislature had intended to punish the possession of any, even the smallest quantity of liquor, on which the duty has not been paid, provision would have been made in section 43. The argument on which the conviction is based and supported would, as Mr. Manekshah points out, make the innocent purchaser from a licensed retailer liable to punishment on proof that the duty on his dram of liquor had not been paid. For these reasons we reverse the conviction and sentence.

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10 March 1892 JARDINE & TELANG, JJ.

Queen-Empress v. Deoshanker.†

Criminal Procedure Code (Act X of 1882), Sec. 421—Appeal—Dismissal—Non-appearance of appellant—District Magistrate.

It is not competent to a District Magistrate to dismiss an appeal under section 421 of the Code of Criminal Procedure on the ground that no one appeared to support the petition; in such a case the District Magistrate must consider whether there is sufficient ground for interfering which implies judicial consideration on the merits.

PER CURIAM:—Although the District Magistrate states that the appeal is dismissed, it appears that the order is really one rejecting under section 421, Criminal Procedure Code. The reason given is that no one appeared to support the petition. But as clearly appears from section

*Criminal Review No. 522 of 1891.

†*Criminal Ruling* 11 *of* 1892. Criminal Application for Revision No. 537 of 1892.

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421 this is not a proper reason. The District Magistrate had to consider whether there was sufficient ground for interfering which implies judicial consideration on the merits. We set aside the order dismissing the appeal and direct the District Magistrate to dispose of it under section 421 or 422.

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10 March 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Ravaji.*

Indian Penal Code (Act XLV of 1860), Sec. 411—Stolen property, receiving.

A conviction under section 411, Indian Penal Code, cannot be sustained on the mere fact of possession of stolen articles, not of an unusual character and such as easily pass from hand to hand.

THE accused were charged with receiving stolen property in that two *dhoturs* and turbuns which were stolen had been found in their possession. For this they were tried before the Sessions Judge of Nasik who convicted them under section 411 of the Indian Penal Code.

ORDER.—Following *Isa Sheikh* v. *Queen-Empress* (1) and *Empress* v. *Rango* (2) the Court is of opinion that the convictions cannot be sustained on the mere fact of possession of stolen articles, not of an unusual character and such as easily pass from hand to hand, six weeks after the theft, and therefore, the Court reverses the convictions and sentences.

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17 March 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Shamsherkha.†

Criminal Procedure Code (Act X of 1882), Sec. 257—Witnesses—Processes unserved—Adjourn, refusal to—Magistrate—Discretion.

Processes against certain witnesses of the accused having remained unserved, the Magistrate refused to adjourn the case on the ground that the witnesses would give the same evidence as certain others upon whom he could not rely —

Held, reversing the conviction, that the Magistrate was bound to assist the accused in enforcing the attendance of his witnesses in the absence of any such reason as is mentioned in section 257, Criminal Procedure Code.

THE accused was tried by the First Class Magistrate of Bhusawal under section 332 of the Indian Penal Code. During the course of the trial, when the accused entered upon his defence, he called several witnesses, of whom some were not able to attend as the processes had not been served upon them. The pleader for the accused applied for a postponement with a view of securing the presence of those witnesses, but the Magistrate declined to do so remarking:—"More witnesses were called, but they did not attend the Court, the processes issued not having been served upon them. However, there seemed no necessity to postpone the case for their appearance, as the pleader for

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**Criminal Ruling* 13 *of* 1892. Criminal Appeal No. 7 of 1892.

(1) I. L. R., 11 Cal., 160. (2) I. L. R., 6 Bom., 402.

†*Criminal Ruling* 14 *of* 1892. Criminal Application for Revision No. 59 of 1892.

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the accused has represented to the Court that those witnesses would furnish the same evidence as has been given by witnesses Nos. 14 and 15. But the Magistrate is not inclined to place any reliance in that of the latter witnesses." The Magistrate eventually convicted him and sentenced him to undergo rigorous imprisonment for fifteen days.

The accused, thereupon, applied to the High Court, contending that the Magistrate erred in law in disposing of the case without hearing all the witnesses summoned by him at the petitioner's instance, on the mere ground that the witnesses, on whom the processes were not served, would have given the same evidence as has been given by witnesses Nos. 14 and 15.

ORDER.—Following *Queen-Empress* v. *Dhananjoi* (1), on section 257 of the Code of Criminal Procedure, the Court is of opinion that the Magistrate having once granted the processes was bound to assist the accused in enforcing the attendance of the witnesses in the absence of any such reason for refusal as is mentioned in that section. The Court, therefore, sets aside the conviction and sentence. As the Magistrate has expressed opinion on the facts without hearing these witnesses the Court thinks it better while directing a new trial to order that it be held by such other Magistrate as the case may be referred to by the District Magistrate.

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24 March 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Balwant.*

Penal Code (Act XLV of 1860), Sec. 465—Criminal misappropriation—False entries—Forgery.

A person making false entries with intent to conceal misappropriation, the documents charged being unaltered documents, cannot be convicted of the offence of forgery.

IN this case the accused were *naka* Karkoons, and it was their duty to receive octroi at the gates and give receipts and accounts for the money. On the 10th January 1892, three carts came in with goods and a receipt was given to each for the amount of octroi he paid. There were counter-foils of these receipts and in these counter-foils smaller sums, by an aggregrate of Rs. 6 were entered. These receipts and counter-foils were written by accused No. 1. It was also the practice to keep a day book in which it was the duty of the *naka* Karkoons to enter all sums they received and to bring up this book with the box containing the money to the Municipal office in the afternoon. In this day book, which was in the handwriting of accused 1, the entries according to the counter-foils were at first written and then they were altered to the correct figures that is, according to the receipts given to the cartmen which contained the correct amount.

(1) I. L. R., 10 Cal., 931. *Criminal Ruling 15 of 1892. Criminal Appeal No 39 of 1892.

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The Sessions Judge of Ahmednagar, upon these facts, found the accused I guilty of the offence of forgery under section 455 of the Indian Penal Code. His reasons were "the accused admittedly wrote, with what must have been a dishonest or fraudulent purpose false entries in the counter-foils, and false entries in the day book, which he afterwards corrected into correct ones and false entries in the classified statement which were not corrected. The offence of forgery on his own admission is proved against him as clearly as it can be."

Before the learned Sessions Judge, the accused was also charged with criminal misappropriation. In cancelling this charge, the learned Judge observed:—"There appears to be no evidence whatever of the misappropriation. The money was actually handed over all right, according to the receipts of the Municipal Karkoon. It was urged that though the money was not actually misappropriated, there is evidence of an *attempt* at misappropriation as shown by the false entries and the alterations in the day book which were meant as a preparation to keeping the money. I think, however, that this does not constitute an *attempt* at misappropriation. If the money had been placed in the box after the enquiries had begun no doubt an attempt would have been made, but this was not the case. The money was put in the box correctly *before* any enquiries were made, so it is clear that the forgeries only constitute a *preparation* for the offence, which in this case could not be or was not carried out. It is difficult to exactly draw the line where a preparation becomes an indictable offence. The American rule is perhaps the best, 'an attempt can only be manifested by acts which would end in the consumation of the offence, but for the intervention of circumstance independent of the will of the party.' Now in this case it is quite clear that no independent circumstance did intervene, there was a preparation made for the offence but the offence itself was abandoned and was not attempted to be carried out by the free choice of the party. So I direct that under the circumstances the first charge be dropped altogether."

PER CURIAM:—The charge of misappropriation was not pressed and the Sessions Judge acquitted the prisoner of that charge. The prisoner was convicted of forgery and now appeals from that conviction. It appears from the words of the charge that the documents charged as forgeries were unaltered documents, *viz.*, counterfoils, receipts and registers. It is admitted by the Government Pleader that there was no charge relating to the altered documents, namely, the daybook entries which the Sessions Judge finds to have been altered in such a manner as to express the real amount of toll received in place of figures expressing smaller amounts. We must give the prisoner the benefit of the acquittal of mis-

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appropriation and of the Sessions Judge's finding that there was no attempt to commit that offence and we follow the reasoning in *Queen-Empress* v. *Kunju*, (1) which shows that the acts done did not amount to forgery. The decision of *Holloway* and *Innes* JJ. in 1 Ind. Jur. N. S. 46 relied on here by the Government Pleader like that of *Empress* v. *Shankar* (2) relates to a case of alteration of entries and it is therefore unnecessary for us to express an opinion upon them. We reverse the conviction and sentence.

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24 March 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Bhima.*

Abkari Act (Bom. Act V of 1878), Sec. 46 (a)—Liquor—Water.

Mixing water with liquor is not an offence under section 46 (*a*) of the Bombay Abkari Act, 1878.

PER CURIAM:—Mixing water with liquor is not an offence under section 46, clause (*a*) of Bombay Act V of 1878 as the trying Magistrate would have seen if he had carefully considered the words used. The District Magistrate also reports that no rules appear to have been made under section 35, clause (*h*). We set aside the conviction and sentence.

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30 March 1892. RESOLUTION IN CHAMBERS.

[*Present*: SARGENT, C. J., BIRDWOOD, JARDINE, PARSONS & TELANG, JJ.]

Queen-Empress v. Mahomed.†

Criminal Procedure Code (Act X of 1882), Sec. 35—Separate sentences—Different offences.

Where there are two separate convictions for two distinct offences in the same case, it is not illegal to pass one sentence for both offences, but it is generally the proper course in such a case to pass a separate sentence for each offence.

IN this case the four accused persons were tried by a Third Class Magistrate and convicted of offences under sections 323 and 504 of the Indian Penal Code. The Magistrate sentenced each of them to pay a fine of Rs. 5 under section 323, Indian Penal Code, and stated as regards conviction under section 504, Indian Penal Code, that "I do not think it necessary to impose any separate penalty under section 504."

The District Magistrate of Broach in making this reference, observed: "The decision as regards the offence under section 504, Indian Penal Code, appears illegal. A separate sentence should have been passed under section 504 as it was a distinct offence, on the strength of *Queen-Empress* v. *Phakeera* (*a*) also the case of *Imperatrix* v. *Wajir Jan* (*b*),

(1) I. L. R. 12 Mad., 114. (2) I. L. R 4 Bom., 657.

*Criminal Ruling 16 of 1892. Criminal Review No. 72 of 1892. †Criminal Ruling 17 of 1892. Report of Proceedings No. 164 of 1891 (*a*) *Ante*, p. 369. (*b*) I. L. R. 10 All., 58.

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which decision has been acquiesced in by the Bombay High Court in *Queen-Empress* v. *Phakeera* (3).

The reference came up for argument before a Bench composed of *Jardine* and *Parsons* JJ. who delivered the following Judgments.

JARDINE, J.—The District Magistrate has referred this case for revision citing the ruling in *Imperatrix* v. *Phakeera* (3) of the 12th April, 1888, as authority for treating the passing of only one sentence as an error in law requiring this Court to exercise its jurisdiction. If the learned Judges who passed that decision intended that the absence of separate sentences is such an error as requires this Court to interfere, then I feel precluded from following it in the face of previous decisions which have in my opinion settled the practice of this Court and which I think are correct law. I do not think we have hitherto interpreted the words, "The Court may sentence him for such offences to the several punishments" in section 35 of the present Procedure Code or in section 314 the corresponding section of the older Code as if the word "may" meant "must." Even where the offences are distinct this Court has refused to interfere, *e. g.*, *Reg.* v. *Vinayek* (4) followed in *Reg.* v. *Murar* (5); also *Reg.* v. *Gulam* (6) decided on section 453 of the Code of 1872 which corresponds to section 234 of the present Code. The Full Bench decision in *Reg.* v. *Tukaya* (8) seems to settle that either a single sentence or separate sentences is lawful and proper. The Legislature while aware of these decisions has not thought it necessary to change the word "may" into "must."

The more recent case of *Queen-Empress* v. *Sakharam* (9) which has been followed in *Queen-Empress* v. *Zor Sing* (10) and in *Queen-Empress* v. *Nirichan* (11) does not diverge from the earlier decisions; and I do not think the remarks it *Queen-Empress* v. *Wazir Jan* (12) which is the authority quoted in *Imperatrix* v. *Phakeera* (13) support the proposition that the High Court is bound to interfere in revision merely because separate sentences have not been passed.

In the present case I think the sentence legal and the punishment sufficient; and that at any rate there is no good reason for interfering in revision. The ruling of the 12th April 1888 is likely I apprehend to burden the Court with a number of references and being as I think opposed to the Judgment of a Full Bench in *Reg.* v. *Tukaya* (14) I do not think we ought to follow it, especially as it is contrary to the practice which has

(3) *Ante*, p. 369. (4) 2 Bom., H. C., 391. (5) 5 Bom., H. C., 3. (6) 12 Bom., H. C., 147.
(8) I. L. R., 1 Bom., 214.
(9) I. L. R. 10 Bom., 493. (10) I. L. R., 10 All., 146. (11) I. L. R., 12 Mad., 36.
(12) I. L. R., 10 All., 58. (13) *Ante*, p. 369. (14) I. L. R., 1 Bom., 214.

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grown up under the older decisions. I would state the following question to be referred to a Full Bench whether *Reg.* v. *Tukaya* is still good law or whether in section 35 of the Code of Criminal Procedure the word "may" is to be read as "must."

PARSONS, J.—If my learned colleague differs from the Criminal Ruling of the 12th April 1888 and wishes the correctness of that decision to be referred to a Full Bench, I have no objection. The point, however, hardly arises in the present case where the Magistrate has designedly omitted to pass any sentence at all for the offence under section 504, Indian Penal Code, of which he has convicted the accused. It might possibly be argued that a single sentence avowedly passed as the punishment for two distinct offences would not be illegal since that single sentence is really two sentences combined in the one, but even there the Court ought, I think, to indicate what punishment it awards for each of the two distinct offences. The inadvisability of not passing separate sentences as likely to lead to complications on appeal is well pointed out in Mayne's commentaries on the Indian Penal Code, 14th Edition at page 45 and a case of the kind actually came before this Court (see Criminal Ruling 74 of the 20th September 1888). That argument, however, cannot be used here where the Magistrate distinctly says that though he convicts of an offence under section 504, Indian Penal Code, he does not think it necessary to pass any sentence for that offence. Such a proceeding is in my opinion absolutely illegal, since the law requires that there must be some sentence passed however small after conviction for an offence (see Criminal Ruling 27th May 1886: coram *Jardine* and *Farran*, JJ). This being so a Magistrate cannot refuse to pass a sentence, which is required by law to be passed, on the ground that he does not consider it necessary to do so.

The papers in this reference were placed before their Lordships the Chief Justice, and *Birdwood*, *Jardine*, *Parsons* and *Telang*, JJ., in Chambers: the following order was recorded.

"The Chief Justice and the Judges having considered Criminal Ruling No. 18 of April 12, 1888 are of opinion that it is not illegal to pass one sentence for two offences when there are separate convictions for two distinct offences in the same case, but that it is generally the proper course in such a case to pass a separate sentence for each offence."

ORDER.—The Chief Justice and Judges having passed a Resolution in Chambers on the 28th March 1892 on the subject, the Court withdrew the reference. As it was necessary that the accused person should be punished on the conviction under section 504 as well as on that under

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section 323, Indian Penal Code, the Court alters the sentence to a fine of Rupees 2 on the former and Rupees 3 on the latter section.

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31 March 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Bhavdya.*

Criminal Procedure Code (Act X of 1882), Sec. 260—Construction.

In section 260, Criminal Procedure Code, clauses (b) to (k) being precisely expressed are not to be governed by clause (a), but they may be given their full effect.

IN this case, the accused were tried summarily by the First Class Magistrate at Rebata, under section 506 (2) of the Indian Penal Code. Upon being asked the Magistrate reported :—" The whole offence under section 506, Indian Penal Code, is triable summarily, vide, section 260, Criminal Procedure Code, and not only the first clause." The Sessions Judge recorded the following endorsement on the above report :—" In section 260, Criminal Procedure Code, it appears to me that paras (*a*) and (*i*) should be read together. An offence under the second clause of section 506, Indian Penal Code, is punishable with transportation or seven years and I do not consider that para (*i*) has the effect of overruling para (*a*). On general principles also it is clear that summary trials were only intended for comparatively trifling offences, and an offence punishable under the second clause of section 506, Indian Penal Code, is obviously not a trifling offence."

PER CURIAM.—We do not concur in the remarks of the Sessions Judge and we are of opinion that the summary trial was legal. We consider that clauses (*b*) to (*k*) of section 260 of the Criminal Procedure Code being precisely expressed are not to be governed by clause (*a*) but may be given their full effect. The record and proceeding are returned.

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7 April 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Devu.†

Criminal Procedure Code (Act X of 1882), Sec. 269—Sessions Judge—Jury—Assessors.

A Sessions Judge tried by Jury an accused on two charges—one of which was triable and the other was not triable by Jury, and dissenting from the verdict of the Jury referred the whole case to the High Court:—

***Held,* that he should have first recorded the opinion of the Jury as assessors regarding the charge not triable by Jury, and that the High Court could treat the verdict on the latter charge as valid.**

PER CURIAM.—The Assistant Sessions Judge has referred the whole case to this Court under section 307 of the Code of Criminal Procedure. There was only one charge against the third prisoner, who was tried by the Court aided by the Jury as assessors. The assessors were of opinion that

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**Criminal Ruling* 18 *of* 1892. Criminal Review No. 93 *of* 1892.

†*Criminal Ruling* 19 *of* 1892. Criminal Reference No. 21 of 1892.

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he was not guilty of the charge, which was under Section 411 of the Indian Penal Code, and the Assistant Sessions Judge takes the same view. We, therefore, acquit him and direct that he be set at liberty. The prisoners Nos. 1 and 2 were tried by a jury on a charge under section 457 of the Indian Penal Code, and the verdict returned was one of acquittal of both them The Assistant Sessions Judge disagrees with this verdict. We are of opinion that the witness Gunpat is not to be trusted fully, and giving the prisoner the benefit of the doubt which arises, we uphold the verdict of the jury and acquit these two prisoners of the charge under section 457. We will take time to consider our order as to the charges under section 380 and 75 of the Indian Penal Code, on which the first prisoner and that under section 380 on which the second prisoner was tried, and direct that in the meantime these two prisoners be kept in custody.

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13 April 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Karsan.*

Criminal Procedure Code (Act X of 1882), Secs. 435, 438—Sessions Judge—District Magistrate—Sentence—Enhancement—High Court—Government.

A District Magistrate who considers that the sentence passed upon an accused by a Sessions Judge is inadequate and should be enhanced, should, instead of referring the case for orders to the High Court under section 438, Criminal Procedure Code, communicate with the Local Government or with the Public Prosecutor.

IN referring this case for the orders of the High Court under section 438 of the Code of Criminal Procedure, the District Magistrate of Ahmedabad observed: "I consider that the punishment awarded (by the Sessions Judge of Ahmedabad) namely, six months' imprisonment is wholly inadequate for the offence, namely *dhatura* poisoning. Three men were all but killed by the action of the accused. The offence of *dhatura* poisoning is in my opinion one of the most serious offences possible, whether the effects are fatal or not and one which ought to be put down by severe penalties."

ORDER.—Having regard to the principle of the Criminal Ruling of the 9th March 1885 and to the cases of *Queen-Empress* v. *Shere Singh* (1) and *Queen-Empress* v. *Zor Sing* (2) the Court refrains from interfering with the sentence of the Sessions Court upon a report by the District Magistrate.

The latter officer ought to communicate with the Local Government or the Public Prosecutor if he considers the sentence is one which ought to be enhanced.

**Criminal Ruling* 20 *of* 1892. Criminal Reference No. 39 of 1892.

(1) I. L. R. 9 All., 362. (2) I. L. R., 10 All., 146.

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21 April 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Umdya.*

Indian Forest Act (VII of 1878), Sec., 25 (d)—Trespass—Reserved forest—Human being.

The trespass of a human being in a reserved forest is made punishable by section 25 (*d*) of the Indian Forest Act, 1878.

IN this case the accused were convicted by the Second Class Magistrate of Taloda of offences under clauses (*d*) and (*g*) of section 25 of the Indian Forest Act. The facts were that on the 21st November 1891 all the accused went into the Rajapur reserved forest and removed therefrom Forest produce, *i.e.*, two cart loads of grass worth rupees 4, without a permit as required by Rule 3 of the rules framed under section 41 of the Forest Act and they thus committed the offence contemplated in clause (*g*) of section 25 of the Act and punishable under the last clause of the section. The Third Class Magistrate convicted them under clause (*g*), and also under clause (*d*) of section 25 holding there were two separate offences.

In making this present reference to the High Court, the District Magistrate of Khandesh observed, "Assuming for the moment that an offence under clause (*d*) occurred it is absorbed in constituting the major offence under clause (*g*) just as house trespass is a necessary ingredient of theft in a house (section 380, Indian Penal Code) and a separate conviction and sentence under clause (*d*) is then wrong in law. At the same time, however, I am respectfully of opinion that no offence under clause (*d*) was committed as the trespass therein referred to is "the trespass of cattle" not of men as the Magistrate 3rd Class appears to have held, and the conviction and sentence under this clause should then be reversed."

ORDER.—The Court is of opinion that clause (*d*) of section 25 of Act VII of 1878 makes punishable the trespass of a human being in a reserved forest. The sentences of fine not being excessive, the Court sees no reason to interfere.

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22 April 1892. JARDINE & TELANG, JJ.

Government of Bombay v. Kallapa.†

Indian Forest Act (VII of 1878),—Cattle Trespass Act (I of 1871), Sec. 11—Trespass—Reserved Forest.

Where the cattle do not go into the reserved forest of themselves but are driven into it by the accused, they are liable to seizure.

THE accused were charged first with the offence of grazing cattle in a reserved forest without proper authority, under section 25 (*d*) of the Indian Forest Act, and secondly of forcibly opposing the seizure of cattle liable to be seized an offence punishable under section 24 of the Cattle

**Criminal Ruling 21 of 1892. Criminal Rerefence No. 45 of 1892.*
†Criminal Ruling 22 of 1892. Criminal Appeal No. 53 of 1892.

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Trespass Act, 1871. They were placed before the Second Class Magistrate of Jamkhed, who acquitted them.

PER CURIAM :—The Magistrate acquitted the accused of the charge under section 24 of Act I of 1871 on the ground that there was no trespass seeing that the cattle had not gone into the reserved forest of themselves but had been driven into it by the accused. This construction of the word "trespass" is in our opinion wrong.

Under Act VII of 1878, section 69, and Act I of 1871 section 11 the cattle were liable to seizure.

We convict both prisoners under section 24 of Act I of 1871 and sentence each to a fine of Rs. 5 or five days' rigorous imprisonment in default.

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22 April 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Jamaludin.*

Penal Code (Act XLV of 1860), Secs. 84, 304—Evil spirit—Exorcising evil spirits.

The accused, in exorcising the spirits of a girl whom they believed to be possessed subjected her to a beating which resulted in her death:—

Held, that they should be convicted of culpable homicide not amounting to murder.

PER CURIAM.—We accept generally the view of the facts stated by the learned Sessions Judge. It has not been contended either by Mr. Bhat, who appeared for the prisoners Nos. 2 and 3, or by Rao Saheb Wasudeo Kirtikar for the Crown, that the findings on the facts are not in accordance with the evidence. The woman Gidowa, whose age was under 18 years, had come from her husband's to her father's house, and complained of some pain in the back. At her own desire, and with her father's consent, she consulted the first prisoner Jamaludin, who is an exorcist of spirits supposed to take up their abodes in people's bodies. Mr. James Campbell, the learned editor of the *Bombay Gazetteer*, has given us references to the Dharwar Volume 22 Appendix B, and the Kolhapore Volume 24, Appendix D, for information about the common beliefs of the people on the subject of these *bhuts* or demons, and their exorcisms and other modes of cures. It is not contested that Gidowa did not consent to a certain amount of violence being used to her by the first prisoner to drive out the supposed spirit which appears to have been looked upon as the ghost of some woman deceased. We find no evidence showing that she consented to such great violence as was used. Jamaludin brought in the second prisoner, and he joined in beating her. She was also trodden upon and kicked. She seems to have stimulated the departure of the spirit and to have run away, pursued by these prisoners; she fell down several times, and the beating and kicking were renewed.

*Criminal Appeals Nos. 45, 46, 47 of 1892.

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After this the third prisoner appeared from the village and joined in the assault, using his fists on her sides. Thereupon she died, and it is proved by the medical witness that there were many wales on her skin, and that the lungs and kidneys were ruptured. The Sessions Judge has sentenced all three prisoners to transportation for life as murderers. He finds that they had no actual intention to kill. The prisoners said they were "possessed" at the time, and were thus unable to recollect what they did. The first prisoner speaks to this possession being that of a spirit called Madar Saheb; the other two appear to have professed to have the god Hanuman indwelling in them for the time being. But before the Magistrate the third prisoner denied that any such entry into him of a god had occurred. It has been argued here that this state of enthusiasm was an unsoundness of mind destroying the power of self control, and that this condition resembles that of a man in an epileptic fit, or one of those people who in different ages or countries assert themselves or are believed to be possessed by an evil spirit. It was argued also that section 84 of the Penal Code about insanity entitles them to acquittal. But under section 105 of the Evidence Act the burden of proving this exception lies on them, and we are of opinion that there is no evidence of unsoundness of mind. Their mere assertions that they were "possessed" by gods are not cogent; it may be that they acted in the way they did in order to give the patient more confidence. They do not appear to have lost self-control. Any how it is admitted that their excited condition was one to which they attained voluntarily; and it is to prevent people by putting themselves into such states doing harm to others that penal laws are enacted. Then it was argued that section 88 applied in their favour. But we agree with the Judge in thinking that there was such absence of due care and attention as makes that exception inapplicable. It is not shown that the treatment used had caused cures before; or that such great violence was at all essential to the cure. Thus the case differs from many of those where surgeons more or less unskilled have been tried for deaths caused under their risky operations. We drew attention to the case of emasculation: *Queen* v. *Baboobeen Higrah* and others (1) and of the snake-charmers: *Queen* v. *Punai Fattama* and another (2). *Queen-Empress* v. *Ganesh* (3). The case of *Sukaroo* v. *Queen-Empress* (4) of an operation for internal piles was cited to us. It was argued that the offence, if any, was not murder; but culpable homicide or rash and negligent act resulting in death. In most of the cases this lenient view has been taken. On careful consideration of the findings of the Judge we are of opinion that when the intention and knowledge of the prisoners

(1) 5 W. R., 7. (2) 3 Beng. L. R. 25. (3) I. L. R. 5 Cal., 357. (4) I. L. R., 14 Cal., 566.

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as found by the Judge are compared with the definitions of the Penal Code, it results that the convictions should have been for culpable homicide under the last part of section 304 and not for murder. See the differences in the definitions as stated by *Melvill*, J., in *Reg.* v. *Govind* (5). We think also that this view of the nature of the offence is fully borne out by the circumstances shown in the evidence. We change the convictions of murder to culpable himicide not amounting to murder, and alter the the sentence on each prisoner to one of three years' rigorous imprisonment.

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12 May 1892. BAYLEY & PARSONS, JJ.

Queen-Empress v. Ganpati.*

Penal Code (Act XLV of 1860), Secs. 352, 99—Coolie—Running away—Peon, preventing the coolie—Coolie seizing the peon's wrist—Criminal force.

The accused who had been brought to a certain place to serve as a coolie attempted to run away; but was obstructed and prevented from doing so by the complainant, a peon in the Mamlatdar's Office. In the struggle which ensued the accused seized the complainant's wrist, for which he was convicted of using criminal force under section 352, Indian Penal Code:-

Held, that as the act of the complainant was altogether illegal and amounted to wrongful restraint the second para of section 99, Indian Penal Code, did not apply and the accused had committed no offence.

PER CURIAM:—The accused has been convicted of using criminal force otherwise than on grave and sudden provocation (section 352 of the Indian Penal Code) and punished with a fine of Rs. 10. The facts of the case stated by the Magistrate show that the accused, after he had been brought to a certain place to serve as a coolie to carry the Collector's kit, attempted to run away; but was obstructed and prevented doing so by the complainant who was a peon in the Mamlatdar's office. The nature of the obstruction is not set out but it certainly amounted to a detention in which a struggle ensued in the course of which the accused seized the peon by the wrist and attempted to get away. The Magistrate says that the accused was not justified under section 99 of the Penal Code in using any criminal force to the complainant but the act of the complainant in detaining the accused was altogether illegal and amounted to wrongful restraint and the accused had the right to defend himself against such an act. As the accused did not inflict any more harm than was necessary for the purpose of defence, he has, committed no offence and his conviction is illegal. We reverse it and order that the fine, if paid, be refunded.

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(5) I. L. R. 1 Bom., 342. **Criminal Ruling* 23 *of* 1892. Criminal Review No. 137 of 1892.

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12 May 1892. BAYLEY & PARSONS, JJ.

Queen-Empress v. Santu.*

Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 66—Market—Selling fish—Road side.

The accused sold a small quantity of fish on the road side on her way to the market and was convicted, under section 66 of the Bombay District Municipal Act, of using for sale a place other than that licensed by the Municipality:—

Held, that, as it did not appear that any direction was issued by the Municipality to the effect that no place should be used as a market except the one licensed by them, the conviction was illegal.

IN this case the accused was convicted under sections 66 and 74 of the Bombay District Municipal Act, 1873, of using as a market for the sale of fish a place other than that licensed by the Municipality for that purpose and was sentenced to pay a fine of eight annas. The accused appeared to have sold a small quantity of fish on the road-side while she was on the way to the Municipal market.

In referring this case to the High Court, the District Magistrate of Kanara observed, "This cannot be held to be using the place, where the fish was sold as a market. Moreover, it does not appear on the record (i) that any market for sale of fish had been licensed in writing by the Municipality or (ii) that any direction had been issued by the Municipality to the effect that no place should be used as a market except the one licensed by them."

ORDER—For the second of the reasons given by the Distict Magistrate, the Court reverses the conviction and sentence and directs that the fine, if paid, be refunded.

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12 May 1892. BAYLEY & PARSONS, JJ.

Queen-Empress v. Lingapa.†

Indian Penal Code (Act XLV of 1860), Sec. 289—Bullock—Escape—Injury.

The accused's bullock escaped from a herd and finding its way into a hospital which was close by the accused's house ate up some clothes. The Magistrate convicted him of an offence under section 289, Indian Penal Code:—

Held, that the conviction could not be sustained because it was through no negligence of the accused that the bullock escaped, and after the escape the accused had done all he could to find it.

IN this case the facts proved were that the accused's bullock strayed into the Hospital Assistant's quarters and chewed some clothes which were hanging there damaging them to the extent of Rs. 4-2-0. For this, the accused was convicted by the Second Class Magistrate of Bijapur of an offence under section 289, Indian Penal Code and was sentenced to pay a fine of six rupees.

**Criminal Ruling 24 of 1892. Criminal Reference No. 418 of 1892.*

†Criminal Reference No. 47 of 1892.

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The District Magistrate of Bijapur, being of opinion that the conviction was illegal, referred the case for the orders of the High Court, observing:—

"The bullock was a new purchase and lost its way apparently when returning at night and strayed into the Hospital Assistant's room instead of into its owner's house, the two houses being near.

"The Magistrate states the accused was negligent in allowing it to accompany the other cattle, and in looking elsewhere than where it was when it disappeared. He states that as the house to which it strayed contained children and that there was the greatest likelihood of harm being done to the children sleeping there, that therefore all that is necessary to have a conviction under section 289 is established.

"I think the Magistrate has totally misapprehended the purport of section 289 of the Indian Penal Code. There is no evidence or allegation that the animal was a dangerous one, much less that the owner knew it—I do not also see that there was any probable danger of grievous hurt. It is true the animal chewed and destroyed some clothes and no doubt its owner is morally and probably legally liable to the Hospital Assistant for their value but I think the law has been strained most unduly to enable this damage to be recovered in a criminal Court, and that the conviction is not justified."

PER CURIAM:—The accused's bullock escaped from the herd. The Magistrate finds that the omission of the accused to search for it in the hospital which was close to his house and where he ought naturally to have suspected, it would go, was such negligence as to bring him within the provisions of section 289 of the Indian Penal Code and so has found him guilty because the bullock went into the hospital and ate up some clothes belonging to the Hospital Assistant.

We do not think that the conviction can be sustained. It was through no negligence of the accused that the bullock escaped and after the escape accused appears to have done all he could to find it. The section refers to animals in possession and of probable danger to human life or grievous hurt. It is difficult to see how any such danger could be calculated to arise from the nature of the beast itself in the present case. We reverse the conviction and sentence and order the fine, if paid, to be refunded.

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2 June 1892. BAYLEY & PARSONS, JJ.

Queen-Empress v. Amina.*

Indian Penal Code (Act XLV of 1860), Sec. 318—Dead body—Child—Secret disposal.

*Criminal Appeal No. 80 of 1892.

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A woman having been delivered of a dead child, left it at the place of birth which was in the compound of her house and told no one about it:—

Held, that upon these facts she could not be convicted of an offence under section 318, Indian Penal Code.

PER CURIAM:—The appellant is found by the Sessions Judge to have been delivered of a dead child and to have left it at the place of birth which was in the compound of her house and to have told no one of the birth. On these facts he has convicted the appellant under section 318 of the Indian Penal Code. As, however, there was no secret burying or otherwise disposing of the dead body of the child, we are of opinion that the conviction is illegal and we reverse it and direct that the appellant be acquitted and set at liberty.

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16 June 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Ramaswamy.*

Criminal Procedure Code (Act X of 1882), Sec. 545—Expenses—Accused, bringing of, before a Magistrate.

Section 545 of the Code of Criminal Procedure does not apply to such expenses as are incurred in bringing the person of the offender before the Magistrate.

ORDER.—The Court returns the record and proceeding with the remark, for the future guidance of the Magistrate, that section 545, Criminal Procedure Code, does not apply to such expenses as are incurred in bringing the person of the offender before the Magistrate.

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16 June 1892. JARDINE & TELANG JJ.

Queen-Empress v. Vithu.†

*Penal Code (Act XLV of 1860), Sec. 490—Contract of service—*Machhwa *Conveying of paddy.*

A failure of a contract to convey paddy in one's *machhwa* is not an offence under 490 of the Indian Penal Code, as there is no contract for *personal* service of the accused.

THE accused was tried by the Second Class Magistrate of Guhogar for an offence under section 490 of the Indian Penal Code, for a breach of contract of service during voyage, in that the accused made a contract with the complainant Ganesh to start on the 26th December 1891 to fetch paddy in his own (accused's) *machhawa* from Roha in Alibag and illegally omitted to do so.

ORDER.—The Court reverses the conviction and sentence and directs return of the fine, on the ground that there was no contract for the personal service of the accused.

**Criminal Ruling 25 of 1892. Criminal Review No. 171 of 1892.*
†Criminal Ruling 26 of 1892. Criminal Review No. 173 of 1892.

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16 June 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Punja.*

Village Police Act (Bom. Act VIII of 1867), Sec. 16 (2)—Wells—Tanks—Reservoirs—Rivers.

Section 16, clause 2 of the Bombay Village Police Act, 1878, applies to offences regarding public wells, tanks or reservoirs, but not to offences regarding rivers.

IN case 1, the accused Punja was charged with having spoiled the drinkable water of the river Parashari by washing a kettle in it, and in case 2 the accused Bapu was charged with having spoiled the water of the same river by washing a cloth in it. They were sentenced by the Police Patel of Pimpalgaon to pay a fine of eight annas each under clause 2 of section 16 of Act III of 1867.

The District Magistrate in making this reference observed: "The sentence is illegal in both the cases as section 16 clause 2 of Act VIII of 1867 applies to offences regarding public wells, tanks, or reservoirs, but not to offences regarding rivers."

ORDER.—The Court sets aside the convictions and sentences for the reasons stated by the District Magistrate.

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4 July 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Charles MacIvor.†

Cantonement Act (III of 1864), Ch. III, Rule 50—House—Hut—Lattice work structure.

A structure of lattice-work erected as a fowl run in the compound of a house in a Cantonement is not a house or a hut within the meaning of Rule 50, Chapter III, Cantonement Act, 1864.

PER CURIAM:—The question here is whether the structure set up by the appellant is such a building as rule 50 refers to. The Cantonement Magistrate in his judgment states it to be "an unroofed courtyard to a servant's house, made of lattice work, with strong wooden uprights and rails laid along the top of the uprights." It is put up for keeping fowls in, and the only witness examined, Captain Cahusai, says it is not what he would call a house or hut. We are of the same opinion that the structure does not come within the ordinary meaning of these words. Moreover, a penal provision is not to be strained against the subject. The Cantonement Magistrate is in error in supposing that rule 50 prohibits a resident in a Cantonement from erecting anything whatever. It is carefully limited to houses and huts. There may indeed be smaller or more temporary erections which do not come within the meaning of these two common words; and which under certain circumstances may be objectionable from a sanitary point of view or as encroachments on roads.

*Criminal Ruling 27 of 1892. Criminal References Nos. 55 and 56 of 1892.

†Criminal Ruling 29 of 1892. Criminal Appeal No. 130 of 1892.

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Such things are dealt with in rule 51; but there, plain words are added such as "shed enclosure, awning, or chubootras." As no such words are used in rule 50, the only possible construction is that rule 50 does not apply to these minor structures. It appears that the structure is not objectionable from the point of view of rule 51. For the above reasons we reverse the conviction and sentence, and direct the return of the fine, if levied.

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14 July 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Ravji.*

Village Police Act (Bom. Act VIII of 1867), Sec. 15 (1)—Refusal to answer questions—Police Patel—Order lawfully issued by Police Patel personally.

The refusal to answer questions put by a Police Patel in a criminal proceeding is not "refusal to obey a lawful order issued by a Police Patel personally" within the meaning of section 15 (1) of the Bombay Village Police Act, 1867.

IN this case the Police Patel of Virvad Budruk convicted and sentenced Raoji to pay a fine of Re. 1 for refusal to give answers to the questions, in a criminal proceeding before him in which he was charged with having committed a petty assault under section 15 of the Bombay Village Police Act, 1867. "The conviction and sentence," the District Magistrate of Sholapur stated, "appear illegal because refusal to give answers to the questions put by a Police Patel to an accused person in a criminal proceeding is not a disobedience to the lawful order issued by such Police Patel personally within the meaning of section 15 of Act VIII of 1867 (Bombay)."

ORDER.—The Court for the reasons stated by the District Magistrate reverses the conviction and sentence, and directs that the fine, if paid, be refunded.

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14 July 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Adeveppa.†

Forest Act (VII of 1878), Sec. 75 Rule, 1—Reward—Amount—Apportionment of reward.

It is not competent to a Magistrate to order a reward to be less than one-half the amount of the fine; and when the reward is to be distributed among more than one person, the apportionment thereof vests in the Conservator of Forest.

THIS was a case under sections 32 (*b*) and 25 (*g*) of the Indian Forest Act, 1878, disposed of by Azam Subrao 2nd Class Magistrate of Murgod. The sentence passed in the case was that the accused had to pay a fine of Rs. 20 (Rupees eight for the first offence and rupees twelve for the second). Out of the fine imposed the Magistrate ordered Rs. 3 to be paid as reward to the informer, and Rs. 5 to the investigating Forest officer.

**Criminal Ruling* 30 *of* 1892. Criminal Reference No. 69 of 1892.

†*Criminal Ruling* 31 *of* 1892. Criminal Reference No. 70 of 1892.

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The District Magistrate of Dharwar, in referring the case for the orders of the High Court, observed, "This latter portion of the sentence is illegal under Rule 1 of the rules under section 75 of the Forest Act (vide page 90 of the compilation of general rules in force in the Revenue Department by *Cordeaux*), by which a Magistrate has no power to grant a less reward than one-half of the fine and when the reward is to be paid to more than one person, the apportionment vests in the Conservator of Forests. In the present instance, the amount of fine is Rs. 20 and the reward offered is Rs. 8; and besides is divided by the Magistrate himself between different individuals, which is illegal as already shown above, and should therefore be set aside."

ORDER.—For the reasons stated by the District Magistrate, the Court sets aside the part of the order about reward and directs the trying Magistrate to pass a new order conformable to Rule 1 made under section 75 of Act VII of 1878.

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28 July 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Hari.*

Criminal Procedure Code (Act X of 1882), Secs. 560, 552, 547, 386, 387—Compensation—Fine—Imprisonment.

The words used in section 560 of the Code of Criminal Procedure are similar to those used in sections 552, 547 of the Code. They do not empower a Magistrate to award imprisonment in the order for payment of compensation. They provide a procedure for the levy of the payment, *viz*, that for levy of a fine under sections 386 and 387. It is only when the payment cannot be recovered that the Magistrate is empowered to award imprisonment.

IN this case the First Class Magistrate of Satara in a case instituted in his Court under section 323, Indian Penal Code, found the complaint to be a frivolous and vexations one. He, therefore, ordered the complainant to pay Rs. 5 as compensation to the accused or in default to undergo eight days' simple imprisonment.

JUDGMENT.—The words used in section 560, subsection I, Clause, 2 of the Code of Criminal Procedure are similar to those used in sections 552 and 547. They do not empower a Magistrate to award imprisonment in the order for payment of compensation. They provide a procedure for the levy of the payment, *viz.*, that for levy of a fine which is prescribed in sections 386 and 387. It is only when the payment cannot be recovered that the Magistrate is empowered to award imprisonment. The Court returns the record with these remarks.

**Criminal Ruling* 32 *of* 1892. Criminal Review No. 263 of 1892.

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8 August 1892. JARDINE & TELANG, JJ.

Queen-Empress v. Yakub.*

Criminal Procedure Code (Act X of 1882), Sec. 337—Pardon—Conditional pardon.

One of the accused was tendered a pardon on condition that he should profess to have been present when the death occurred and to have personal knowledge of the circumstances under which the offence occurred:—

Held, that such a condition could not be attached to a tender of pardon as the only condition which the law allows is stated in section 337, Criminal Procedure Code; and that the law should be so worked that the temptation to the accomplice to strain the truth should be as slight as possible.

PER CURIAM:—The full and careful Judgment recorded by the Sessions Judge who convicted the three prisoners enables us to understand the value he attached to the statements of the different witnesses and the inferences he drew from the evidence. He has also recorded with equal clearness the opinions of the three assessors who all differed from the learned Judge and were of opinion that the guilt of the prisoners was not proved. The whole case has been fully argued before us by Mr. *Inverarity* and Mr. *Apte* for them and the Government Pleader for the Crown.

We do not think it is proved that the woman Baya met her death by murder. There were no marks of violence on the corpse; and there is no statement by any eye-witnesses as to the time, place or manner of her death. She appears to have been drowned and the dead body was found on the seashore on the 3rd March.

The prosecution theory rests on direct evidence that the prisoner Yakub induced Baya about 10 P.M. on the 2nd March to embark with him in a boat to go to Ratnagiri to the native theatre there: and that the other prisoners Mahomed and Silleman accompanied them. The chief witness about this is Hari Gopal. He says he went with Yakub to call Baya and saw them all start from the bunder. He and his daughter Jani say they facilitated a meeting between Baya and Yakub at Hari's house in the morning of the same day. As Hari is not all supposed to be an accomplice in any crime, we think the fact that he was taken into confidence is an indication that the intentions of the prisoners were not criminal. But we are not disposed to believe altogether the story he narrates. The little daughter of Baya contradicts him and says that Mahomed and Silleman came with Yakub to call Baya away. Moreover she does not mention Hari.

The subsequent threatening of Hari by prisoner 1 after Baya's death is uncorroborated, and so is a similar occurrence described by Kadir.

There was apparently no reason why Mahomed should press Baya to

*Criminal Ruling 34 of 1892. Criminal Appeal No. 136 of 1892.

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meet Yakub as Ajiji deposes. The evidence of the two boatmen about meeting the boat of the prisoners is not very material especially as the date of that occurrence was not ascertained. One of them Inno deposed to improper means used by the Police to induce him to inform.

It seems to us improbable that if Baya left in the manner described, Ajiji her sister who was with her shortly before and saw her gaily dressed with her own and Ajiji's ornaments on should have had no knowledge of Baya's intentions and have put no questions, more especially as according to the theory of prosecution Baya was about to cross the creek to Ratnagiri to go to the theatre, leaving three young children alone in the house, her husband being absent at Bombay.

The witness Hari gave inconsistent reasons to explain why he was invited to go with Yakub to Baya's house to call her.

It is we think to be regretted that no Magistrate took part in the inquiry following the discovery of the corpse, a matter for which sections 173 and 174 of the Code make provision. Rightly or wrongly it was assumed by the police who held the inquest that no crime had been committed and the corpse was not even sent for medical inspection.

The evidence about some property said to be Baya's being afterwards found does not affect the prisoners Mahomed or Silleman. It is open to some doubt whether the ornament marked F in the record really belonged to Ajiji. If it did and was only left with Baya for safe custody which is not altogether a probable story, the conduct of Ajiji in taking no notice of Baya's wearing it on the night in question and her seeming indifference to the fact after the corpse had been found without this ornament requires further explanation. The theory of the prosecution does not account for some other matters, *e.g.*, the loss from Baya's house of currency notes and clothes, articles which she was not likely to carry with her to the theatre.

On these grounds we think the prisoners are entitled to have the convictions and sentences reversed.

The Sessions Judge directed a tender of pardon to the prisoner Mahomed which was refused. It appears so far as we can judge from the record to have been coupled with a condition that the prisoner should profess to have been present when the death of Baya occurred, and to have personal knowledge of the circumstances under which the offence alleged by the prosecution occurred. We are of opinion such a condition could not be attached to the pardon tendered. The condition which the law allows a Court to attach is stated in section 337 of the Code of Criminal Procedure. It may tender a pardon to an offender "on condition of his making a full and true disclosure of the whole of the circum-

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stances within his knowledge relative to such offence and to every other person concerned whether as principal or abettor, in the commission thereof." He is not to be bound over to any particular narration. The principle is that the law should be worked so that the temptation to the accomplice to strain the truth should be as slight as possible. Per *Blackburn*, J. in *Winsor* v. *the Queen* (1).

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3 August 1892. JARDINE & TELANG, JJ

Queen-Empress v. Ramashetti.*

Village Police Act (Bom. Act VIII of 1867), Secs. 15, 16 (3)—Inquest—Refusal to serve—Police Patel—Road—Bullocks, unyoking of and feeding—Offence.

A refusal to serve on an inquest when called on by a Police Patel specially empowered under section 15 is not a refusal to obey a lawful order of a Police Patel, punishable by the Police Patel himself under section 15 of the Bombay Village Police Act, 1867.

The unyoking of bullocks and feeding them on a road is not an offence under section 16 (3) of the Act.

THE District Magistrate of Kanara in making the present reference remarked, "In the first case one Ramashetti was fined Rs. 3 by the Police Patel of Soopa Petta, specially empowered under section 15 of the Bombay Village Police Act (VIII of 1867) for refusing to serve on an inquest. A Patel is nowhere empowered to issue an order to a man to serve on an inquest. Only section 11 of the Act enacts that he should assemble an inquest, and the second clause of this section makes the refusal to attend, under certain circumstances, punishable by a Magistrate. But it does not appear that the refusal can be called refusal to obey a lawful order so as to be punishable under section 15 by the Patel himself.

"In the remaining four cases the same Patel convicted and sentenced four persons for unyoking their bullocks and feeding them on the road under clause 3 of section 16 of the Village Police Act. This clause makes punishable the offences of *depositing* in *forbidden* places *any dirt, filth or rubbish*. In these cases there is no depositing of dirt, filth or rubbish, but only of fodder. Nor is there anything to shew that the place where the fodder was deposited was a 'forbidden place.'

"For these reasons, I think that all the convictions are wrong in law."

ORDER.—The Court reverses the convictions and sentences in all the five cases, for the reasons stated by the District Magistrate.

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9 August 1892. JARDINE & TELANG, JJ.

Balwantrao v. Ramchandra.†

High Court—Contempt of Court—Practice.

The power of the High Court to imprison for contempt is irrespective of the Code.

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(1) L. R. 1 Q. B., 312. **Criminal Ruling* 35 *of* 1892. Criminal References Nos. 76 to 80 of 1892.

†Criminal Application for Revision No. 242 of 1892.

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PER CURIAM :—It is admitted that the injunction of this Court was personally served on Ramchandra on the 28th April last and that a few days afterwards he sent a pass or authority to a third person to remove some wood from the jungle and again a few days later wrote to his servant to assist the third person in the removal. We are of opinion that these acts are distinct breaches of this Court's order and that the disobedience amounts to contempt of Court. The excuse offered is that the third person is the vendee of Ramchandra and that the sale occurred before the service of the injunction. We do not think the affidavit which does not declare the date of the sale can be treated as proof that the sale occurred before the 28th April. But even if it were so treated, we think the excuse is not a justification.

The power of the High Court to imprison for contempt is irrespective of the Codes, *Surendranath Banerjee* v. *Chief Justice and Judges of the High Court of Bengal* (1), *Hassonbhoy* v. *Cowasji Jehangir Jassawalla* (2), *Navivahoo* v. *Narotamdas Candas*, (3) *Martin* v. *Lawrence* (4).

We will pass our order on Monday next and we so intimate to the pleader of Ramchandra in order that his client may appear before us on that day.

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8 September 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Bahadarshah.*

District Municipal Act (Bom. Acts VI of 1874, and II of 1884), Secs. 35, 36, 99—Rules—Omission to exhibit printed copies in vernacular—Sanction—Revenue Commissioner—Government.

The omission by a District Municipality to keep printed copies of the rules in the vernacular language for sale as required by section 36 of the District Municipal Act of 1884 does not affect the validity of the rules.

The approval by the Revenue Commissioner of the rules is tantamount to approval by the Governor-in-Council within the meaning of section 99 of the District Municipal Act, 1873.

THE accused was convicted by the First Class Magistrate of Ahmednagar and sentenced to pay a fine of Rs. 10 under rule 63 of the Ahmednagar Municipal Rules of the 16th January 1879, made under section 14 of the District Municipal Act VI of 1873.

The Sessions Judge of Ahmednagar, in referring the case to the High Court under section 438 of the Code of Criminal Procedure remarked as under :

" The proviso to clause I of section 14 of the Act directs that no rule shall have the effect until the same shall have been approved by the Governor in Council and section 95 requires that the rules in force under section

(1) L. R., 10 I. A., 179. (2) I. L. R., 7 Bom., 1. (3) I. L. R., 7 Bom., 5. (4) I. L. R., 4 Cal., 655.

*Criminal Ruling 37 of 1892. Criminal Reference No. 87 of 1892.

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14 of the Act shall be kept at the Municipal office for public inspection, and shall be printed in the vernacular language, and sold at a reasonable price.

"On enquiry I find that no notification was ever published by Government in the Government Gazette according their sanction to the rules and bye-laws now in force in the Municipality, that the rules as they exist at present are couched in English language and are open for public inspection at the Municipal office and that they have never been translated into vernacular nor are they printed as required by law.

"It seems from the correspondence on the subject that the Commissioner, C. D., under the powers delegated to him by the Governor in Council as laid down in section 99 of the Act, sanctioned the draft rules in his letter No. 1853 dated the 19th April, 1879, subject to the corrections and additions pointed out and suggested by the Collector and President. It is further stated that the Commissioner C. D., has given sanction to the Ahmednagar Municipal Rules. But as a matter of fact, the rules as stated above, are not printed and so the provisions of section 95 are not fully complied with.

"In these circumstances, I am inclined to think that unless the necessary requirements in connection with the rules are carried out, they have not the force of law and that no complaint can be entertained till then under any of the rules or bye-laws."

ORDER.—Rules under section 14 of the Act of 1873 kept in force by section 35 of the Act of 1884 become, as it were, part of the Act on approval by the Governor in Council. Under section 99, the approval of the Commissioner is approval by the Governor in Council; *i. e.*, on approval by the Commissioner the rules became law and a breach of them is punishable. The omission by the Municipality to discharge its duty as laid down in section 36 of the Act of 1884 does not affect the validity of the rules. The conviction is legal. The accused does not plead ignorance of the rule by reason of the non-observance of the provisions of section 36. The Court, therefore, returns the record and proceeding.

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8 September 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Dorabji.*

Abkari Act (Bom. Act VIII of 1878), Secs. 43 (g), 45 (c)—Toddy—Selling in quantities not permitted by law—Gomasta.

The holder of a license and his *gomasta* were convicted under section 45 (*c*) of the Abkari Act, 1878, for selling a larger quantity of *toddy* than permitted by the rules:—

Held, that the act of the *gomasta* fell within the provisions of section 43 (*g*) of the Act.

THE accused Dorabji, a servant of Sorabji sold toddy weighing four maunds to Nama without a permit, which was in excess of four gallons

*Criminal Ruling 38 of 1892. Criminal Reference No. 89 of 1892.

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prescribed in Government Notification issued under section 17 of the Bombay Abkari Act. Dorabji was convicted of offence under section 45 (c) of the Bombay Abkari Act, 1878, and sentenced to pay a fine of Rs. 30, Sorabji was sentenced to pay a fine of Rs. 20.

The District Magistrate of Surat, being of opinion that the conviction and sentence passed upon Dorabji was illegal, made this reference, observing, "under the ruling of the High Court No. 27 published at page 9 of Mr. R. K. Desai's Digest of Criminal Rulings the licensee is reponsible. In this case Dorabji who is a *gomasta* (servant) of the licensee and the licensee Sorabji are both convicted. The conviction of the servant Dorabji is illegal".

ORDER.—The Court declines to interfere in this case, since the act of the accused is an offence under section 43 (*j*) of the Act and the punishment is not illegal under that section.

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8 September 1892. PARSONS & TELANG, JJ.

In re Gangaram.*

Bombay Abkari Act (Bom. Act VIII of 1878), Secs. 44 (a), 45 (c).—Hydrometre—Prescribed quantity of liquor—Accounts.

The not keeping of a hydrometer is made an offence by section 44 (*a*) of the Bombay Abkari Act, 1878.

Mere omissions to fulfill the terms of the license are not punishable under section 45 (*c*) of the Act.

PER CURIAM:—We do not interfere with the conviction for not keeping a hydrometer since that is an offence under section 44 (*a*) of the Bombay Abkari Act, 1878. We reverse the convictions and sentences for not keeping the prescribed quantity of liquor and for not keeping accounts as required by the license, since these are not acts committed in breach of the conditions of the license but omissions to fulfill the terms of the license and omissions are not made punishable by section 45 (*c*) of the Act. See *Queen-Empress* v. *Nana Mahadev* (1), and Criminal Ruling 9, 8th February 1892 which rulings we follow.

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22 September 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Namdeo.†

Workman's Breach of Contract Act (XIII of 1859), Secs. 1, 4 (b)—Criminal Procedure Code (Act X of 1882), Sec. 560—Compensation.

As refusal to perform work according to a contract is not made punishable by clause (1), section 2 of the Workman's Breach of Contract Act, 1859, a complaint of such a refusal is not a complaint of an offence; and consequently, no compensation can be awarded in such cases under section 560, Criminal Procedure Code, 1882.

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*Criminal Review Nos. 298 and 299 of 1892. (1) Vide *ante*, p. 284.

†*Criminal Ruling* 40 *of* 1892. Criminal Review No. 318 of 1892.

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PER CURIAM:—As the complaint of the employer under section 1 of Act XIII of 1859 is not an accusation of any offence, the order of the Magistrate awarding compensation under section 560 of the Criminal Procedure Code, is illegal. An offence means any act or omission made punishable by any law for the time being in force (section 4 (*b*) of the Criminal Procedure Code). Neglect or refusal to perform work is not made punishable by Act XIII of 1859. It is only the failure to comply with the order of the Magistrate that is punishable. We, therefore, reverse the order awarding compensation.

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22 September 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Natha.*

Criminal Procedure Code (Act X of 1882), Sec. 423—District Magistrate—Appeal—Enhancement of sentence.

It is not competent to a District Magistrate to enhance a sentence in appeal.

PER CURIAM:—The five accused persons were convicted by 2nd Class Magistrate of offences under sections 457 and 380 of the Indian Penal Code and sentenced to three months' rigorous imprisonment for each offence.

On appeal the District Magistrate acquitted all of the accused of the offence under section 457 and changed the conviction under section 380 into one under section 379 in the case of accused Nos. 2, 4 and 5 and into one under section 411 in the case of accused Nos. 1 and 3 but he sentenced them all to six months' rigorous imprisonment. He has thus enhanced the sentence which he had no power by law to do. We alter these sentences of imprisonment into one of three months' rigorous imprisonment in the case of each of the accused.

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22 September 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Ganesh.†

District Municipal Act (Bom. Act VI of 1873), Sec. 84—Arrears of tax—Payment before the hearing of the case—Penalty.

A Magistrate cannot inflict a penalty under section 84 of the Bombay District Municipal Act, 1873, if an order for the payment of the arrears of the tax cannot be made because the arrears were paid before the case came on for hearing.

PER CURIAM:—Unless the Magistrate orders the recovery of arrears he cannot, under the provisions of section 84 of the Bombay District Municipal Acts of 1873 and 1884, adjudge a penalty; for by the words of the section the penalty is to be adjudged in addition to the arrears. When, therefore, as in this case the arrears were paid before the case came on

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**Criminal Ruling* 41 *of* 1892. Criminal Review No. 306 of 1892.

†*Criminal Ruling* 42 *of* 1892. Criminal Review No. 319 of 1892.

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for hearing so that no order for their recovery was passed by the Magistrate, the adjudication of a penalty was illegal. We reverse the order. The penalty, if paid, must be refunded.

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6 October 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Usuphkhan.*

Criminal Procedure Code (Act X of 1882), Sec. 161—Police investigation—Accused—Truth—False evidence—Indian Penal Code (Act XLV of 1860), Sec. 193.

A person examined under section 161, Criminal Procedure Code, 1882, by the Police with respect to an offence with which such person may himself be charged and convicted is not bound to speak the truth and in such a case he cannot be convicted for giving false evidence, under section 193, Indian Penal Code.

IN this case Usuphkhan was tried by the First Class Magistrate of Khandesh, on a charge of giving false evidence in a case other than a judicial proceeding under section 193, Indian Penal Code, under the following circumstances. On the 10th August 1891, accused was found in possession of a gun in contravention of the provisions of section 14 of the Arms Act No. XI of 1878. When the case was being investigated before the Chief Constable of Paroda, accused stated to him falsely that the gun was his master's, while in reality it was not. It was accused's own property and he had not obtained a license to possess it. In this he knowingly made a false statement naturally to save himself from the punishment he was liable to under section 19 of the Arms Act. The Magistrate held that he "intentionally gave false evidence," an offence coming under the latter portion of section 193, Indian Penal Code, and sentenced him to suffer rigorous imprisonment for twenty days and to pay a fine of Rs. 10.

The District Magistrate of Khandesh, being of opinion that the conviction and sentence were illegal, made this reference, observing: "The Magistrate, however, appears to have failed to appreciate the provisions of section 161 and 162 of the Criminal Procedure Code. Under section 161 only witnesses are obliged to answer truly any question put to them by a Police officer in an investigation and not the accused who is not bound to criminate himself. So also a statement to the Police officer is no evidence under the provisions of section 162 except in special instances which do not exist in this case."

ORDER.—The Court reverses the conviction recorded against and sentence passed upon the accused and directs the fine, if paid, to be refunded.

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*Criminal Ruling 43 of 1892. Criminal Reference No. 108 of 1892.

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6 October 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Tulaji.*

Forest Act (Act VII of 1878), Secs. 54, 76— Reward—Forest produce.

A reward can only be paid out of the proceeds of any forest produce legally confiscated, and in the case of such produce being the property of Government and therefore not liable to confiscation under section 54 of the Forest Act, the payment of a reward would be illegal under section 75 (*b*) of the Act.

THE District Magistrate of Nasik in making this reference stated, "so much of the order as relates to the payment of reward, out of the confiscated property, appears illegal inasmuch as the said property belonged to Government and cannot, therefore, be confiscated but must be handed over intact to the Forest Department under section 55 of the Forest Act."

PER CURIAM:—Rewards can only be paid out of the proceeds of fine and confiscations, section 75 (*b*) of Act VII of 1878. In the present case that timber was the property of Government and so could not be confiscated under section 54. As there was no legal confiscation, the order that a reward should be paid out of the proceeds of the timber was illegal and we reverse it.

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12 October 1892. PARSONS & TELANG, JJ

Queen-Empress v. Framji D. Taraporewalla.†

Penal Code (Act XLV of 1860), Sec. 292— Obscene—Checks to conception.

There is nothing obscene (within the meaning of that word as used in section 392 of the Indian Penal Code) in advocating checks to conception: also there is nothing obscene in the explanation of what these checks are or in the mere statement of the places where and the prices at which, they can be procured.

PARSONS, J.— I assume that there is nothing obscene (within the meaning of that word as used in section 292 of the Indian Penal Code) in advocating checks to conception. This whole case, both in the Magistrate's Court and in this Court, has proceeded and been argued upon this assumption. There is thus nothing obscene in the explanation of what these checks are or in the mere statement of the places where, and the prices at which, they can be procured. For none of these things has the book, in the present case concerned, been alleged or adjudged to be obscene. It has been condemned solely on account of the manner in which certain advertisements contained in it are worded. In order to decide whether the conviction is right or not, I would frame this single issue: "Are there details in the advertisements inconsistent with decency, which are not necessary and are not justified? In my opinion, this issue must be determined in the affirmative. The details at pp. 69, 70, 76, 77, 82, 85 and 86 are certainly

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**Criminal Ruling* 44 *of* 1892. Criminal Reference No. 109 of 1892.

†Criminal Appeal No. 219 of 1892.

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inconsistent with decency and offensive to delicacy. They present to the mind things which delicacy and purity and decency forbid to be exposed. In this respect they go very much further than any advertisements in any of the other books of the kind which have been referred to. They are quite unnecessary, and there is no other justification for them than the supposition that the publisher of the book, who himself supplies the articles, thought that by inserting them, he would show the superiority of his own wares over those vended by other dealers, and so acquire profit for himself. This is no justification at all. The publication in the beginning of the work in question of the "Theory and Practice of Neo-Malthusianism" appears me to be only subservient to the real aim and object of the book, which is to put up by advertisements the publisher's own specialities; and as in these advertisements there is much that is indecent and obscene, I am of opinion that the conviction is right, and I affirm it.

TELANG, J.—I am of the same opinion. The question in this case arises on the true construction of the word "obscene" in section 293 of the Indian Penal Code, a word about which Lord *Lyndhurst* said: "I can easily conceive that two men will give an entirely different conception as to the meaning." As I said, however, during the course of Mr. Inverarity's reply, the general question which formed the topics of part of the argument before us, and which are discussed in the judgment of Mr. Justice *Windeyer* of New South Wales, read to us by Mr. Inverarity as part of his own argument, do not now present very much difficulty. For it would not, upon the authorities, be possible to hold that a discussion in the abstract of the doctrine of Neo-Malthusianism, or even that an advertisement describing the apparatus which is to help in practically carrying out the precepts of Neo-Malthusianism, is in its very nature indecent and "obscene." Neither such a description nor such an advertisement could be said to be written in the language used by Lord *Campbell* in the House of Lords, "for the single purpose of corrupting the morals of youth." Nor can they be said to satisfy the less exacting, and probably more accurate, test suggested by *Cockburn*, C. J., in *Ragina* v. *Bradlaugh* in the first question he formulated in that case, *viz.*, "Is this publication, in *its scope and object*, a thing calculated to deprave and debase the morals of those who read it" or as the same learned Judge put it in *Regina* v. *Hicklin* (1), whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall? But there is always another question which arises in these cases, and that question, in the language of Sir *Alexander*

(1) L. R., 3 Q. B., 371.

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Cockburn, is whether, independently of the enquiry to which the first question in *Reg.* v. *Bradlaugh* is directed, " the details given, irrespective of the ultimate purpose of the works, are calculated to inflame the passions and corroupt the morals of the readers. " It is upon this question that I think, the answer must be unfavourable to the accused in this case. After much consideration, I have come to the conclusion that the language used at pp. 69 and 70 of this pamphlet, and also I may add at pp. 85 and 86, does come within the rules indicated in the second of the two questions formulated by Chief Justice *Cockburn*, and that therefore the publication before us must be deemed to come within the meaning of section 293 of the Indian Penal Code. On this ground I am of opinion that the conviction in this case must be affirmed.

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13 October 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Muniram.*

Criminal Procedure Code (Act X of 1882), Sec. 106—Security—Attempt—Theft.

A person convicted of an attempt to commit theft cannot be asked to furnish security under section 106, Criminal Procedure Code, because the section does not apply to the offence.

ORDER.—As theft is not one of the offences mentioned in section 106 of the Code of Criminal Procedure, Mr. Richardson's order is illegal and the Court reverses it, should it be deemed necessary to require the accused to furnish security, the Presidency Magistrate must initiate the proceedings in the manner, required by law.

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13 October 1892. PARSONS & TELANG, JJ.

Queen-Empress v. Adivaya.†

Forest Act (VII of 1878), Sec. 75,—Rules 1—Reward—Amount—Magistrate.

Under rule 1 of the rules framed under section 75 of the Indian Forest Act, 1878, one-half of the proceeds of the fine is payable as a reward without any order of the convicting Court.

THIS was a case under section 41 of the Indian Forest Act, 1878, and Rules 3 and 26 of the rules framed under the same Act, where the 2nd class Magistrate of Mugad sentenced the accused to pay a fine of Rs. 25 and one-half of it is awarded to Forest Officers through whose instrumentality the conviction was obtained.

On appeal, the First Class Magistrate in charge Dharwar Taluka, confirmed the conviction and reduced the sentence to a fine of Rs. 2 and cancelled such portion of the Magistrate's order as related to the granting of reward.

The District Magistrate of Dharwar, in making this reference, observed. " This latter portion of the order of the appellate Magistrate

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**Criminal Ruling* 45 *of* 1892. Criminal Reference No. 113 of 1892.

†*Criminal Ruling* 46 *of* 1892. Criminal Reference No. 111 of 1892.

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cancelling the Magistrate's order granting reward, is illegal under Rule 1 of the Rules under section 75 of the Forest Act. From what I read of section 75 and rules thereunder, I find that Local Government has empowered trying Magistrate to use his discretion in awarding as reward larger amount than one-half of the fine inflicted on accused and that he has no power to interfere in the payment of reward which does not exceed half of the fine."

ORDER.—The Court reverses the order of the appellate Court cancelling entirely that part of the order of the trying Magistrate as relates to the reward, since it is opposed to Rule 1 of the rules framed by Government under section 75 of the Forest Act. It is not necessary for this Court to make any other order in the case since by that rule one half of the fine inflicted by the appellate Court will be payable as a reward without any order of a Court.

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17 November 1892. TELANG & FULTON, JJ.

Queen-Empress v. Bajio.*

Criminal Procedure Code (Act X of 1882). Sec. 436—District Magistrate—Sessions Court—Reference to the High Court—Local Government—Public Prosecutor.

A District Magistrate is not warranted by section 438 of the Code of Criminal Procedure to refer to the High Court a case in which the Sessions Judge refuses to grant sanction for the prosecution of certain persons for giving false evidence. If, however, the District Magistrate is of opinion that a failure of justice has occurred he should communicate with the Local Government or with the Public Prosecutor.

THE accused Rewlo and Hatio were tried before the Sessions Court at Surat for culpable homicide and were acquitted for want of evidence. As the witnesses made statements grossly inconsistent with what they said before the committing Magistrate application was made to the Sessions Court for sanction to prosecute them on an alternative charge of giving false evidence. The Sessions Judge refused the sanction.

The District Magistrate thereupon made this reference for moving the High Court to grant sanction against two men, under section 195, Criminal Procedure Code. The Magistrate observed:—

"I may be allowed to remark that the sanctity of a Court of Justice is not in the least understood by ordinary witnesses, and is never likely to be, if ignorance is held sufficient, to condone perjury however reckless. That the witness is of a low caste and easily tutored may be a reason for leniance in awarding punishment but scarcely for holding him guiltless altogether.

"Whether or not a murder was actually committed does not seem to me to affect the present question, but it was an all important point in the

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**Criminal Ruling* 48 *of* 1892. Criminal Reference No. 144 of 1892.

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original trial. The evidence given by the witnesses before the Magistrate went to show that a murder had been committed. Their evidence before the Sessions Court did not. Hence their contradictions were material to the case.

"The Sessions Judge draws a subtile distinction between contradictions and inconsistences, and he says, the inconsistences might perhaps be explained. It is to give the witnesses an opportunity of doing this as well as on grounds of public justice that I submit a prosecution to be desirable."

ORDER.—The District Magistrate should be informed that section 438 does not allow a reference of the nature made by him. If he thinks proper to do so he can follow the procedure indicated in Criminal Ruling No. 20 of 1892.

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17 November 1892. TELANG & FULTON, JJ.

Queen-Empress v. Nathu.*

Village Police Act (Bom. Act VIII of 1867), Sec. 15—Omission to obey—Refusal to obey—Police Patel.

Where there is a mere omission to obey and no deliberate refusal to obey an order given by a Police Patel personally, a conviction under section 15 of the Bombay Village Police Act cannot be sustained.

THE accused in this case were convicted of having refused to obey a lawful order of a Police Patel given by him personally, under the latter part of section 15 of the Village Police Act (Bom. Act VIII of 1867). The accused in this case were witnesses in another case pending before the Police Patel and were, on the previous evening ordered by him to be present before him on the morning of the 8th ultimo at 7 A. M. They failed to appear. Sometime after they were sent for and they appeared. On their appearance they were asked by the Police Patel why they did not appear as ordered. They answered they had private business which detained them from appearing. The Police Patel took these answers to be confessions and convicted and sentenced them each to pay a fine of Rs. 2.

The District Magistrate of Khandesh being of opinion that the convictions and sentences were illegal, made this reference, stating:—

"The question is whether this omission on the part of the accused is tantamount to 'refusing to obey the lawful orders of the Police Patel' in the strict letter of the law.

"In my opinion it may possibly amount to 'disobedience' but hardly to 'refusal to obey.' Mere neglect is not apparently made punishable under the terms of section 15."

**Criminal Ruling 49 of 1892. Criminal Reference No 145 of 1892.*

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ORDER.—Conviction and sentence quashed. The evidence shows no more than an omission to obey an order, it does not show a deliberate refusal to obey.

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24 November 1892. TELANG & FULTON, JJ.

Queen-Empress v. Manchi.*

Criminal Procedure Code (Act X of 1882) Sec. 342—Accused—Examination.

Section 342 of the Code of Criminal Procedure is imperative and not permissive on the point that the Court must question an accused generally on the case after the witnesses for the prosecution have been examined and before he is put on his defence.

PER CURIAM:—The Sessions Judge's summing up is not as full as it might have been and is also erroneous on one or two points comprised in it, (*e. g.*, in saying that the accused must account for &c) but after looking through the evidence, we do not think there is any reason for us to interfere in this case, as it does not appear that there has been any failure of justice. We must, however, draw the attention of the Sessions Judge to section 342, Criminal Procedure Code, the provisions of which are imperative and do not appear to have been followed by him.

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24 November 1892. TELANG & FULTON, JJ.

Queen-Empress v. Janaki.†

Criminal Procedure Code (Act X of 1882), Sec. 200—Complaint—Presentation—Mukhtyar—Dismissal.

Where a complaint under sections 408 and 409, Indian Penal Code, is presented by the complainant's *mukhtyar* instead of by the complainant herself who is not present in Court, the Magistrate is justified in dismissing the complaint as he has no opportunity of examining the complainant as required by section 200, Criminal Procedure Code.

ORDER.—The complainant not appearing to have been present in Court the Magistrate could not examine her. The dismissal of the complaint is, in strictness, not illegal. It is open to the complainant to make another complaint. The Court declines to interfere.

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1 December 1892. TELANG & FULTON, JJ.

Queen-Empress v. Bhagooji.††

Workman's Breach of Contract Act (XIII of 1859)—Criminal Procedure Code (Act X of 1882), Sec. 545—Fine—Expenses of suit.

It is inexpedient to order the payment of expenses of a suit under the Workman's Breach of Contract Act, 1859, because no fine can be imposed under the Act.

THE accused was charged under the Workman's Breach of Contract Act, 1859, section 1, with neglect to perform work for which he already received an advance ; he took Rs. 25-8-0 from the complainant and passed

*Criminal Ruling 50 of 1892. Criminal Reference No. 240 of 1892.

†Criminal Ruling 51 of 1892. Criminal Application for Revision No. 335 of 1892.

††Criminal Ruling 52 of 1892. Criminal Review No. 330 of 1892.

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a bond to weave with the said complainant but he worked for about three months without repaying anything and then failed to attend. The First Class Magistrate of Ahmednagar ordered the accused to pay Rs. 25-8-0 to the complainant according to the bond and Rs. 8 as expenses of the suit.

ORDER.—The Magistrate's order awarding compensation, which he says was made under section 545 of the Code of Criminal Procedure, is clearly wrong. There was no fine imposed in this case and none could be imposed under the Act. There was, therefore, no fund out of which alone the compensation could be awarded under the express words of section 545. The order in so far as it awards compensation in respect of costs must be reversed.

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1 December 1892. TELANG & FULTON, JJ.

Queen-Empress v. Vithal.*

Criminal Procedure Code (Act X of 1882), Sec. 307—Sessions Judge—Jury—Verdict-Acquittal—Reference—High Court.

Where the Sessions Judge refers a case to the High Court under section 307, Criminal Procedure Code, in which the jury has returned a verdict of acquittal, the High Court has to consider whether from the evidence it is so convinced that the jury ought to have convicted the accused as to take upon itself the responsibility of deciding differently from those to whom the decision was primarily entrusted by law and without any appeal in ordinary cases.

PER CURIAM:—This is a case of trial by jury where the Sessions Judge disagreed so completely with the verdict of the Jury that he has submitted the case under section 307 of the Criminal Procedure Code to this Court. There is always some practical difficulty about the exercise af the functions entrusted to the High Court under section 307 of the Criminal Procedure Code. The decision of a Jury, no doubt, in the majority of cases, is, and should be regarded as final, and indeed unless their verdict were ordinarily so looked upon, the authority conferred on them by law and the Jury's own sense of responsibility would be weakened. The general principle on this point has been stated in various rulings of the Calcutta High Court as well as of this Court and the abstract rule does not present much difficulty. This Court has to consider whether from the evidence it is so convinced that the Jury ought to have convicted the accused as to take upon itself the responsibility of deciding differently from those to whom the decision is primarily entrusted by the Law and without an appeal in ordinary cases. Looking upon the case from that standpoint of view we think that it is difficult for us not to differ from the verdict which the Jury arrived at in this case. And it is to be remarked that the precise form in which the theory of the defence is now raised by coun-

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**Criminal Ruling* 53 *of* 1892. Criminal Reference No. 136 of 1892.

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sel before us appears never to have been put before the Jury; and indeed there are no indicia in support of such a theory to be found in the evidence before the Court. Now we feel no doubt about the fact that the girl was outraged; it is not necessarily incompatible with that circumstance that the girl should have been able to do such ordinary household duties and such other work which she is alleged to have done on the same day. Then it is not in any way explained why these two particular persons should have been accused of the outrage. It has been stated by them, no doubt, that there had been some quarrels between their relatives but they were not of a recent date nor of any particular significance. On the other hand there is much force in the argument of the Government Pleader that rape is not the kind of offence which would ordinarily be charged in such cases on account of the disgrace which attends it even for the victim and that fact is a great difficulty in the way of the theory of the defence. If, as was suggested in argument, the police had been actually on the track of the outrage before these men were denounced, then, the theory that the relations of the girl had denounced the two accused in order to save her husband whom the theory indicates as the true culprit, would have been possible; but there is no evidence of that. There was, no doubt, much delay in making the complaint but it is natural that the girl's family should feel some reluctance in bringing such a matter into Court. They may have at first thought, perhaps, that the injury to the girl would be but slight; they found, however, that such was not the case and they then probably made the complaint. We do not think the evidence in the case is concocted and we think that it is not consistent with the theory that the accused were not guilty, and therefore, they must be convicted of the offence with which they were charged. We think, however, that the fact of their being young may be taken into consideration in awarding the sentence. We convict both the accused of the offence of rape punishable under section 376 of the Indian Penal Code and sentence them each to four years' rigorous imprisonment.

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8 December 1892. TELANG & FULTON, JJ.

Queen-Empress v. Bala.*

Indian Penal Code (Act XLV of 1860), Sec. 475—Forgery—Fraudulent—Dishonest intent.

The intention to create a favourable impression about oneself or an unfavourable impression about another in the mind of a third person, does not fall under the words "intention to defraud" in section 475, Indian Penal Code.

TELANG, J.—I concur. The act of the accused was not committed "dishonestly" and on the whole I think it was not committed

*Criminal Appeal No. 246 of 1892.

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"fraudulently" within the meaning of those words as defined in the Penal Code. On the evidence, it is not proved that the accused's intention was to cause wrongful gain "or wrongful loss." This appears to have been the Sessions Judge's view also; and the act was therefore not dishonest. It was not "fraudulent," because the intention to create a favourable impression about oneself or an unfavourable impression about another in the mind of a third person can hardly be held to fall under the words "intention to defraud" except by a straining of language:

FULTON, J.—The appellant has been convicted of forging a document purporting to be made by a public servant in his official capacity. The facts found proved by the Sessions Judge are as follows: The accused is a forest guard who with another man named Gulab drove to the pound a number of cattle found trespassing in the forest and received from the pound keeper a receipt made out in the names of both of them: subsequently he erased Gulab's name and forwarded the receipt thus altered to the Divisional Forest Officer with a letter in which he took to himself sole credit for the capture of the cattle and made various accusations against the Range Forest Officer.

The question arises on these facts whether the erasure of Gulab's name amounted to forgery. This offence presupposes the making of a false document the definition of which in section 464 of the Indian Penal Code requires a fraudulent or dishonest intention at the time of the alteration or manufacture of the document. We have therefore, to consider what the accused's intention was. The Sessions Judge was of opinion that the sole effect of the erasure was to give him credit for impounding a large number of cattle. The Government Pleader contended that the intention was to get a reward and referred us to Mr. Betham's Evidence in which he said that the accused might have got a reward by sending him the receipt and that he had often given rewards for merely impounding cattle. Now, if the intention was by means of this altered document to obtain a pecuniary reward that intention would be fraudulent and the offence of forgery would be complete. But we are by no means certain that there was any such intention or that the object was to obtain a reward which might or might not be given. On the whole it seems more probable that the intention was simply to gain credit or possibly indirectly to cause some injury to the characters of Range Forest Officer, Vasudev. But, under these circumstances, although the object with which the receipt was altered may have been very wrong and improper we are not in a position to hold that it is proved that the alteration was made dishonestly or fraudulently. A person is said to do a thing dishonestly if he does it with the intention of causing wrongful gain to one person or

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wrongful loss to another. In the present case as it is not proved that there was any intention to cause either wrongful gain or wrongful loss, it cannot be said that the act was done dishonestly. The question whether it was done fraudulently is not quite so clear but we think we must follow the principle of the decisions of this Court and the CALCUTTA HIGH COURT in the cases of *Queen-Empress* v. *Shanker* (1), *Jan Mahomad* v. *Queen-Empress* (2), and *Queen-Empress* v. *Haradhan* (3): and hold that the words "intent to defraud" imply an intention by deceitful means to deprive some person of property or right. A person is said according to the defining section to do a thing fraudulently if he does it with intent to defraud and not otherwise. Although the word fraud in its original signification seems to mean the same as deceit it would be using language otherwise than in its ordinary sense to hold that a person could be defrauded, if he were merely deceived as to the character of another and were not by the deceit either deprived of any property or cheated out of some right. In the case of the *Queen* v. *Naylor* (4) the words "intent to defraud" were held to apply to a case where a person by deceit induced another to part with goods which he hoped ultimately to pay for and where the intention to cause permanent wrongful loss or wrongful gain was not established. But there appears to be no case in which it has been held that they are applicable to circumstances in which there was no intention to induce delivery of property or the loss of some right. In the case of *Empress* v *Abdul Hamid* (5) where the intention was to obtain an appointment by means of a false certificate it was held that the intention was fraudulent because the object was to gain a pecuniary advantage. In the case of *Imp.* v. *Appasami* (6) in which the accused was proved to have written a false name on an examination paper it was held that his act amounted to forgery because the intention was to obtain a certificate which would have a certain recognized value. In the present case though possibly pecuniary gain might have resulted indirectly from the deceit practised it is impossible to hold that it is proved that the receipt was altered with the intention of gaining such pecuniary advantage. Under these circumstances, we think that the conviction must be reversed. The sentence has already expired and no order in respect of it is required.

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8 December 1892. TELANG & FULTON, JJ.

In re Kadarbhai.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction—Magistrate—Supplementary evidence—Record of evidence.

(1) I. L. R. 4 Bom., 65. (2) I. L. R. 10 Cal., 584. (3) I. L. R., 19 Cal., 380.
(4) I. C. C. R., p, 4. (5) I. L. R. 13 Cal., 351. (6) I. L. R., 12 Mad., 153.

*Criminal Ruling 54 of 1892. Criminal Application for Revision No. 406 of 1892.

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A Magistrate can take supplementary evidence after an application has been made to him for sanctioning the prosecution for making a false complaint but in such cases such evidence must be duly recorded.

PER CURIAM:—We do not think that the Sessions Judge was right in his view if we have correctly apprehended it that it was not competent to the Magistrate to take supplementary evidence in dealing with the application for sanction to prosecute witnesses made to him in this case. But although such evidence might be taken it must be duly recorded. And the Magistrate not having here recorded it, there is no sufficient evidence on the record to justify the sanction granted by the Magistrate. We therefore do not interfere with the Sessions Judge's order revoking such sanction. But this order is to be without prejudice to the applicant's right, if any, to apply for a fresh sanction on proper materials.

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12 December 1892. CANDY & FULTON, JJ.

Queen-Empress v. Bai Reva.*

District Municipal Act (Bom. Act VI of 1873), Sec. 82—Complaint—Private person.

Section 82 of the District Municipal Act does not prevent a private person from making a complaint to the Magistrate in certain cases, *e. g.*, where an offensive liquid was allowed to flow from the premises of the accused into the street.

PER CURIAM:—In both these cases it has been found as a fact that offensive liquid was allowed to flow from the premises of the accused into the street. But the legality of the convictions has been denied on two grounds: first, that no complaint was made as provided by section 82 of the Municipal Act by the Municipality; second, that permission had been granted to the accused persons as provided by section 54 of the Act. As regards the first contention we see no reason to differ from *Imperatrix* v. *Mulchand* (1), which was followed in reference No. 74 of 1892 and in which it was held that the law does not prevent a private person from making a complaint to the Magistrate in such cases. As to the second point, we hold that the resolutions of the Municipal Committee in 1891 did not give the permission required by section 54 of Act VI of 1873. Possibly these Resolutions show that if the accused persons had made application they might have obtained the necessary permission under section 54. But we cannot hold that these resolutions by themselves amounted to such a permission as is required by section 54.

Under these circumstances we order the record and proceedings to be returned, and decline to interfere.

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*Criminal Application for Revision Nos. 354 and 356 of 1892. (1) Vide, *ante*, p. 355.

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15 December 1892. CANDY & FULTON, JJ.

Queen-Empress v. Rama.*

Criminal Procedure Code (Act X of 1882), Secs. 519, 545—Stolen property—Innocent mortgagee—Payment to the mortgagee out of fine.

In a conviction under section 380, Indian Penal Code, the Magistrate ordered Rs. 28 to be paid out of the fine to an innocent mortgagee who had advanced money to the accused on the stolen property:—

Held, that sections 519 and 515, Criminal Procedure Code, were not applicable as no injury was caused to the mortgagee by the offence committed.

IN this case the accused was convicted under section 380 and sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 30. The property recovered, worth Rs. 34-8-0, was ordered to be restored to the complainant and Rs. 28 out of the fine to be paid to one Bhau to whom the stolen property was mortgaged by the accused, in consideration of the amount (Rs. 26) paid by the former and the interest accruing thereon.

The District Magistrate of Sholapur in making this reference, said—"I am of opinion that the Court had no power to order the payment of Rs. 28 to the said Bhau under the provisions of sections 519 and 545 of the Criminal Procedure Code. The Court could only have ordered the payment out of the proceeds of the property found in the possession of the accused person at the time of his arrest under section 519. Moreover section 545 (*b*) on which the Magistrate Second Class relies does not apply, because no injury was caused to the mortgagee by the offence committed."

ORDER.—For the reasons given by the District Magistrate the Court sets aside the order of compensation passed by the Second Class Magistrate and directs that the money be refunded to Government.

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21 December 1892. CANDY & FULTON, JJ.

Queen-Empress v. Vishnu.†

Magistrate—Personally interested—Criminal Procedure Code (Act X of 1882), Sec. 556.

It is usually expedient for the ends of justice that a Magistrate who has as an Assistant Collector supervised and given advice in a departmental inquiry against a Subordinate should not finally try and determine the criminal case aganist the same Subordinate.

ORDER.—We are of opinion that it is usually expedient for the ends of justice that a Magistrate who has as Assistant Collector supervised and given advice in a departmental inquiry against a subordinate should not finally try and determine the criminal case against the same subordinate. Under these circumstances, we direct Mr. Stewart, if a *prima facie* case is made out against the accused, to commit the case to the Court of Sessions at Nasik. The District Magistrate should be informed that his

**Criminal Ruling 55 of 1892. Criminal References No. 153 of 1892.*

†Criminal Ruling 57 of 1892. Criminal Application for Revision No. 408 of 1892.

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remark in his endorsement No. 8341 of 7th instant is improper. He was at liberty to bring any circumstance to the notice of the Court through the Government Pleader.

1893.

13 January 1893. CANDY & FULTON, JJ.

Queen-Empress v. Rawji.*

Indian Penal Code (Act XLV of 1860), Secs. 201, 511, 109, 193—False complaint.

Where a person having reason to believe that a certain man has committed an offence punishable under section 457, Indian Penal Code, instigates the complainant and witnesses in the case to make statements which he knows to be false, he commits an offence under sections 109 and 193 and not under sections 201 and 511 of the Indian Penal Code.

IN this case the accused were charged before the Second Class Magistrate of Niphad with attempting to cause disappearance of evidence of offence to screen the offender in that the accused having reason to believe that one Dada had committed an offence under section 457, Indian Penal Code, attempted to cause the disappearance of evidence of the commission of that offence with the intention of screening Dada from legal punishment by instigating the complainant and witnesses in the case to make a statement that Dada was standing on the *ota* when arrested. The accused were convicted by the Magistrate of offences under sections 201 and 511, Indian Penal Code, and sentenced them each to pay a fine of Rs. 25.

JUDGMENT.—The facts recited by the Second Class Magistrate discloses an offence not under section 201 but rather under sections 109 and 193, Indian Penal Code, an offence which was beyond the jurisdiction of the 2nd Class Magistrate. We must, therefore, set aside the convictions and sentences and order the fine if paid to be refunded leaving it to the District Magistrate to take further steps if he thinks it necessary.

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13 January 1893. CANDY & FULTON, JJ.

Queen-Empress v. Bhula.†

Penal Code (Act XLV of 1860), Secs. 409 and 511—Breach of trust—Pound Keeper—Cattle Trespass Act (I of 1871), Sec. 27.

The accused, a cattle pound keeper, having levied Rs. 5 for five buffaloes in his charge gave a receipt for Rs. 4 only to the owner of the cattle, and entered only Rs. 4 in his accounts: but before the money was paid into the treasury, he altered his accounts and entered the proper amount, namely, Rs. 5. The Magistrate convicted him under section 27 of the Cattle Trespass Act, 1871:—

Held, that the conviction should have been under sections 409 and 511 of the Indian Penal Code and that section 27 of the Cattle Trespass Act was not applicable to such a case.

**Criminal Ruling 1 of 1893.* Criminal Review No. 429 of 1892.

†Criminal Ruling 2 of 1893. Criminal Reference No 158 of 1893.

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THE accused was charged with failing to perform duties under section 27 of Act I of 1871, in that he being cattle pound keeper of Khatraj Taluka Mehemadabad levied Rs. 5 for five buffaloes in the pound in his charge at rupee one each for them from a certain *dharala*, the owner, on account of penalty but gave a receipt for Rs. 4 only to the payee and entered Rs. 4 only in his accounts; but a complaint against him having been made by the *dharala*, before the money was remitted into the Treasury and the accused having come to know of the complaint, altered the entries in the account book and the counterfoil of the receipt and remitted the full amount of Rs. 5. The Second Class Magistrate of Mehemadabad convicted and sentenced the accused, under section 27 of Act I of 1871, to pay a fine of Rs. 5.

The District Magistrate of Kaira, in referring the case to the High Court, stated:—"Section 27 of Act I of 1871 is wholly inapplicable to the case. The view of the Magistrate that the accused failed to keep the accounts ordered by Government because he made alterations in some of the entries is clearly wrong, and the Magistrate has taken no notice of what was really the offence committed, *viz.*, the attempt to appropriate a portion of the fine. The accused's act appears to fall under sections 409 and 511, Indian Penal Code.

ORDER.—For the reasons given by the District Magistrate, the Court sets aside the conviction recorded against and the sentence passed upon the accused and orders the fine, if paid, to be refunded to him.

The District Magistrate will, if he thinks it necessary, take further steps against the accused.

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26 January 1893. CANDY & FULTON, JJ.

Queen-Empress v. Surmal.*

Criminal Procedure Code (Act X of 1882), Sec. 364—Statements of accused—Language, in which they should be recorded by a Magistrate—Irregularity.

A Bhil accused having been examined by a Magistrate in the Marathi language and the accused's answers having been given in Marathi with a very large sprinkling of Bhil terms, the Magistrate recorded the accused's statements in English:—

Held, that the Magistrate procedure was irregular and that he should have recorded the accused's statements in Marathi.

PER CURIAM:—We think the Second Class Magistrate should have recorded the statements of the accused in the language in which they were examined (Marathi) even though their answers were given with a very large sprinkling of Bhil terms. Whether such an irregularity could have been cured by section 533 of the Criminal Procedure Code we express no opinion.

**Criminal Ruling 4 of 1893. Criminal Appeal No. 305 of 1893.*

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Excluding these statements we think there is sufficient evidence against accused No. 3, Surmal *walad* Jaban. Including these statements we think there was not sufficient evidence against accused No. 6, Devchand *walad* Bhikari. We therefore order No. 6 Devchand *walad* Bhikari to be acquitted and discharged; and the appeal of accused No. 3, Surmal *walad* Jaban, to be dismissed.

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2 February 1893. CANDY & FULTON, JJ.

Govinda v. Keshavrao.

Criminal Procedure Code (Act X of 1882), Secs. 560, 435, 439—Compensation—Death of the accused.

Where a Magistrate awarded compensation to an accused person, under section 560 of the Criminal Procedure Code, and the complainant applied to the High Court, under sections 435 and 439 of the Code, the High Court declined to pass any order as the accused had died, because no order could be passed to the prejudice of a person who could not be served with a notice.

ORDER.—The Magistrate First Class has quoted section 250 of the Criminal Procedure Code, which was repealed by Act IV of 1891.

We think that the Magistrate should have called on complainant to show any objection which he might have to urge against the direction to pay compensation.

We, therefore, as regards accused No. 3, set aside the order of the First Class Magistrate directing Rs. 5 to be paid by complainant to him.

We make no order as regards accused No. 1 who is dead, no authority having been shown to us for passing an order to the prejudice of an accused person who cannot be served with a notice.

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9 February 1893. CANDY & FULTON, JJ.

Queen-Empress v. Manya.†

Bombay District Police Act (Bom. Act IV of 1890), Sec. 61 (d)—Negligent driving—Offence.

The words "contrary to any Regulation" in clause (*d*) of section 61 of the Bomby District Police Act, 1890, refer to the words "or by driving &c," and not to the words "causes obstruction, injury, &c., by any misbehaviour, negligence or illusage in the driving, management or care of any animal or vehicle" in the first part of the clause.

THE accused Manya drove his bullock cart negligently on a pulic road at Igatpuri and thereby caused injury to one old woman. The accused, when placed before the Second Class Magistrate of Igatpuri, pleaded not guilty, but was sentenced to pay a fine of Rs. 3 under section 61 clause 4 of the District Police Act.

The District Magistrate, in referring the case for the orders of the High Court, observed: "The sentence is illegal as no regulation has been

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**Criminal Ruling 6 of 1893. Criminal Application for Revision No. 403 of 1893.*
†Criminal Ruling 7 of 1893. Criminal Reference No. 12 of 1893

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made by the District Magistrate as is required by clause 4 of the said section."

ORDER.—We think that the words "contrary to any regulation" in clause D. of section 61 of Bombay Act IV of 1890 refer to the words "or by driving" etc. and not to the words "causing injury by negligence in driving" in the first part of the clause.

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6 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Ladka.*

Penal Code (Act XLV of 1860), Sec. 417—Cheating.

Where a person who gives a false name and address in order to shield himself from prosecution for an offence, he cannot be convicted of an offence under section 417, Indian Penal Code, because his intention cannot be said to be fraudulent and his act is not likely to cause damage or harm to the person to whom the false information is given.

THE accused was charged with the offence of cheating under section 417, Indian Penal Code, before the First Class Magistrate of Viramgam, in that he gave his false name as Magan Kuverji residing near Derasar to the Sanitary Inspector who wanted it for his prosecution for committing nuisance and thereby inducing the Inspector to prosecute the man named Magan Kuverji who was an innocent man. The Magistrate fined him Rs. 25 for this offence.

PER CURIAM:—The accused Ladka Gulabchand was charged and convicted of *cheating* under section 417 of the Indian Penal Code in that he "fraudulently gave his false name and address to the Sanitary Inspector and induced him to charge Magan Kuverji with a criminal offence" and that "the action of the accused was likely to cause harm to the complainant (the Sanitary Inspector) in his mind and reputation." There is no evidence that the accused gave a false name "fradulently," that is "with intent to defraud but not otherwise" (section 25, Indian Penal Code). Nor can it be said that "by deceiving any person he intentionally induced the person so deceived to do anything which he would not do if he were not deceived, and which act is likely to cause damage or harm to that person in body, mind, reputation or property" (section 415, Indian Penal Code). It is not asserted that the Sanitary Inspector was induced to prosecute Magan Kuverji; but the Magistrate remarks that "had the real name and address of the accused remained in dark Magan Kuverji would probably have been prosecuted innocently, which would perhaps have brought a trouble upon the complainant, and his reputation as an efficient officer would have been damaged." We are unable to concur with this reasoning. The act of the accused was not likely to cause damage or harm to the Sanitary Inspector. We do not think that even

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**Criminal Ruling* 10 *of* 1893. Criminal Review No. 63 of 1893.

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"perhaps" his reputation would have been damaged had he on the false information given by accused applied for a summons against Magan Kuverji. We must, therefore, reverse the conviction and sentence and order the fine, if paid, to be refunded.

We regret to notice that a petty case of this nature, the witnesses bring all present in Viramgaum, required four hearings before the First Class Magistrate, Viramgaum.

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6 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Navalmal.*

Bombay Act III of 1867, *section* 11, *Rule* 59—*House—Repair—Cantonement.*

A person who neglects to repair his house within the cantonement limits, does not commit an offence punishable under Rule 57, Chapter III of the Cantonement Rules.

PER CURIAM:—The accused was charged and convicted under Rule 57 section 11 of Bombay Act III of 1867 "with neglect to repair houses in Cantonement limits after being repeatedly warned by tomtom, thereby committing an offence under section 57, Cantonement Rules."

Assuming that the Rules made under Bombay Act III of 1867 are still in force (section 2 (2) Act XIII of 1889), it must be pointed out that Rule 57 provides that "every person shall keep in proper repair the boundary walls, fences, or other enclosures of his estate or premises." There is no mention of repair of houses. The conviction was, therefore, illegal and must be set aside and the fine, if paid, must be refunded.

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20 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Appaji.*

Criminal Procedure Code (Act X of 1882), *Sec.* 349—*Second Class Magistrate—Submitting a case—District Magistrate.*

Where a Second or Third Class Magistrate, after recording his opinion, submits a case under section 349, Criminal Procedure Code, to the District Magistrate, the District Magistrate should not confine himself to considering whether the decision of the Magistrate was plainly and manifestly opposed to the evidence, but he should find on the evidence the facts which he considers proved, and in passing judgment he should state the point or points for determination, his decision thereon and the reasons for decision.

PER CURIAM:—This case was sent up to the District Magistrate, Belgaum, under section 349, Criminal Procedure Code, by the second class Magistrate Chikodi, who recorded a careful opinion that the accused persons (the Head Constable of the Police post and the Kulkarni at Nipani) had been guilty of extortion, section 384, Indian Penal Code.

The District Magistrate took further evidence (the deposition of a Karkun in the office of the District Deputy Collector), and in passing

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**Criminal Ruling* 11 *of* 1893. Criminal Review No. 64 of 1893.

**Criminal Ruling* 13 *of* 1893. Criminal Application for Revision No. 14 of 1893.

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sentence (nine months' rigorous imprisonment on each accused) made the following remark :—" Accused's vakil was anxious for me to weigh each point in the evidence all the way through. But I do not understand this to be my duty under section 349, as this would be practically to try an appeal from the Subordinate Court, which I do not think was the intention of section 349."

Then after stating that he had gone through the evidence, and heard the accused's vakil at length, and after reviewing certain points in the case, the District Magistrate concluded:—" I think, therefore, that for the purposes of section 349 of the Code of Criminal Procedure I can safely accept the 2nd Class Magistrate's conviction of accused" and he proceeded to pass sentence.

We are of opinion that the District Magistrate was mistaken in his interpretation of the provisions of section 349, Criminal Procedure Code. No doubt under the corresponding section (461) of the old Code (Act X of 1872), the 2nd or 3rd Class Magistrate was to record a finding, and then he submitted his proceedings to the District Magistrate. Under the present Code the 2nd or 3rd class Magistrate records his opinion. It is for the District Magistrate to find on the facts which he considers proved. Whether he is practically trying an appeal from the Subordinate Court, matters not. Both under the old and the present law he has to pass " such judgment, sentence or order in the case as he deems proper". And if he passes judgment he must state the point or points for determination, the decision thereon, and the reasons for the decision. We think, therefore, that the District Magistrate was mistaken in supposing that all he had to consider was whether the decision of the 2nd Class Magistrate " was very plainly and evidently opposed to the evidence." He had to consider whether the evidence was worthy of belief. It is clear from the rest of the judgment recorded by the District Magistrate that notwithstanding his interpretation of section 349 he did not omit to consider this point; for he gave reasons for holding that it could not have been a trumped up case. Under these circumstances—and the Sessions Judge having summarily rejected the appeal made by the accused persons to him—we intimated at the hearing of this application for revision that we would not remand the case to the District Magistrate but would go into the evidence ourselves, and consider the case on the merits.

We have done so, and have come to the conclusion that the application must be dismissed. The complaint was made on 30th November 1891, and was verified before the 2nd Class Magistrate on the next day. Then ensued a preliminary enquiry, in which all the witnesses were apparently examined at great length, and which seems to have lasted six months.

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Then followed the trial itself, the 2nd Class Magistrate recording his final opinion on 15th October 1892. Such procedure is much to be deprecated. If on taking the complaint the 2nd Class Magistrate had at once issued process, and promptly proceeded with the trial, he would have been in as good if not better position to appreciate the merits of the case, and the parties and witnesses would have been saved considerable trouble and expense. Mr. Jardine, who argued the case for the applicants, contended that it would be unsafe to convict on the evidence of the complainant and his witnesses, who were nearly all his caste fellows, and as there was evidently a strong feeling in the town against the 2nd accused, the Kulkarni, the whole case was possibly trumped up through spite.

No doubt this argument is worthy of consideration. But we agree with the District Magistrate that there are weighty reasons against this view. No attempt was made to cross-examine the Karkun examined by the District Magistrate who proved that Baija's complaint against the present complainant was certainly trumped up. The inference is that the Naik and Kulkarni used Baija as an instrument for extorting money, rather than that the Marwadis in Nepani between the Thursday and the Monday used the admitted incidents, which happened in complainant's shop on the Thursday, as the foundation for an elaborately concocted conspiracy to ruin the Naik and Kulkarni. If the evidence for the prosecution is to be believed, then as the District Magistrate remarked the charge is certainly proved. The Magistrate, who on two occasions examined the witnesses at great length, believed the witnesses, and we see no valid reason for holding a contrary opinion.

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22 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Canji.*

Criminal Procedure Code (Act X of 1882), Sec. 433—High Court—Appeal—Review.

The High Court sitting in appeal cannot review an order passed by it under section 433 of the Code of Criminal Procedure.

PER CURIAM:—We think that on the preliminary point, which has arisen, this appeal must be dismissed. It is not asserted that the Magistrate has not disposed of the case conformably to the order of the High Court passed under section 433 of the Criminal Procedure Code. The Magistrate has, therefore, acted according to law, and we cannot sitting in appeal review the order conformably to which the Magistrate has given his decision.

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*Criminal Ruling 14 of 1893. Criminal Appeal No 35 of 1893.

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23 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Sherkhan.*

Criminal Procedure Code (Act X of 1882), Sec. 110—Security for good behaviour—Evidence.

Where a pesron is charged with being an habitual offender and there is nothing but evidence of general repute to go upon, that evidence must be so general and overwhelming as to leave no practical doubt that the accused has been in the habit of committing thefts and robberies or other offences of the kinds specified, and before making an order for security under section 110, Criminal Procedure Code, the Magistrate must be satisfied that as a matter of fact the suspected person has committed several offences in the past.

CANDY, J.—The Sessions Judge of Ahmednagar has forwarded under section 438, Criminal Procedure Code, the record of proceedings taken before Mr. Gibb, Magistrate First Class, against a Pathan by name Sherkhan under section 110 of the Criminal Procedure Code. Mr. Gibb found that accused was an habitual robber or thief, and ordered him to execute a bond in Rs. 100 himself with one surety in the same sum, as security that he will be of good behaviour for six months.

The sureties produced having no property were rejected, and Sherkhan was committed to prison. On appeal, the First Class Magistrate's order was confirmed by the District Magistrate, who relied on the fact that the appellant had been unable to provide the small security required, when so many of his caste fellows are resident in the district and are known to be well off.

The Sessions Judge, in referring the case, has commented on the nature of the evidence recorded by the First Class Magistrate—comments, it may be noted, which the District Magistrate admits are entitled to much weight—and he has remarked on a great and increasing tendency on the part of the Police and Magistrates to press the provisions of sections 109 and 110 beyond what appears to be their due limits.

The case is, therefore, of some importance, as it is necessary to lay down the principles by which we think Magistrates should be guided in dealing with cases under section 110. It is worthy of note that in Act X of 1872 (section 505) as in Act XXV of 1861 (section 296) there was a provision by which a Magistrate could require security from a person who appeared from evidence as to general character to be by repute a robber, house-breaker or thief. That provision is not to be found in the present Code (Act X of 1882), by section 110 of which (following in effect the provisions of section 506, Act X of 1872 and section 297, Act XXV of 1861) a Magistrate on receiving information that a person is an habitual robber, house-breaker or thief, can require such person to show cause why he should not be ordered to execute a bond with sureties, and then (section

*Criminal Ruling 15 of 1893. Criminal Reference No. 22 of 1893.

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117 (on the appearance of the person the Magistrate proceeds to inquire into the truth of the information, and to take such further evidence as may appear necessary, the fact that a person is an habitual offender being proved by evidence of general repute or otherwise. Thus it is not sufficient to prove by evidence as to general character that the person is by repute a robber, house-breaker or thief. It must be proved that he *is* an habitual robber, house-breaker or thief, though such fact may be proved by evidence of general repute or otherwise.

My colleague has drawn my attention to the report of two cases before the Special Court of Lower Burmah to be found at pages 542 and 546 of Selected Judgments of the Court of the Judicial Commissioner and of the Special Court Lower Burmah (Vol. I) in which this point was carefully considered.

In Criminal Reference No. 5 of 1891, *Agnew* J. in delivering the Judgment of the Special Court said:—"I think having regard to the last clause of section 117 of the Criminal Procedure Code, which provides that the facts that a person is an habitual offender may be proved by evidence of general repute, it would not be right to lay down as a hard and fast rule that evidence must be given to show that the person against whom proceedings are instituted under Chapter VIII of the Code has actually been convicted of any of the offences mentioned. It does seem strange that a man should be liable to be treated in a particular way because he is an habitual thief without proof that he has ever been convicted of theft at all. But we are bound by the provisions of the Code and should not be justified in laying down a rule which would be at variance with any of those provisions.

"I think, however, that in dealing with cases under this Chapter, Magistrates ought, especially where no conviction is proved, to take great care to test the evidence for the prosecution. It is not sufficient, I think, to simply record the statement of three or four persons that the individual charged has the reputation of being an habitual offender, but the Magistrate should ascertain what the witnesses' means of knowing anything about the accused are: whether the accused is known to have associated with criminals; whether he has frequently been known to have been near the place where thefts &c, have been committed; whether he has any and what means of livelihood; whether there has been any quarrel in which accused was concerned which would supply a motive for bringing a false charge; and whether any instances of the commission of offences by the accused, even if no conviction has been had, are known to the witnesses. The Magistrate should, in short, cross-examine the witnesses, nd should endeavour to assure himself beyond reasonable doubt that the

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accused is really an habitual offender. and not rest satisfied with the bare statement that the accused is reputed to be an habitual offender of the class named."

And in the next case, the Judicial Commissioner said:—"Although proof of previous convictions is not absolutely essential to establish the fact that the accused person is an habitual offender, there must, in the case of a man who has never before been convicted, be strong and convincing evidence, whether of repute or otherwise, to prove that he is in the habit of committing thefts or other cognate offences, and that it is necessary for the safety of the public that he should be required to give security. Under such circumstances complete and thorough enquiry as to the accused's antecedents is required; for, before arriving at the conclusion that he is proved by mere evidence of repute to be an habitual offender, the Magistrate should examine a larger number of villagers and ascertain clearly what the grounds for suspicion are. The accused, too, should be questioned as to his past history and given the opportunity which a proper examination affords of meeting, if he can, the allegations of his accusers. It is always a serious evil to have to send to prison for a year a person who has never been found guilty of any specific offence, as, besides the danger of injustice, the fact of imprisonment is not likely to improve his character; while the feeling that he is liable to be sent to jail whether he is convicted of an offence or not may not improbably make him reckless and render him, on his release, really dangerous to the community. Orders, therefore, requiring security for good behaviour on the ground that an accused person, who has never before been convicted, is nevertheless an habitual offender, should never be made except after a patient and exhaustive enquiry, such as to show beyond all reasonable doubt that the accused is in the habit of committing theft or other similar offences, and that it is essential for the safety of the community to send him to jail in case he fail to give security for good behaviour. In such cases it is necessary to examine a considerable number of witnesses to make sure that the evidence of repute is strong and general and it is also necessary to ascertain that the suspicions of the witnesses rest on some firm basis."

I entirely concur with the above principles.

Applying them to the present case we find that Sherkhan served for thirteen years in the 8th Regiment Bombay Infantry, that he obtained his discharge about four years ago, that he attends every year a month's drill and receives a lump sum of Rs. 41, and that his conduct was good and is considered now by the Subhedar Major to be still good. There is nothing to contradict Sherkhan's assertion that when he obtained his discharge he

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took service in Junaghar (Kattyawar) for a time, then he was employed by a fruit seller at Jeur and it is apparently admitted that recently he was employed by the Remount Agent at Ahmednagar. He seems to have left this employment last September, and then to have visited his caste fellows who are termed Rohillas by the country folk and who have settled in the Sheogaon Taluka of the Ahmednagar District. Witness No. 8, a sweetmeat seller of Pathardi, deposed that the people in his neighbourhood are afraid of these "Rohillas" and witness No. 11 the Chief Constable of Ahmednagar Camp, deposed that when thefts take place in Camp every complainant gives accused's name. Also accused was suspected of a theft last July and again in August. The Head Constable of Pathardi (No. 1) and the Police Patel of Pathardi (No. 3) who deposed that accused lived at Chandgaon are contradicted as to this point by the Police Patel (2) and Kulkarni (7) of Chandgaon. No doubt he has visited the neighbourhood; and it is possible that these Pathans have (as stated by the District Magistrate) Loukari relations with the members of the criminal classes. But that fact is not sufficient proof that Sherkhan is an habitual robber, or thief. The fact that he could not produce an approved surety must not be strained against the accused. It seems doubtful whether the First Class Magistrate would have accepted one of these "Rohillas" as a surety, and it is not likely that accused has intimate friends of good position of a different class.

We reverse the order of the First Class Magistrate and direct the accused to be set at liberty.

FULTON, J.—I concur. By an habitual thief or robber is meant a persón who has committed thefts and robberies in the past and is ready to commit them again when opportunity offers. We cannot o course lay down any rule that in order to prove that a person is an habitual offender there must always be proof of previous convictions for the law says that the fact may be proved by evidence of general repute or otherwise; but in cases in which there is nothing but evidence of general repute to go upon that evidence must be so general and overwhelming as to leave no practical doubt that the accused has been in the habit of committing thefts and robberies or other offences of the kinds specified. Before then making an order for security under section 110 the Magistrate must ask himself whether he is satisfied that as a matter of fact the suspected person has committed several offences in the past. In some such cases he may be able to answer this question in the affirmative and may say that he feels satisfied that unless the accused had committed such offences there would not have been such a consensus of opinion unfavourable to him but unless he can do so it is obvious that he cannot decide that the person

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before him is an habitual offender. In the present case the evidence does not seem to be such as to render it reasonably certain that Sherkhan has committed thefts or robberies. The Rohillas bear a bad repute and many of them have probably earned this repute by their misdeeds but the evidence that Sherkhan personally has a general repute so bad as to justify the Court in believing him to be a thief by habit is not very strong. The question no doubt is one of fact in regard to which this Court would not ordinarily interfere in revision, but I think in the present case it is necessary to do so because the Magistrate's judgment though carefully prepared does not make it clear that the necessity of being satisfied that Sherkhan had actually committed thefts or robberies was present to his mind.

As a general rule I think that although proof of previous convictions is not absolutely essential the Courts must be very careful in the application of section 110 to persons who have never before been convicted. For suspected persons who have no ostensible means of subsistence or who cannot give a satisfactory account of themselves section 109 is provided.

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23 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Chunilal.*

Act XII of 1885, Sec. 8, Rule 3—Petroleum—Importation—Land.

Petroleum imported by land into British India from territory beyond the limits of British India, but not shown to have been imported from any port does not come within the restrictions imposed by Rule 3 of the Rules framed for regulating the importation of petroleum by sea into the Presidency of Bombay.

PER CURIAM:—We think that the conviction must be reversed. We do so on the ground that Rule 3 provides not that petroleum from any place but that petroleum from any port in Burma or from any port beyond the limits of British India may not be brought into British India by sea or land except at the ports of Bombay, Karachi and Aden. Can it be said that the petroleum in the present case comes within those qualifying words? It was from Bhavnagar, so accused says, and the fact is accepted by the prosecution. But it is not shown that it was from the port of Bhavnagar. It may have come to Bhavnagar by land, and not been near the port at all. The Rule speaks of importation, that is bringing by sea or land; but the petroleum which may not be so brought except under certain limitation is petroleum from a port, and the importation in the Rule is also limited to bringing to a port. The fine of paid to be refunded. The order of confiscation to be set aside and the petroleum to be returned.

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*Criminal Ruling 16 of 1893. Criminal Application for Revision No. 442 of 1892.

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27 March 1893. TELANG, CANDY & FULTON, JJ.

Queen-Empress v. Yesu.*

Sessions Judge—Jury—Mis-direction—Non-direction—Criminal Procedure Code (Act X of 1882), Sec. 298.

As a general rule non-direction by Judge to the jury does not amount to mis-direction; and the High Court will not interfere with the verdict of a Jury because there was non-direction unless the circumstances were such as to make the non-direction amount to a mis-direction.

CANDY, J.—In my opinion the Sessions Judge misdirected the Jury. After telling them rightly, "what you really have to see is what was the intention of the parties," he went on to say, "Now the prosecution has produced evidence to show that accused is a prostitute. In the first place in her examination before the Magistrate she is asked what her occupation is and she states *Kasab karane va pan tambaku vikane.* Now that is an important admission. Is it likely that any chaste woman would gratuitously make an admission that would impress an ineffaceable stain on her character? Then I come to the extract from the Income Tax Register, in which accused is described as a prostitute. Now though the accused is not bound by the entry in that Register, you have the fact that she was so described, and no steps are taken to correct the description. If mistake it had been surely she would have shown some virtuous indignation at being thus opprobriously designated."

On turning to the record it appears that the "important admission," on which the Sessions Judge laid such stress, does not exist. In the vernacular record of the statement made by the accused on 3rd November in the committal proceedings it is recited, *not* that she was asked what her profession was, but the description is given by the Karkun as noted by the Sessions Judge; and in the English record of the same statement the Magistrate made no mention of her profession, which he would have made had accused made such an important admission. Indeed, it is impossible to understand how she could have made such an admission, for, as noted by the Magistrate in his grounds of commitment, she in October had pleaded before him in the enquiry under section 202 that she had not followed the business of prostitution for the past three years. He did not believe that assertion, not because she had subsequently admitted before him that she was still a prostitute—the ground which of course he would have taken had she made such an admission—but because there was evidence which he believed to that effect. This is not a mere technical error to which no objection was taken at the trial. There is nothing on the record showing that the public prosecutor relied on an alleged admission before the Magistrate, or that the pleader for the accused had any opportunity of contesting the point. If the prosecution did

*Criminal Ruling 17 of 1893. Criminal Appeal No. 316 of 1892.

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mean to rely on it, then certainly the Magistrate and his Karkun should have been called to prove the point.

Next with regard to the fact in connection with the Income Tax Register, on which the Session Judge laid much stress:—instead of no steps having been taken to correct the description, Exhibit 10 shows that in 1891 accused did appeal to the Collector, asserting that she did not carry on prostitution, and it is fact that in August 1892 the tax was remitted she saying that she had no assessable income. The Session Judge would have been justified in commenting on those facts; but he was not entitled to ignore them, or to tell the Jury that no steps had been taken by the accused. It is not a question of virtuous indignation at an opprobrious designation. The woman had been a prostitute; she admitted as such to the Magistrate, but she asserted that she was not still one, and the steps she took in the matter of the Income Tax Register tends to support that assertion. Therefore when the Jury were told that, in appreciating the direct evidence that she was still a prostitute, they were bound to lay stress on the facts that she admitted that she was still a prostitute and that she took no steps in connection with the Income Tax Register, they were in my opinion clearly misled.

The direct evidence consists of the depositions of the following witnesses:—Ganpati examined on 11th November in the Sessions Court said that he had a month ago slept with a woman at the house of accused. Examined by the Magistrate on 1st November he said that 18 or 20 days ago he had slept with accused herself. Lala examined on 11th November said that he had slept with her 35 days ago, and when he went a second time the pimp turned him away. Mohanlal deposed that Lala had told him of his visit to accused; and he stated also that men come and go to her. There is nothing to show how the Police came to know of the evidence of these three men. The Magistrate noted that accused's neighbours were unwilling to say that she is a prostitute. Having regard to the above facts it seems to me that the proper course for us to take would be to order a new trial.

The present Chief Justice of this Court in *Reg.* v. *Fattechand* (1) said—"I am inclined to agree with Mr. Justice *L. Jackson* that it would not be safe to lay down any rule, although probably in most cases the ends of Justice would be satisfied by considering whether if the case had been tried by a Judge and assessors the Court would set aside the finding."

The remarks of Mr. Justice *Jackson* to which *Sargent* C. J., referred are to be found at page 95 of W. R. in the report of the well known case of *Reg.* v. *Elahi Buksh*. He said—"In regard to the proposed rule that

(1) 5 Bom H. C., 58.

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we should not interfere in cases of misdirection where the facts are such that, if the trial had been heard before a Judge and assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe—I might say it is rarely safe—for an appellate Court with papers before it. to put itself in the place of the Court below which has heard the witnesses; and it might be that in affirming the conviction on the faith of some unnoticed circumstance of corroboration found in the evidence, we might be using that which the Judge and Jury would not have relied upon. But this perhaps only suggests caution in the application of the rule, rather than an objection to the rule itself."

Now here the admitted fact of obtaining possession of the little girl (aged 4) was not *per se* criminal. The specific intent or knowledge which renders it criminal must be established by cogent evidence. Taking the registered document from the father was not criminal. Nor would it by itself be evidence of the specific intent, which must be proved before conviction can be had under section 373. Naturally the accused would not care to keep the child for a year or two, and then be forced to give it up to the father should he claim it. The woman has already one girl and two boys, whom she employs apparently in her shop. It is not contended that she is a *naikin*, in which case the tender age of the child has been held not to negative the belief that the child was likely to be used for an immoral purpose. The Session Judge may have been right in ridiculing the idea that the woman was actuated by benevolent or charitable motives; but it is not an unreasonable defence that she may have wished to marry the girl to one of the boys in her keeping. On the other hand it is possible that the intention of the accused was that the girl should be eventually employed as a prostitute. It is a question to be determined on the evidence and on all the circumstances of the case whether the prosecution has made out the criminal intention; and it is a question which is pre-eminently for a Jury, after weighing all the evidence and circumstances, and after being carefully and accurately directed as to the evidence and facts. I think that the accused is entitled to have her case fairly put before the Jury, and I think also that the prosecution may claim to have the case put on a wider basis than the alleged fact that the accused is at the present time a prostitute. It is possible that she may—as alleged by her—have ceased to be a prostitute herself, but there was apparently evidence—certainly before the Magistrate—that she kept a brothel, and I do not think that the attention of the Jury was clearly called to this point.

The case is one of some difficulty, one, as I have said above, which seems to be specially for a Jury to determine. I would, therefore, order

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a retrial. But as my learned colleague is unable to come to any other conclusion than that the appeal should be dismissed, the case must be laid before another Judge (Section 429).

FULTON, J.—I do not think that there has been any substantial misdirection or that the Jury have been misled thereby. It was not suggested that there had been any misdirection on points of law but it was argued that the Judge summed up too unfavourably to the prisoner and without sufficiently emphacising the facts which Mr. Manekshah contended told in her favour. The most serious ground for urging that there was a misdirection was that the Judge, when he laid stress on the fact that Yesu was described as a prostitute in the income tax returns and said that no steps had been taken to correct the descriptions and that if it had been mistaken she would surely have shown some virtuous indignation at being thus opprobriously described, omitted to point out that in the extract dated the 23rd September 1891 she was reported to have said that she had no shop and did not carry on prostitution. I think it would have been better if the Judge when calling attention to these extracts had specially noticed this entry of 30 April 1891, but still I cannot say that there was any actual misdirection. She had been similarly described as prostitute in the income tax proceedings of 1887, 1888 and 1889 and there is nothing to show that until 1891 when she said she did not carry on prostitution she had ever raised any objection to the description. Even in 1891 there is not much trace of indignation in her statement that she has no shop and does not carry on prostitution. There seems to have been a desire to avoid income tax but nothing more. If she had really been indignant at being described as a prostitute it was open to her to petition the Commissioner under section 27 of the Income Tax Act (II of 1886). Such a petition might have been unavailing; but it was a remedy which one might certainly have expected a virtuous woman, wrongly assessed on the ground that she was a prostitute, to have attempted. Consequently when the Judge in his charge said that no steps had been taken to correct the misdescription and that if it had been mistaken the accused would surely have shown some virtuous indignation at being thus opprobriously described. I do not think there was any misdirection of a kind to prejudice the accused though the language used was possibly not quite so accurate as would have been employed in a judgment.

Next it was contended that when the Judge referred to the description of the accused in the statement of the 3rd November in which her occupation was said to be prostitution and shop keeping, he ought to have pointed out that as her principal ground of defence was that she was not a prostitute, she could not thus

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have described herself and that in the statement of 18 October she merely described herself as a shop-keeper. It was also said that as the question, in answer to which the description of the accused's profession is recorded, was not taken down the answer was inadmissible as not being recorded in accordance with law. As regards this technical objection I have to observe that although an irregularity in the record may render useless a confession recorded under section 164, I do not think that such an irregularity as the omission to record the question put does render the answer given at the examination of a prisoner during the commital proceedings, which under section 287, Criminal Procedure Code, must be rendered by the prosecutor and read as evidence, inadmissible in the absence of any objection taken at the trial. Had such an objection been taken I feel sure some note of it would have been made and it would doubtless have been met in the manner provided by section 533. Such being the case it would hardly be proper now on appeal to reject the evidence for I think it must be held that as the accused was defended by a pleader who cannot have failed to notice the compromising nature of the description she waived the technical objection that the question had not been recorded. Turning now to the objection that the Judge ought to have cautioned the Jury as to the improbability of the accused making such a statement, I do not think there was any actual misdirection. The Judge possibly thought it was more probable that she did make the statement than that an erroneous record had been prepared. If the accused's pleader thought she did not make the statement and that the record was incorrect he must have commented on the fact; but the Judge's charge leads me to think that no such suggestion was made at the trial and that the possibility of the incorrectness of the record did not occur to any one till the case came up on appeal. As to the statement of October 18th in which she described her profesion as shop keeping it does not appear to have been put in evidence either by the prosecution or defence. Strictly speaking, therefore, we are not entitled to look at it; but if we did, it not would hardly help the accused as it contains a clear admission that she was a prostitute upto three years ago and there is relly no evidence excepting that of the man who keeps her to suggest that she has changed her mode of life. Probably it would have been better if it had occurred to the Judge to tell the Jury that as accused's defence turned in a great measure on her denial of prostitution it was unlikely that she would have intentionally described herself as a prostitute; but the point seems to me immaterial for independently of this heading the other evidence on the record to my mind clearly proves the fact that she is one.

The other objections urged by Mr. Manekshah were that the Judge

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had taken too unfavourable a view of the agreement and should have told the Jury that they ought to presume *prima facie* that it was a *bona fide* agreement and not one merely intended to cover an immoral transaction, that he should have told them that possibly the accused was misled by the father telling her that his wife had deserted him, that the evidence of No. 13 was all hearsay, and that the age of the child negatived the idea that she was obtained for immoral purposes; while the fact that she had under her charge other children of both sexes suggested that she was acting from motives of benevolence. As regards No. 13 the Government Pleader pointed out, I think, correctly that his evidence is not hearsay because the witness said that he knew she was a prostitute because men come and go to her. In cross-examination he was asked about certain individuals whose statements doubtless were hearsay, but there is nothing to show that his statement that men come and go to her was not the result of his own observations. As to the other points I think the Judge was entitled to express his own opinion and I do not think that he did so more unfavourably than the evidence warranted. The Jury doubtless heard the arguments of the accused's pleader who must have used much the same arguments as those so clearly and forcibly put before us by Mr. Manekshah and I do not think they were misled by the unfavourable impression traceable in the observations of the Judge. The evidence was in my opinion such as fully justified the verdict. In the case of *Queen-Empress* v. *Tippa* (1) alluded to by the Government Pleader the age of the child (5 or 6) was not held to negative the belief that she was likely to be used for an immoral purpose. It is perfectly clear that the accused bears the reputation of being a prostitute and there is nothing to indicate that she has ever made any serious effort to get rid of this reputation. I see no reason for disbelieving witnesses 11 and 12 who say that she is a prostitute. It was said that these were chance witnesses picked up by the Police, but if they were false witnesses and if the accused is not a prostitute she ought to have been able to get some of her neighbours to come to say so. Her omission to call witnesses to her character which had been seriously impunged for several years could hardly fail to weigh heavily with the jury. The agreement to my mind is much more suggestive under the circumstances of an attempt to conceal an immoral purpose or a guilty knowledge than of a desire to obtain the child in order to get her honorably married, for if the accused's motives were good there seemed no reason for registering an agreement which could not be effected without some expense or indeed for making any written agreement at all. Her refusal too to give back the child to her

(1) I. L. R., 16 Bom. 737.

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mother without payment of exorbitant charges seems against her. Looking to the summing up as a whole I do not think there was any misdirection and I consider that it would be undesirable to set aside the verdict of the Jury. It was their duty to Judge of the intention or knowledge of the accused from her conduct and the inference which they drew seems to me to be such as would ordinarily be drawn. Moreover, even if there was any misdirection, we can only set aside the decision if such misdirection occasioned or may have occasioned a failure of justice and as on the evidence I think that the accused ought to have been convicted I would decline to interfere; section 537, Criminal Procedure Code; *Queen* v. *Fattehchand* (2). If the case were a doubtful one turning on the appreciation of conflicting evidence it might (assuming that there was a misdirection) be necessary to order a retrial; but in the present case I can see no room for doubt, for considering the immoral life the accused herself had led, it seems impossible to doubt that she obtained the child otherwise than with a knowledge that it was likely to be used for immoral purposes. In the Full Bench case of *Reg.* v. *Pestanji Dinsha*, (3), *Westropp* C. J. in an elaborate judgment explained the law as follows:—"But even on motion for a new trial non-direction is only a ground for granting a new trial where the verdict is against the weight of evidence (*Ford* v. *Lucy &c.*,) and in *Duke of Newcastle* v. *Broxtowe* it was said on a motion for a new trial in a case of alleged misdirection that it is only in those cases in which the Court is satisfied that the Jury has been led to a wrong conclusion that it ought to interfere. The same doctrine has been frequently laid down. What the Court looks to is whether complete and substantial justice has been done; if so there is no reason to grant a new trial. These it is true were all civil cases but the principle is equally sound in criminal cases."

In the course of argument attention was called to the procedure in examining the accused at the beginning of the trial and it was said that this was irregular as the accused could by law only be examined for the purpose of enabling her to explain the evidence against her. At the time of her examination only her statement before the committing Magistrate had been recorded and some of the questions put to her appeared to go beyond what was then in evidence against her. Her attention too was not specially directed to the heading of her statement before the Magistrate. Assuming however, that the examination was irregular, it does not appear that she was prejudiced thereby as she does not seem to have made any damaging admissions. As she was defended by pleader there was full opportunity for him afterwards to explain the evidence against her.

(2) 5 Bom., H. C., 85. (3) 10 Bom. H. C. 88.

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I would dismiss the appeal.

TELANG, J.—This case has been referred to me under section 429 of the Code of Criminal Procedure in consequence of a difference of opinion between *Candy* and *Fulton* JJ. who originally heard it, Mr. Justice *Candy* having been of opinion that there had been such a material misdirection by the Sessions Judge as to require a new trial to be directed, while Mr. Justice *Fulton* was of a different opinion. I have had the advantage of reading their opinions as also of hearing an argument on the points arising in the case from Mr. *Branson* for the prisoner and Rao Saheb *Vasudev Jagannath Kirtikar*, for the Crown.

The points of misdirection alleged I gather to be as follows:—(1) That the prisoner did not in fact admit herself to be a prostitute as the Sessions Judge nevertheless told the Jury she did. (2) That the prisoner, contrary to what the Judge told the Jury, had in fact objected to being described in the Income Tax papers as a prostitute. (3) That the proceedings before the Magistrate in which the accused and the father of the girl took part should have been put to the jury as weighing in favour of the innocence of the accused, and not the other way. (4) That the attention of the Jury should have been drawn to the evidence of witnesses Nos. 14, 15, 16. (5) And that the evidence of witness No 13 and the Income Tax papers should not have been placed before the Jury at all because they were legally inadmissible. It is not, I think, to be denied that there is considerable ground for the criticism of the summing up of the Sessions Judge on several of the matters above noted. For instance, there can be no doubt that strictly speaking there is no evidence of any admission by the prisoner of her being a prostitute. Or again when the Judge told the Jury that the prisoner had not objected to her occupation being registered as prostitution, that too is not a strictly accurate statement of the evidence. Further, I cannot doubt that the third and fourth points above enumerated ought to have found some place in the summing up of the learned Judge. And it is, I think, to be regretted that in the charge to the Jury (where as a rule there is necessarily no opportunity for rectifying the results of any errors), greater care was not taken in placing the evidence on these points accurately and precisely before the Jury.

As regards the evidence of witness No. 13, I am unable to agree with the learned counsel for the prisoner in thinking that his evidence was wholly inadmissible and would be excluded, if a new trial were ordered. I am of opinion that his answers in examination-in-chief were in strictness, not inadmissible, though perhaps on cross-examination directed to the witness's means of knowledge they might have turned out to be of little value; and the hearsay evidence elicited from him was elicited in

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cross-examination, not in examination-in-chief nor, I think, were the Income Tax Papers legally inadmissible. Looking at section 16 of Act II of 1886 and to the admitted circumstance that the prisoner made a representation to the authorities about the entries relied on, I cannot hold that those papers were inadmissible as contended by the learned counsel. The question therefore that presents itself in the case is whether the four points enumerated above constitute such misdirection as to have occasioned an erroneous verdict, for it is not every misdirection which would justify this Court in disturbing the verdict of a Jury. And looking at the case as a whole, I have come to the conclusion, that the misdirection here is not of such a nature as to require the interference of this Court. As a general rule non-direction is not mis-direction: *Anderson* v. *Fitzgerald* (1). And although no doubt there may be circumstances in which non-direction may amount to mis-direction (I. L. R. 7 Cal., 42). I don't think this to be such a case, looking to all the circumstances connected with the evidence adverted to on this point. And as to the points touching the prisoner's occupation, her admitted former occupation renders the error on that point also one of comparatively small importance; while the circumstances show, that in itself the error is much less serious than it was assumed to be in the argument on behalf of the prisoner. Upon the whole, therefore, I have come to the conclusion, that the case does not furnish sufficient grounds for justifying this Court in interfering in any way with the verdict of the Jury.

I ought to add that in argument before me it was contended that there was no evidence to go to the jury and that the prisoner was entitled to an acquittal. This was not the view taken by either of my learned colleagues, and does not appear to have been argued before them. I am of opinion, however, that the argument is unsustainable; and that there being some evidence, which, if believed, proved the offence, the case was properly left to the jury for its verdict.

The appeal must be dismissed.

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29 March 1893. CANDY & FULTON, JJ.

Queen-Empress v. Govinda.*

Criminal Procedure Code (Act X of 1882), Secs. 438, 191 (a), (b), 350—Magistrate.

A Magistrate who succeeds another Magistrate in his office has power under section 350 of the Criminal Procedure Code to try a case in which his predecessor has issued process and has granted a formal adjournment, but has recorded no evidence.

In a case begun by a Magistrate and continued by his successor, the latter has power under section 191 (*a*) and (*b*), Criminal Procedure Code, to issue process for the arrest of an accused against whom a process was not issued by the Magistrate who began the trial.

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(1) 4 H. L. C. 484. **Criminal Ruling* 18 *of* 1893. Criminal Reference No. 1 of 1893.

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PER CURIAM.—From the reference of the District Magistrate it appears that accused, 1 to 12 were arrested by the Police under section 6 of Bombay Act IV of 1887 (Gambling Act) and placed before the First Class Magistrate of Kumpta who issued warrants under the Criminal Procedure Code for the arrest of accused 13 to 20 and formally adjourned the case from 19th to 23rd August. Before, however, recording any evidence the First Class Magistrate was transferred to another District and his office was temporarily placed in charge of a Third Class Magistrate. This Magistrate took up the case against 1 to 20 and also issued a warrant for the arrest of No. 21 and finally convicted all of them excepting Nos. 14 and 17. On appeal by the convicted persons excepting accused No. 12, the First Class Magistrate with Appellate Powers reversed the conviction of the said appellants on the ground that the Third Class Magistrate was not competent to continue the proceedings against Nos. 1 to 20 or to initiate proceedings against No. 21 and referred the case to the District Magistrate, with a request that he would decide what course should be adopted as he could not order a retrial, the Third Class Magistrate of Kumpta not being subordinate to him. On receipt of the papers, the District Magistrate Mr. Sheppard transferred the case to a Second Class Magistrate at Kumpta for retrial, but some further correspondence having taken place his successor Mr. Lamb referred it to the High Court with a view to the decision of the Appellate Court being set aside and an order being passed that the appeal should be disposed of on the merits. Notice has been given to all the Appellants but no one has appeared on their behalf.

In thus referring a case in which an order for retrial had been given by his predecessor, we think that Mr. Lamb exceeded the jurisdiction conferred on him by section 438, Criminal Procedure Code, but as the papers are now before us and as we agree for the most part with the remarks of Mr. Lamb and consider that a retrial would cause great and unnecessary inconvenience both to the accused persons and the witnesses and as it is open to us under section 439 to review any case in whatever way it may have come to our knowledge, we now proceed to deal with the questions raised in Mr. Lamb's letter.

As regards accused 1 to 20 we agree with the District Magistrate who made the reference in thinking that Mr. Divatia's order reversing the conviction on the ground that the Third Class Magistrate had no jurisdiction to continue the proceedings was erroneous. The Code, it is true, contains no express provision for the continuation of cases in which process has been issued by a Magistrate who has been transferred, before they have come on for hearing. Section 350

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does not of course purport to deal with such cases, but it shows that one Magistrate may succeed another, and that when that occurs the successor may continue the hearing of cases, in which evidence has been partly recorded by the predecessor. In what way succession can take place excepting by the appointment by competent authority of one Magistrate to carry on the duties of the previous Magistrate, it is difficult to imagine. By practice the Magisterial work of a District is distributed between the holders of various administrative offices in such District and when a new officer is appointed to any such office the intention is that he is to carry on all the duties (including the Magisterial duties) usually connected with such office. He thereby becomes the successor of the out-going Magistrate and is we think authorized to continue all cases whether part heard or otherwise of which the preceding Magistrate had taken cognizance before his departure. Section 350, it will be observed, assumes that the successor of a Magistrate who has partly heard a case may have and exercise jurisdiction therein and we believe it has never been doubted that a Mamlatdar or Assistant Collector with Magisterial powers can finish the cases commenced by his predecessor so far as they fall within the Magisterial jurisdiction conferred on him by Government. We think then that a similar rule must prevail in regard to cases taken cognizance of by a Magistrate transferred elsewhere although the examination of witnesses has not commenced at the time of the transfer. If jurisdiction may as a matter of course be exercised by the successor after the hearing of evidence has begun, there seems no reason why it should not be exercised where the evidence has not been commenced. To require a stay of proceedings in the latter case pending the receipt of an order of reference from the District Magistrate would cause much unnecessary inconvenience both to accused persons and witnesses. Moreover there is no section very suitable as an authority for such reference; for section 528 contemplates the withdrawal of a case from a Magistrate and its reference to another and the expression " withdrawal " could hardly be used appropriately when a Magistrate had died or been transferred before the receipt of orders about the disposal of his pending cases. Section 192 seems equally inapplicable.

As regards all the appellants (excepting accused No. 21) we think that Mr. Divatia was in error in reversing the conviction on the ground that the Magistrate had no jurisdiction to try the case. The mere fact that he was a Third Class Magistrate and that his predecessor had First Class powers does not seem to affect the question as both were equally competent to try cases under the Gambling Act.

As regards accused No. 21 the case is different. He was arrested by a

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warrant issued by the Third Class Magistrate. We agree with the District Magistrate that as there had been a complaint and Police Report relating to the offence of gambling for which this accused was arrested it was competent to the Third Class Magistrate under section 191 (*a*) and (*b*) to take cognizance of that offence and issue a warant for the arrest of No. 21. We think, therefore, the reversal of his conviction in appeal on the grounds stated by Mr. Divatia was erroneous.

We set aside the orders in appeal passed on 3 November 1892 by Mr. Divatia and direct that the appeals be disposed of on their merits by the District Magistrate or such other Magistrate with appellate powers as he may think proper to refer the case to.

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4 April 1893. CANDY & FULTON, JJ.

Queen-Empress v. Alibax.*

Criminal Procedure Code (Act X of 1882), Sec. 408, proviso (a)—Sessions Judge—Jurisdiction—Appeal—Indian Penal Code (Act XLV of 1860), Sec. 395.

When a Sessions Judge has confirmed the sentences passed by an Assistant Sessions Judge on some of the accused persons in a case, he has no jurisdiction to hear the appeals preferred by any of the prisoners in that case, as such appeals under section 408, proviso (a) of the Criminal Procedure Code, all lie to the High Court, irrespective of the length of sentence.

ORDER.—Register this application as an appeal. The Sessions Judge should be informed that as in this case he had confirmed some of the sentences he had no jurisdiction to deal with the appeals of any of the prisoners which all lay to the High Court (irrespective of the length of sentence, under provision (*a*) of section 408 of the Criminal Procedure Code.

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5 April 1893. CANDY & FULTON, JJ.

Queen-Empress v. Mulubhai.†

Criminal Procedure Code (Act X of 1882), Sec. 528—Transfer of case—Notice.

An order under section 528 of the Code of Criminal Procedure, for the transfer of a case from the Court of one Magistrate to the Court of another Magistrate, should not be made on the *ex parte* representations of the complainant only but notice should be given to the accused before making the order, as the order might operate to the prejudice of the accused.

PER CURIAM :—The District Magistrate in making his order of transfer made two mistakes. He omitted to record in writing his reasons for making the order as provided by the last clause of section 528 of the Criminal Procedure Code (amended by Act III of 1884); and having regard to the fact that he was acting solely on the *ex parte* representations of the complainant in the case, he should have given notice to the accused persons before passing an order which might have operated to their pre-

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**Criminal Ruling* 19 *of* 1893. Criminal Appeal No. 108 of 1893.

†*Criminal Ruling* 21 *of* 1893. Criminal Application for Revision No. 80 of 1893.

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judice. This is the principle which has been followed by this Court (see application for Revision 166 of 1889, Criminal Ruling No. 32 of 8th July 1889), and the expediency of such a procedure is obvious. In the present case it appears that the Chief Constable of the Goga Taluka sent up a case to the Mahalkary (2nd Class Magistrate) under sections 147, 341 of the Indian Penal Code. The complainant, the Revd. R. W. Sinclair, then made a written application to the District Magistrate, which he forwarded through the Assistant Collector and First Class Magistrate Mr. J. K. N. Kabraji, asking for the case to be transferred to a First Class Magistrate. This application Mr. Kabraji forwarded to the District Magistrate with a private note from Revd. R. W. Sinclair, (which has not been certified to this Court). Mr. Kabraji apparently and very rightly expressed no opinion regarding the case, but merely told the District Magistrate that he had been expecting the case to be sent to him. (He apparently thought that it was a case of an offence which could be tried by a First Class Magistrate only).

On receipt of these communications the District Magistrate at once transferred the case to Mr. Kabraji. The result was that the accused persons were summoned to appear before Mr. Kabraji at his camp at Detroj, a place several miles beyond Viramgaum. The hardships likely to be caused to all the accused persons and the witnesses in the case by this circumstance is obvious. Application was then made to this Court on behalf of the accused persons; and accordingly an order was issued calling for the Record and Proceedings. That order was endorsed by the District Magistrate as follows :—

"In returning this Writ the undersigned has the honor to invite attention to my letter No. $\frac{C.M.}{4}$ of this date. He has no papers on my record as he transferred the case on a simple note from Mr Kabraji, which was returned to him by return of post with an endorsement, to the effect that the case had been transferred. In his letter $\frac{C.M.}{5}$ the District Magistrate stated that he had received a brief note from Mr. Kabraji informing him that there had been a serious shooting case in a Ghoga village, and that it appeared that money had been extorted and suggesting that the case should be transferred to him. The District Magistate added that the complainant Revd. R. W. Sinclair has made no application to him for the transfer of the case, and that he rarely if ever allowed transfer of cases at the request of either party, but only on the application of a Magistrate or of my own motion which is practically what happened in this case."

The District Magistrate's memory must have been singularly at fault. The record shows that Mr. Kabraji made no suggestion that the

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case should be transfered to him. Action was taken solely on the *ex parte* representation of the complainant.

On a careful consideration of the facts we have decided that it is not necessary to interfere with the District Magistrate's order transferring the case to Mr. Kabraji. The Magisterial proceedings have not commenced; no evidence has been recorded. The defect owing to absence of notice has been cured by our having had the advantage of hearing Mr. Kalabhai for the accused persons. Mr. Kabraji is now in the Gogha Talaka, or is about to proceed their immediately. We understand that he has been directed to dispose of the case while in Gogha Taluka; and on that understanding we can leave the case where it is, as no inconvenience will be caused to the accused, as was the case when they were summoned to Detroj. We have no reason to suppose that Mr. Kabraji will not deal with the case with perfact impartiality. Though he committed an error of Judgment in permitting the complainant to address a private note to him in connection with the case, and in forwarding the same to the District Magistrate, he has apparently expressed no opinion on the merits of the case. He can now dispose of it as speedily as possible.

With reference to his letter to the Deputy Register, No. 531 of 30th March 1893, Mr. Kabraji should be informed that the High Court can not take notice of any representation on such a subject by letter.

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20 April 1893. CANDY & FULTON, JJ.

Queen-Empress v. Ganpatram.*

Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 33 (2)—Municipality—Notice—Building.

The effect of clause 2, section 33, of the Bombay District Municipal Act, 1873, which permits a person to erect the building of which he has given notice, if within the period prescribed the Municipality has failed to issue written orders, is by implication to prohibit the erection of any building within such period, unless in the meantime written orders have been issued.

THE accused on the 8th September 1892, gave notice of building on a particular piece of land at Broach to the Broach Municipality under section 33 of the District Municipal Act. Without waiting, however, for the requisite sanction, the accused commenced the erection of the house. He was, thereupon, tried by the First Class Magistrate of Broach under sections 33 and 74 of the Act and fined in a sum of Rs. 2.

PER CURIAM.—The building erected appears to be a shed and therefore within the definition.

Although section 33 of Act VI of 1873 does not seem to have been

*Criminal Ruling 22 of 1893. Criminal Application for Revision No. 19 of 1893.

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very carefully drafted, we think that the effect of clause 2 which permits a person to erect the building, of which he has given notice, if within the period prescribed the Municipality has failed to issue written orders, is by implication to prohibit the erection of any building within such period unless in the meantime written orders have been passed. We, therefore, reject the application.

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1 June 1893. CANDY & FULTON, JJ.

Queen-Empress v. Mahadu.*

Bombay District Municipal Act (Bom. Acts VI of 1873, and II of 1884), Sec. 84—Cess upon houses—Rule—Construction—" Yielding a yearly rent."

Where it appears to be the intention of a Municipality in drawing up certain rules that a cess should be levied not only on houses actually yielding rent, but also on houses capable of yielding rent, and the cess is recited in the rules as imposed on every house "yielding a yearly rent," the expression must be treated as equivalent to the expression "capable of yielding a yearly rent."

THE accused Mahadu failed to pay Municipal tax Rs. 3-9-0 for the year 1892-93 for the house in which the accused himself lived and the Municipality applied to the Third Class Magistrate of Sholapur for the recovery of it under section 84 of Act VI of 1873, as amended by Act II of 1884 (Bombay). The Magistrate ordered the accused to pay the tax Rs. 3-9-0 and a fine of 14 annas.

The District Magistrate of Sholapur, being of opinion that the conviction was illegal, made this reference to the High Court, observing:—"The wording of the rules is as stated by the applicant 'every house yielding a yearly rent &c.' and the word 'yielding' has as a matter of fact and practice been taken by the local Courts to mean not only 'actually yielding' but also 'capable of yielding' and the tax has been levied accordingly. That it was the intention of the Municipality to levy water-cess not only on houses actually yielding but also on houses capable of yielding rent is I believe certain—but unfortunately the rules are carelessly drafted, and I do not think that the simple word 'yielding' can fairly be construed as including 'capable of yielding'."

PER CURIAM:—We think the interpretation put on the rule by Mr. Tagore and by practice is correct. Where the intention is perfectly certain, as in the present case, the literal meaning of the words must give way. Many instances will be found in which it has been necessary to modify the language of statutes in some small degree so as to make them consistent with the obvious meaning of the Law which, it will be remembered, is the will or intention of the Legistature and not merely the language in which that will or intention is communicated. The

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**Criminal Ruling 23 of 1893. Criminal Reference No. 42 of 1893.*

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general rule no doubt is that the will or intention must be gathered from the grammatical meaning of the words used and this rule especially prevails in the construction of penal statutes; but it is always qualified by the presumption that exists against the Legislature having intended injustice or absurdity. In the present case, this presumption must prevail and the expression yielding rent must be treated as equivalent to the expression capable of yielding rent.

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12 June 1893. CANDY & FULTON, JJ.

Queen-Empress v. Waman.*

Indian Forest Act (VII of 1878), Sec. 64, and Sec. 41, Rule 26—Criminal Procedure Code (Act X of 1882), Secs. 222, 223—Indian Penal Code, (Act XLV of 1860), Sec. 414—Charge—General Charge—Pass—Forest Produce.

An *inamdar*, the owner of a forest, obtained, in October 1891, a book of passes authorising him to issue the same for the transit of forest produce belonging to himself. Between October 1891 and March 1892, he issued 50 of these passes covering forest produce, (*i. e.*, myrabolams) exceeding altogether 10 *khandis*; of these about one *khandi* may have belonged to the *inamdar*, and the rest, it was presumed, belonged to Government, but it could not be made out what particular pass or passes covered the produce belonging to the *inamdar*. The *inamdar* was prosecuted in respect of the passes issued for the myrabolams over and above his own, and was convicted by a Magistrate under sections 411 and 109, Indian Penal Code, and Rule 26 of the Rules passed under section 41 of the Indian Forest Act, 1878. The charge as framed by the Magistrate was in general terms with reference to all the transactions between October 1891 and March, 1892. On appeal, the Sessions Judge amended the convictions and found the *inamdar* guilty of an offence under section 414, Indian Penal Code, in respect of the myrabolams covered by the passes issued on 30th March, 1892 and also of a breach of the Rule 26 of the Rules passed under section 414 of the Indian Forest Act in respect of the abovementioned myrabolams.

Held, (1) that the conviction under Rule 26 of the Rules passed under section 41 of the Indian Forest Act could not be sustained, there being no express prohibition in Rule 3 against issuing such passes for the forest produce belonging to Government;

(2) that the general charge as framed by the Magistrate was correct.

CANDY, J:—As intimated at the hearing we must accept the facts found by the Sessions Judge. They seem very clear. Accused who is Inamdar of Gude, obtained in October 1891 a book of passes authorising him to issue the same in respect of forest produce belonging to himself. (Rules 3, 13 under section 41 Act VII of 1878).

Between October 1891 and March 1892 accused or his agent issued 50 of these passes, covering *hirdas* exceeding 10 khandis. The Sessions Judge has found it indubitably proved that the forest produce (*hirdas*) belonging to accused which could have been covered by passes in the abovementioned period, must at the very utmost have been within one Khandi. Whose property then were the 9 or more Khandis? Obviously these must have been the property of Government. The plea of the accused is that these

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*Criminal Ruling 24 of 1893. Criminal Application for Revision No. 74 of 1893.

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hirdas were all the produce of his own forest at Gude; if that is found to be utterly impossible, and no other plea is established as to whence the *hirdas* could have come, the natural inference is that they were the produce of the Government forests. And it is not denied that any pass-holder dealing with such *hirdas* as if they were his own property, when as a fact they were not, would be dealing with stolen property. It must have been criminally misappropriated and accused must have assisted in disposing of it.

So far there is practically no dispute. But it is contended for the accused that as the Sessions Judge has convicted him, not as did the Magistrate on the general charge of disposing of the *hirdas* between October 1891 and March 1892, but as the specific charge of disposing of 16 *maunds* of *hirdas* covered by two passes on 30th March 1892, the prosecution was bound to prove that those particular 16 *maund* were the property of Government and not the produce of the Gude forests. The Sessions Judge thought that this was proved, because the accused asserted that *all* the passes covered *hirdas* the produce of his own forests ; and taking him at his words as far as was possible it was evident that the limit of his own forest produce had been reached long before 30th March 1892, so the *hirdas* covered by the passes of 30th March could not have been the produce of his own forests. The answer made for accused to that argument is a change of plea, an assumption directly at variance with the plea, *viz.*, that all the *hirdas* covered by all the passes up to 30th March 1892 were the property of Government, and that the prosecution, by taking the *hirdas* covered by the passes of 30 March 1892, has hit upon the *hirdas* which happened to be the produce of Gude Forest. Whether it is open to the accused to raise such a defence, it is not in my opinion necessary to decide. For I am clearly of opinion that under section 68 of the Forest Act the burden was on accused to show that the *hirdas* covered by the passes of 30th March 1892 were not the property of Government. This he has not done. It was held by the Sessions Judge (contrary to the view taken by the Magistrate) that section 68 was not applicable to the present case. In my opinion the Magistrate was right. It is evident that the words of the section are intentionally wide, and it seems to me that it would be to deprive the words of their ordinary sense to say that the present proceedings are not in consequence of anything done under the Act. Everything in the case depends upon things done under the Act. Under section 41 the Local Government may prohibit the moving of produce without a pass or otherwise than in accordance with the conditions of such pass, provide for the establishment of depots to which produce shall be taken &c. Under the Rules accused obtained a

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book of passes for issue in respect of his own produce. No such pass can be given with regard to produce the property of Government, as that should be taken to the depots. The Forest authorities finding that accused was issuing passes for more produce than could possibly have been his own property, and that thus he must have been disposing of Government property, took proceedings against him, in which the question arose as to whether the produce in question was the property of Government. Accused purports to have disposed of these *hirdas* under the authority given him under the Act. In consequence of the accused purporting to issue passes under the Act, the *res gestae* come under the consideration of the Court. In my opinion it is only in consequence of things done under the Act that the question as to the ownership of the *hirdas* arises. In this view of the case I would confirm the convictions and sentences passed by the Sessions Judge under the Indian Penal Code. But I am unable to see how accused broke any of the Rules 2 to 24 of the Forest Rules (see Rule 26) or abetted the breach. If he had moved his own produce without a pass, he would have been guilty of a breach. But nothing in Rule 3 applies to produce which is the property of Government. Accused was authorized under Rule 13 to move his own produce with the passes : but the fact that he moved Government produce with the presses would not amount to a *breach* of Rule 13. I would, therefore, reverse the convictions and sentences recorded by the Sessions Judge on the 3rd and 4th convicts.

With regard to the case of *Reg.* v. *Hanmanta* (1) quoted by the Sessions Judge as an authority for not allowing a general charge, it may be pointed out that the charge of theft on which the High Court recorded a conviction was a general one "between 31st October 1874 and 30th June 1875." There the wood was removed at different times in excess of the wood which the accused were lawfully entitled to take. I am inclined, therefore, to think that it was unnecessary for the Sessions Judge to alter the charge as framed by the Magistrate.

Since the above was written we have heard part of the case reargued. I see no reason to alter the opinion which I had already formed. The facts found show that the accused must have devised the plan of dealing with the Government *hirdas* by means of the passes which he issued under Rules under the Forest Act which purported to relate to his own *hirdas*. In consequence of the accused issuing these passes the question arose whether the *hirdas* covered by them were the property of Government apart from the applicability of section 68 of the Forest Act, it is clear that the plea of the accused was that all the *hirdas* covered by the passes were

(1) I. L. R., 1 Bom., 610.

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the produce of his own forest. This plea was proved to be false. Therefore it is clear that some at least of the *hirdas* covered by the passes must have been Government property; and then, whatever may have been the exact form in which the charge should have been drawn up, it is clear that accused must rightly be convicted under section 414, Indian Penal Code.

Under these circumstances, I concur in the orders proposed by my learned colleague. A sentence of six months' rigorous imprisonment and fine of Rs. 75 to a man in the position of accused, is very serious, and will meet the justice of the case.

FULTON, J:—I quite agree with my learned colleague in thinking that the issue by the accused of passes to cover the transit of myrabolams belonging to Government was not a breach of either rule 3 or rule 13 under section 41 of the Forest Act. Rule 3 does not apply to Forest produce the property of Government and the authorization under rule 13 to the issue of passes for private myrabolams does not amount to a prohibition of the issue of passes for myrabolams the property of Government. Such passes would be unauthorized and without validity, but their issue would not be a breach of any rule as there is no rule applicable. It follows then that there was no proceeding taken under the Forest Act in which any question arose whether the myrabolams were the property of Government or not, for if they belonged to Government there could be no offence under Rule 3 which does not apply to Government produce and if they were private property they were covered by a pass and therefore no offence had been committed. It also appears to me that there was no proceeding in consequence of any thing done under the Forest Act. The only thing done under the Forest Act (though done very irregularly) was the issue of a Pass Book under Rule 13. The proceedings were subsequent to the issue of that book but I do not think they were consequent on it. They appear to me to have been consequent on the alleged dealing of the accused with Government myrabolams as if they were his own, and not on the issue by the Forest Officer of a Pass Book. The issue of a Pass Book may have facilitated the offence but I do not think it caused it. Therefore I do not consider that it can correctly be held that the issue of the Pass Book was the cause of the accused's misconduct or that these proceedings were the consequence of such issue or of anything else done under the Forest Act; and I agree with the Sessions Judge in holding that section 68 of the Act cannot be applied to this case.

I am unable however to hold that the Sessions Judge was right in finding that the 16 Maunds of myrabolams referred to in charge were

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stolen property. The facts found by him show that it is not impossible that 16 Maunds were the produce of the Gude Forest but if this be conceded it seems clear that we cannot say with certainty whether these particular items were stolen or not. The Government Pleader like the Sessions Judge argued that there was a presumption that the earlier items were not stolen and that therefore it followed that the latter items must be. But the presumption of innocence and honesty referred to applies to all items alike and not with special force to the earlier rather than the later items. The fact is we know nothing about them ; and if we admit that some of the items were stolen and some were not all we can say is that we do not know which items, whether earlier or later, were stolen. Consequently it follows that unless under the circumstances a single charge could be framed based on the evidence of the whole series of transactions the accused would have to be acquitted for it would be impossible to single out any one item and say with certainty that the myrabolams dealt with on that particular occasion were stolen.

When delivering Judgment I expressed my opinion that on the facts found by the Sessions Judge one such charge might have been framed and that therefore the conviction ought to be upheld but on the representation of Mr. *Khare* that the point had not been argued we decided to reserve it for a further hearing. To this course objection was taken by the Government Pleader who referred us to *Imperatrix* v. *Fox* (1) which shows that an order made by the High Court in revision cannot be reviewed, but without questioning the correctness of this decision we overruled the objection because no order had been recorded when the application was made. Mr. *Khare* asked to be allowed to argue the question directly the judgment was pronounced and the Deputy Registrar was thereupon at once instructed not to issue any order until the matter had been further considered. In the Full Bench case of the *Queen* v. *Godai Raout* (2) the CALCUTTA HIGH COURT while holding that in a criminal matter it could not review its own judgment remarked: "We do not mean to say that if before Judgment had been recorded the attention of the Court be called to any matter showing that there is an error or mistake in the Judgment pronounced the Court has not the power of correcting such error, or mistake." Now the soundness of this view cannot I think be impugned for it seems clearly reasonable and is in no way inconsistent with the decision in *Imperatrix* v. *Fox* which dealt with a recorded Judgment. In the present case the Judgment had not been recorded when the order to hear further argument was made.

(1) I. L. R., 10 Bom., 176. (2) 5 W. R., 61.

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Turning to the question at issue it appears from the Judgment that the Sessions Judge found that between the 25th October 1891 and 30th March 1892 the applicant issued passes covering the transit of 10 Khandis of myrabolams of which not more than one was his own while the other nine were stolen property. This finding based as it is on reasoning similar to that used in the case of *Regina* v. *Burton* (3) we accept as correct though for reasons which I have given above it seems to me that it is impossible to say on what days passes were issued for stolen myrabolams and on what days the passes covered myrabolams belonging to the accused.

Mr. *Inverarity* contended that under these circumstances it would be impossible to frame one charge under any section of the Criminal Procedure Code for even assuming that the greater portion of the myrabolams were stolen the accused if he assisted in disposing of them by giving passes to facilitate their transport committed on each occasion a separate offence for which under section 233, Criminal Procedure Code, a separate charge must be framed, that not more than three charges could be tried together, and that as it was not certain that any charges, relating to separate items would comprise an offence it was impossible on the facts found by the Sessions Judge to record a conviction. In support of this argument he referred to the cases of *Rex.* v. *Dunn and Smyth* (4) *Rex.* v. *Williams* (5) *Reg.* v. *Balls* (6) and *Imp.* v. *Fakirappa* (7). Of these the case of *Rex.* v. *Dunn and Smyth* in which it was held that where a prisoner was charged with receiving various articles of stolen property at different times the indictment must specify particular items seems most nearly applicable to the present case; but it must be considered subject to the remarks made in the later case of *Reg.* v. *Hinley* (8) in which when a father had received from time to time a number of pairs of boots stolen by his son on different occasions evidence of all the receipts was admitted on the ground that they appeared to constitute one continuous transaction.

In the present case, it is true, the assistance was rendered at different times to different persons not proved to be acting in collusion with each other and it may therefore be difficult to treat the various acts as one transaction, but as the facts found by the Sessions Judge show conclusively that the accused between the 25th October 1891 and the 30th March 1892 committed a number of offences punishable under section 414, Indian

(3) Dears. C. C., 282. In this case it was held that the circumstances proved that a quantity of pepper found on the prisoner when coming out of a room in the London Docks where pepper was stored was stolen property though it was impossible to prove that any pepper was actually missing. (4) 1 Morr. C. C., 146. (5) 6 C. & P., 626. (6) 1 C. C., 328.
(7) I. L. R. 15 Bom., 491. (8) 2 M. & Rob., 524.

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Penal Code, I am unable to hold that he ought to be acquitted because it cannot be proved on which of many occasions such offences were committed. Under the circumstances I think the difficulty should have been met by simply charging him under section 233 with the commission of one offence under section 414 on some date unknown between the 25th October 1891 and the 30th March 1892 and by relying on the whole of the evidence to prove the fact. That evidence no doubt showed the commission of a number of offences but it was equally effective to prove one and unless it could be said that a charge thus framed would fail to give the accused reasonable notice of the matter with which he was charged it would in my opinion be strictly in accordance with law for section 222, Criminal Procedure Code, merely provides that the charge shall contain such particulars as to the time and place of the alleged offence and the person (if any) against whom or the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

The principle that under section 233, Criminal Procedure Code, an accused person may be charged with one offence committed on one of two occasions when the evidence shows conclusively that such offence has been committed but does not show on which occasion is fully established by the divisions on the subject of false evidence when the only proof relied on by the prosecution consists of contradictory statements, and by the form of charge in the alternative given in Part XXVIII of the V Schedule of the Code of Criminal Procedure. The subject is fully discussed in the judgement in *Queen* v. *Mahamad Humayun Shah* (9) in which *Couch* C. J. explained the law as follows:—"The 439th section of the Code of Criminal Procedure now in force (Act X of 1872) requires that 'the charge shall state the offence with which the accused person is charged' and the 440th that 'the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is charged.' The charge in this case does that. It states what the offence is, namely, that the accused committed an offence punishable under section 193 of the Penal Code and it contains such particulars as to time and place as give sufficient notice to the accused of what he is charged with. He is told that by making the two statements one of which it is alleged he knew or believed to be false or did not believe to be true he committed an offence punishable under section 193." These arguments have apparently been accepted by the Legistature which in Act X of 1882 has substantially

(9) 13 Beng. L. R. 324.

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re-enacted the law on the subject of charges at it stood under the previous Code and they have been explained with approval in this Court's Judgement in *Imperatrix* v. *Ramji Sabajirao* (10). But if it is permissible (as there can be no doubt it is) to charge a person with one offence committed on one of two occasions it is clear that in principle there is no objection to charging him with one offence committed on one of many occasions provided such a charge gives him reasonable notice of the matter with which he is charged. The reasonableness then of the notice is the criterion by which the validity of the charge must be judged and this must depend in each case on the circumstances. In one case it may be necessary to specify accurately time and place while in another it may be unreasonable to require the prosecution to do so. In the ordinary case of contradictory statements it is reasonable as pointed out by *Couch*, C. J. to inform the accused that the offence of giving false evidence is alleged to have been committed on one or other of the occasions on which the statements were made. In the case of *Regina* v. *Hanmanta* (11) the various acts constituting the offence of abetment of theft in respect of which a conviction was recorded took place between the 31st October 1874 and 30th June 1875. In *Regina* v. *Bleasdale* (12) the prisoner was indicted for stealing by means of a shaft branching out in many directions coal worth about £10,000 from a number of different owners during a period extending over many years and though as a matter of convenience the Judge confined the evidence to what was taken from one owner he held that the whole taking was one transaction. In the *Queen* v. *Shepherd* (13) the felling of trees with the theft of which the prisoner was charged lasted over a month. In the *Queen* v. *Firth* (14) the theft of gas of which the accused was convicted extended over a number of years. In the *Queen* v. *Hinley* (15) the receipt at different times of a number of stolen pairs of boots was treated as one transaction, *Maule*, J. remarking :—" It is true that Judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment where as will often be the case the effect of so doing will be to create confusion or to surprise the prisoner or otherwise to embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place. The whole according to the opening seems to constitute one transaction."

Cases of this sort show the wide discretion which the Courts have always exercised in determining whether an accused person has been given

(10) I. L. R., 10 Bom., 124. (11) I. L. R., 1 Bom., 610. (12) 2 C. and K., 765. (13) 1 C. C., 116. (14) 1 C. C., 772. (15) 2 M. & Rob., 524.

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reasonable notice of the circumstances connected with the offence with which he is charged and that no general rule as to the particularity to be required can be laid down. In the present case it seems to me clear that no improper prejudice could be caused to the accused by charging him as above indicated, but that (to use the words of *Maule* J.) nothing but embarrassment could result from putting the prosecutors to their election. The evidence should clearly that an offence had been committed and it would be hardly reasonable to contend that because the prosecution could not do what was evidently impossible, namely specify which particular items were stolen, no charge could be framed. The learned Sessions Judge on page 244 of the paper book remarked " the accused would clearly be prejudiced by being tried on a general charge of dishonest receiving and abetment of Forest Rules for on the whole it may be certain that there has been an offence and yet it may be impossible to prove that on a particular occasion when the accused received or disposed of *hirdas* they acted illegally". But if, as I think is the case here, it is certain on the evidence that there has been an offence, it seems clear that the Criminal Procedure Code is sufficiently wide in its provisions to enable a charge of such offence to be framed and does not require the prosecution to furnish for such charge more particulars than under the circumstances it can reasonably be expected to know. I notice that in appealing to the Sessions Judge the accused did not complain of the indefinite nature of the charge framed (*vide* page 107 and page 242) by the Magistrate and that in his examination he did not attempt to distinguish between one item and another but simply said that all the myrabolams in respect of which he issued passes were his own. Supposing the accused had been innocent I think it would probably have been more difficult for him to bring satisfactory evidence that any particular item of a few maunds was his own than to prove generally that the whole lot belonged to him.

As then it appears from the facts found by the Sessions Judge that the evidence was sufficient to support a charge under section 414 of the Indian Penal Code and as the accused does not appear to me to have been in any way prejudiced by the confusion that has arisen in connection with the charge or the omission to frame it in the form which I have indicated, I do not think having regard to the provisions of sections 535 and 537 of the Criminal Procedure Code that we ought on revision to interfere with the conviction under section 414 albeit arrived at by a different process of reasoning from that followed in this judgment.

I would set aside the conviction and sentence under the Forest Act but leave untouched the conviction and sentence under one of the charges

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under section 414 of the Indian Penal Code namely six months' rigorous imprisonment and a fine of Rs. 75 or in default further rigorous imprisonment for three months.

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15 June 1893. CANDY & FULTON, JJ.

Queen-Empress v. Moti.*

Criminal Procedure Code (Act X of 1882), Secs. 123, 124—Security—Term—Magistrate.

Under section 123, Criminal Procedure Code, it is not competent to a Magistrate to award a shorter term of imprisonment in default of security than that for which security is required, but if he thinks that the term ought to be shortened, his proper course is to report the matter to the District Magistrate with a view to his taking action under section 124 of the Code.

ORDER.—The papers to be returned and the attention of the Magistrate called to the fact that imprisonment under Chapter VIII of the Criminal Procedure Code is not intended as a punishment but as a precautionary measure, and that under section 123, Criminal Procedure Code, it was not competent to him to award a shorter term of imprisonment in default of security than that for which security was required. If the Magistrate thought the term ought to be shortened the proper course would be to report the matter to the District Magistrate with a view to his taking action under section 124.

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22 June 1893. CANDY & FULTON, JJ.

Queen-Empress v. Jamshedji.†

Abkari Act (Bom. Act V of 1878), Sec. 45 (c)—Licensee—Servant—Breach of license.

An agent of the holder of a license to sell liquor cannot be legally convicted of an offence under section 45 (c) of the Bombay Abkari Act, 1878, for breaches of such license committed by the licensee's servants.

THE accused was convicted on a trial held by the First Class Magistrate of Khandesh in that he committed an act in breach of the conditions of his license, under Act V of 1878 (Bombay) and sentenced to pay a fine of Rs. 100.

In making this reference to the High Court under section 438 of the Code of Criminal Procedure, the Sessions Judge of Khandesh reasoned as follows:—"As the High Court has ruled that a liquor shop-keeper selling short measure cannot be found guilty of cheating, the Magistrate made Jamsetjee responsible for the misdeeds of the liquor shop-keeper at Jaitana and fined him Rs. 100. In doing this, I consider that the Magistrate was wrong. In Article 6 of the license it is clearly stated that the 'licensee shall be responsible for the acts and omissions of any agent whom he so appoints and of every servant employed by him in the manufacture, sale and transport of spirit, as if they were his own acts

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**Criminal Ruling 25 of 1893. Criminal Review No. 138 of 1893.*

†*Criminal Ruling 26 of 1893. Criminal Reference No. 47 of 1893.*

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and omissions'. This for the license. The Abkari Act too in sections 45 and 53 clearly shows that the licensee can alone be held liable if he commits any act in breach of any of the conditions of his license not otherwise provided for in this Act, and in the second part of section 53, it is stated that the holder of a license shall be responsible as well as the actual offender for any breach committed by any person in his employ or acting in his behalf under sections 43-46 as if he had himself committed the offence unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of the offence. I do not see that Jamshedji or any other agent can be saddled with the responsibility for the acts of his subordinates, which has been by the Act imposed on the licensee only."

ORDER.— For the reasons given by the Sessions Judge the Court reverses the conviction recorded against and the sentence passed upon the accused, without expressing any opinion whether the servants could be prosecuted under section 43 (*g*) of Bombay Act V of 1878. The fine, if paid, to be refunded.

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26 June 1893. CANDY & FULTON, JJ.

In re Kankuchand.*

Criminal Procedure Code (Act X of 1882), Secs. 202. 435—Complainant—Personal knowledge—Dismissal of complaint.

The provisions of section 202, Criminal Procedure Code, do not confine the evidence in the inquiry under that section to that of the complainant, but leave it to the discretion of the Magistrate to examine such witnesses and make such inquiry as he thinks fit.

A Presidency Magistrate dismissed a complaint under section 203, Criminal Procedure Code, on the ground of want of personal knowledge on the part of the complainant of the circumstances alleged by him :—

Held, that the reasons given were not sufficient, and that the complainant should have been allowed to bring forward evidence to prove them.

PER CURIAM :—We think that the Magistrate was mistaken in supposing that under section 202 of the Criminal Procedure Code the evidence should be confined to that of the complainant. The section leaves it in the discretion of the Magistrate to examine such witnesses and make such enquiry as he thinks fit. The reasons moreover for the dismissal of the complaint are insufficient. The complainant could not be expected to have personal knowledge of the circumstances and should have been allowed to bring forward evidence to prove them.

The story is that the complainant is a partner in the firm and pecuniarily interested in its affairs, and that the accused was a managing partner, who defrauded the firm by entering sums of money as paid to

*Criminal Ruling 27 of 1893. Criminal Application for Revision No. 77 of 1893.

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various persons named in the complaint in excess of what was actually paid them. It was contended by Mr. Inverarity for the prosecution that the subsequent settlement of accounts related merely to the figures entered in the accounts and could not extend to any items fraudulently overcharged to the firm. On these points the Magistrate has arrived at no definite finding. The complainant has a right to have them investigated and the case must accordingly go back for further enquiry.

The question whether the complainant is or is not a partner in the firm is not one that is of much practical importance at the present stage. His complaint and cross-examination show *prima facie* that he has a pecuniary interest in the firm and is not a mere meddlesome busybody interfering in other people's affairs. The decision in *Narayan Genesh Sathe's case* (1) shows that the nature of the complainant's position in the firm is not the real criterion of his right to institute criminal proceedings, but it is not necessary to determine whether in a case like the present it would be right to issue process on the complaint of a mere outsider for it is clear that at least in his own belief the complainant is not in that position. He claims an interest in the firm and whether his claim is valid or not it appears so far as can be ascertained from the papers before us to be made *bona fide*. He was therefore entitled to complain if he was in a position to bring forward evidence to establish his allegations of criminal conduct on the part of the accused. The question whether he was able to do so was, if the Magistrate saw reason to distrust the truth of the complaint, the matter to be determined after taking such evidence as might be necessary and to this question the Magistrate should have directed his attention.

Under these circumstances we must set aside the order dismissing the complainant; and we remand the complaint to the Chief Presidency Magistrate for disposal according to law.

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12 July 1893. CANDY & FULTON, JJ.

Queen-Empress v. Lakshman.*

Criminal Procedure Code (Act X of 1882), Sec. 260—Indian Penal Code (Act XLV of 1860), Secs. 182, 211—Magistrate—False charge—Evidence,

A First Class Magistrate cannot give himself jurisdiction to try an offence under section 211, Indian Penal Code, by treating it as an offence under section 182, of the Code.

PER CURIAM:—If the information A was false, then the offence committed was one punishable under section 211 of the Indian Penal Code, being a false charge of the offence of theft made to the Police :—such an offence was not triable summarily and the Magistrate by treating it as

(1) I. L. R., 13 Bom. 590.

*Criminal Ruling 30 of 1893. Criminal Application for Revision No. 142 of 1893.

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falling under section 182 could not give himself jurisdiction to try the case summarily. We set aside the conviction and sentence.

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27 July 1893. CANDY & FULTON, JJ.

Queen-Empress v. Fata.*

Criminal Procedure Code (Act X of 1882), Secs. 109, 118, 513—Security for Good behaviour—Deposit—Magistrate.

A person was ordered by a First Class Magistrate to execute a bond for Rs. 25 for his good behaviour for six months and to deposit a sum of Rs. 7 which would be returned to him at the end of six months, if he had not in the meanwhile violated the order :—

Held, that the order as to deposit was illegal under sections 109, 118 and 513 of the Code of Criminal Procedure.

THE accused was found loitering in Viramgam at night and on being searched was found to have a big iron bar in his possession and could not give a satisfactory account of himself. He was, therefore, ordered by the First Class Magistrate to execute a bond for Rs. 25 and to deposit as security the sum of Rs. 7 found in his possession.

ORDER.—The Court sets aside the order of the First Class Magistrate as to the deposit and directs the deposit to be returned.

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3 August 1893. CANDY & FULTON, JJ.

Queen-Empress v. Balapa.†

Abkari Act (Bom. Act V of 1878), Secs. 45 (c), 43 (g)—Licenses—Servant—Naukarnama.

A servant of a country spirit farmer holding a *naukarnama*, issued by the spirit farmer and countersigned by the Collector, but not himself holding a license granted under the Bombay Abkari Act, 1878, is not liable to conviction under section 45 (*c*), but can be convicted under section 43 (*g*) of the Act.

THE accused was a servant of the country spirit farmer of the Belgaum District and held a *naukarnama* issued by the farmer and countersigned by the Collector. He was tried and convicted by the First Class Magistrate of Belgaum to pay a fine of Rs. 30 under section 45 (*c*) of the Bombay Abkari Act V of 1878.

The District Magistrate of Belgaum, in making this reference, observed," He does not himself hold a license granted under the Act; and as such the conviction and sentence cannot stand—*vide*, Criminal Ruling 22 of 1890."

ORDER.—While concurring with the District Magistrate that the accused was not liable to conviction under section 45 (*c*) of the Bombay Abkari Act, the Court considers that, on the facts found proved by the Magistrate, he ought to have been convicted of an offence under section

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**Criminal Ruling 33 of 1893. Criminal Review No. 219 of 1893.*

†Criminal Ruling 34 of 1893. Criminal Reference No. 33 of 1893.

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43 (*g*) of the Act. The Court, therefore, alters the conviction accordingly, and leaves the fine untouched.

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24 August 1893. CANDY & FULTON, JJ.

Queen-Empress v. Louis Frances.*

Public Conveyances Act (Bom. Act VI of 1863), *Secs.* 23, 35—*Appeal—High Court—Revision.*

In section 35, Public Conveyances Act, 1863, the words " no conviction under this Act... shall be open to appeal or reversal by any other Court " mean no conviction of any person under the Act.

Where, therefore, an accused, who was the owner of a public conveyance, was convicted by a First Class Magistrate under section 22 of the Public Conveyances Act, on the ground that he was responsible for the act of his servant who had refused to let the conveyance for hire, the High Court held that it was not precluded by section 35 of the Act from interfering in revision, for the person punishable under section 22 was " the driver or other attendant, " and the accused was, therefore, not a person punishable under section 35; and that as the conviction was manifestly wrong it must be reversed.

IN this case Louis Frances was convicted by the Cantonement Magistrate of Ahmednagar of an offence under section 22 of Bombay Act VI of 1863 and sentenced to pay a fine of Rs. 8.

The Sessions Judge of Ahmednagar made this reference to the High Court, under the following reasons:—

"No charge has been prepared, but I gather from the proceedings that the convicted man was held to have committed an offence under Act VI of 1863, in that he being an owner of Public Conveyances (*tongas*) refused to let his conveyances to the complainant Captain Duffin who was desirous of hiring them.

"I am of opinion that the conviction and sentence are not warranted by law. Section 22 of the Act punishes the misconduct of the driver or other attendant of a public conveyance plying for hire. Louis Frances, however, was not the driver or other attendant of the conveyances in question but was their owner. The Magistrate considers that he is responsible for the acts of his servants when they are employed for his benefit. But this doctrine may be applicable where there is a suit for damages, but not in a criminal prosecution for personal misconduct. Also under section 22 of the Act the driver or attendanat is punishable for misconduct if the public conveyance to which he belongs is plying for hire. In the present case, it was midnight, the establishment was closed, presumably everybody had gone to bed and the conveyances were not plying for hire. In no sense, therefore, was Louis Frances the driver or other attendant of a public conveyance plying for hire and therefore he is not liable to be punished under section 22 of Bombay Act VI of 1863".

**Criminal Ruling* 37 *of* 1893. Criminal Reference No. 88 of 1893.

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PER CURIAM :—We agree with the view taken by the Sessions Judge who has referred this case, and think, that the conviction purporting to be under section 22 of Bombay Act VI of 1863 was wholly bad.

Our attention has been called to Criminal Reference 33 of 1881, in which this Court, while agreeing with the Sessions Judge, Belgaum; in the view taken by him of section 22 of Bombay Act VI of 1863 and of a conviction recorded by the Cantonement Magistrate, Belgaum, under that section declined to interfere, as section 35 of the Act debarred this Court from reversing the conviction. We are of opinion on consideration that we are not bound by that ruling to refrain from interfering in such a case as the present. The words of section 35 are " no conviction under this Act . . . shall be open to appeal or reversal by any other Court," and these words must mean no conviction of any person punishable under this Act. In the present case the person punishable under section 22 is " the driver or other attendant." The Magistrate has convicted the owner of the conveyance who might have been hundred miles away when the alleged offence was committed, because he considers the master responsible in a criminal Court for the acts of his servants. Such a doctrine, is as the Sessions Judge shows, clearly wrong, and then there is no conviction of any one punishable under section 22 of the Act. Having regard to the above admitted facts, and apart from a consideration of the question whether an Act of the Local Legislature could take away from the High Court powers of revision which may be exercised under the Act of Parliament, as well as under the Code of Criminal Procedure, we direct that the conviction and sentence be set aside and that the fine, if paid, be refunded.

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24 August 1893. CANDY & FULTON, JJ.

Queen-Empress v. William Keegan.*

Indian Penal Code (Act XLV of 1860), Sec. 304A—Throwing a stick—Intentional injury—Death.

The accused threw his stick at deceased with such force that it hit deceased on the head with the point and made a punctured wound which caused the death of the deceased. Upon these facts, the Magistrate held that it was doubtful from the authorities whether the case would fall within section 323 or section 304 A of the Indian Penal Code :—

Held, that as according to the facts, the case could not come within the terms of section 304 A of the Code, because injury was intentionally caused to the deceased.

PER CURIAM :—We do not agree with the District Magistrate that it is doubtful from the authorities whether the case would come within section 323 or section 304 A. He found that accused threw his stick at deceased with such force that it hit him in the head with the point and made a punctured wound which caused the death of the deceased. Accord-

*Criminal Ruling 33 of 1893. Criminal Review No. 174 of 1893.

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ng to that statement of the facts injury was intentionally caused to the deceased and thus the case could not come within section 304 A.

Under the circumstances we must set aside the conviction and sentence recorded by the District Magistrate on 17th April 1893 and direct that the accused be committed to the Court of Sessions on charges framed under sections 304 (2nd part) and 323, leaving it to the Sessions Court to determine what offence, if any, was committed. Counsel for accused has argued before us that all the facts have not been fully brought out. On this point we express no opinion as it will be open to him as well as to the Prosecutor for the Crown to examine all the witnesses in fuller detail.

Accused to be admitted to be at liberty in his own recognizance (to the amount of Rs. 500 five hundred) to appear before the District Magistrate.

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11 September 1893. CANDY & FULTON, JJ.

Queen-Empress v. Sada.*

Criminal Procedure Code (Act X of 1882), Secs. 44, 161—Indian Penal Code (Act XLV of 1860), Sec. 176—Police officer—False answers—Information.

An accused who was tried under section 193, Indian Penal Code, for giving false evidence to the Police in the course of an investigation made under section 161, Criminal Procedure Code, into a charge of murder, contended that if he had spoken truly, his answers would have had a tendency to expose him to a criminal charge under section 176, Indian Penal Code:—

Held, (1) that when once information of the fact of a crime had reached the Police, the object of section 44, Criminal Procedure Code, had been fulfilled and no further duty imposed by it remained;

(2) that as information had already reached the Police Patel of the murder, there was no liability imposed on the accused to inform the Police *proprio motu* of the murder, and his admission of failure to give information would not have exposed him to a criminal prosecution, under section 176, Indian Penal Code, and he was therefore bound to answer truly all questions relating to the case put to him by the Police.

IN this case the accused was charged by the First Class Magistrate of Broach with an offence under section 193 of the Indian Penal Code and convicted and sentenced to suffer rigorous imprisonment for nine months. The Joint Sessions Judge of Broach, in appeal, acquitted the accused. The Government of Bombay, therefore, preferred this appeal to the High Court, against this acquittal.

PER CURIAM:—We are unable to agree with the Sessions Judge and must reverse his order of acquittal and restore the conviction and sentence recorded by the First Class Magistrate, Mr. Sorabsha Hormusji, and direct that accused Sada Nandbha undergo the remainder of his sentenee. The point was never taken by the accused before the Magistrate, and

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**Criminal Ruling* 40 *of* 1893. Criminal Appeal No. 223 of 1893.

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therefore, there is no evidence whatever on the record to show that the answers to the questions put to the accused by the Chief Constable must have had a tendency to expose him to a criminal charge. Section 44, Criminal Procedure Code, imposes liability to give forthwith information to the nearest police officer of the commission of certain offences. Here it is evident that information was given almost immediately to the Police Patel of the commission of the murder and the requirements of section 44, Criminal Procedure Code, were thereby satisfied. When once information of the fact of the crime had reached the Police Patel, the object of the section had been fulfilled and no further duty imposed by it remained: *Queen-Empress* v. *Gopal Sing* (1). There was no legal liability imposed on accused to inform the Chief Constable *proprio motu* of the details of the murder; and therefore he was bound to answer truly all questions relating to the case put to him by the Chief Constable. It is admitted that he did answer falsely such questions. Therefore he was rightly convicted.

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18 September 1893. CANDY & FULTON, JJ.

Queen-Empress v. Bomonji.*

Indian Railways Act (IX of 1890), Sec. 121—Resident Engineer—Obstruction—Right of way—Fence.

The accused obstructed the Resident Engineer of a Railway Company (who was acting under orders of the Company) in putting down a line for a fence which would have interfered with the right of way claimed by accused and was convicted by a District Magistrate "with obstructing a Railway servant in the execution of his duty" under section 121 of the Indian Railways Act:—

Held, that the legality of the conviction depended on the validity of the accused's claim to the right of way; for if that claim was valid, it could not have been the duty of the Resident Engineer to obstruct it and the Railway Company could not by their orders make it his duty to do so.

PER CURIAM:—We think that the question whether the Chief Engineer who was taking measures the effect of which would be to obstruct the right of way claimed by the Defendant was acting in the execution of his duty depended on the validity of the defendant's claim. If that claim was valid and he really had a right of way across the land it could not be the duty of the Chief Engineer to obstruct it. A Railway Company cannot any more than a private individual by their orders make it the duty of their agent to interfere with an existing right of way. We think then that it was not open to the District Magistrate to convict the Defendant under section 121 of the Indian Railways Act without deciding whether or not the alleged right of way existed. The Government Pleader argued that the Defendant had produced no evidence to prove his right of way but from the District Magistrate's judgment we understand that he refused to go

(1) I. L. R., 20 Cal., 316.

**Criminal Ruling* 41 *of* 1893. Criminal Application for Revision No. 234 of 1893.

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into that question. We must, therefore, set aside the conviction and direct that the fine, if paid, be refunded. We do not think it necessary to order the District Magistrate to continue these proceedings by taking up the Defendant's case and enquiring into its merits unless the Railway Company or their Agent the complainant shall apply to him to do so. If, however, such application is made it will be necessary for him to dispose of the case in the manner above indicated. Attention is called to Criminal Ruling 13 of 5th April 1888.

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12 October 1893. CANDY & FULTON, JJ.

Queen-Empress v. Kaglo.*

*Opium Act (Bom. Act I of 1878),—Rules—*Chandul—*Manufacturing for his own use.*

A person after purchasing opium from a licensed vendor, made therefrom a preparation called *chandul* for his own domestic use. The Magistrate convicted him of an offence in contravention of the rules prescribed and made by Government under the Opium Act, 1878:—

Held, that the conviction was bad, and that Rules 3 and 4 (1) read together, must be construed as permitting the manufacture of *chandul*, by a person for his own domestic use, from opium licitly obtained.

THE accused, a chinaman, was found to have in his possession (*a*) certain apparatus used for preparing *chandul*, (*b*) eight tolas 6 annas of opium. The Magistrate charged and convicted the accused, 1stly of making a preparation of opium without a license in contravention of para (*b*) of the rules 4 or 5 under the Opium Act, and 2ndly that he possessed opium in excess of the limit prescribed by Rule 4 (II) as modified by No. 6437 of 10th August 1892. He fined the accused in Rs. 4 and Rs. 2 for those offences.

The District Magistrate of Kanara, in referring this case for the orders of the High Court, observed:—

"In the Government Resolution quoted above the limit is two tolas so as to the second conviction there is no question, but I cannot see how any offence has been committed except that of having opium in excess of the proper amount.

"From Rule 4 para (*b*) it appears to me clear that a person may make a preparation or admixture of opium for his own use provided he has bought it from a licensed dealer. Rule 39 certainly makes it necessary to obtain a license for the retail of opium and for the manufacture *and* retail of any intoxicated drugs made from the poppy. This, however, does not in my opinion necessitate any license for the manufacture of a preparation of opium for domestic use such as the accused pleads guilty to; and no attempt was made to show accused had retailed *chandul* to others.

"In my opinion, therefore, accused should only have been found guilty of the offence—possession of opium exceeding the limit two tolas."

**Criminal Ruling 42 of 1893. Criminal Reference No 101 of 1893.*

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ORDER.—For the reasons given by the District Magistrate we reverse the conviction and sentence on the first head of the charge and direct the fine, if recovered, to be refunded.

Reading Rules 3 and 4 (1) together we suppose it must have been the intention to permit the manufacture of *chandul* by a purchaser of opium from a licensed vendor for his own (the purchaser's) domestic use, and the more so because we have given notice to the commissioner and no cause have been shown against the view taken by the District Magistrate. At the same time we must call attention to the unsatisfactory wording of the Rules. Section 4 of Act I of 1878 provides that except as permitted by the Act or rules no one may manufacture &c. opium at all (including an admixture such as *chandul*, Section 2). Section 9 provides a punishment for manufacture contrary to the Act or Rules. Under these circumstances we think that the rules should be in a permissive and not a negative form; as it is very inconvenient to spell out an implied permission from the absence of prohibition—the general prohibition being already contained in the law—we may mention that lately the Rules in Burmah have been redrafted in a permissive form.

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16 October 1893. CANDY & FULTON, JJ.

In re Bhanji.*

Criminal Procedure Code (Act X of 1882), Sec. 96—Search warrant—Property, production of—Property in the hands of third parties—Practice and procedure.

Section 96 of the Criminal Procedure Code authorizes and compels the production of property in respect of which a search warrant is issued; but, when property not alleged to be stolen is in the hands of third parties, such production can only be demanded for the purposes of evidence, and ought not to be granted for the sole purpose of attaching property, the title to which is in dispute.

PER CURIAM:—This is an application under sections 435, 439 of the Criminal Procedure Code, praying the High Court to set aside certain proceedings of the Presidency Magistrate, Mr. Webb, who sworn complaints made before him of the offence of cheating said to have been committed by one Raghoji Hemraj, issued search warrants under section 96 of the Criminal Procedure Code for the production of certain goods. The said goods were seized by the Police and are still in the possession of the Police.

It was contended by Mr. Macpherson for the applicant that a search warrant issued under section 96 of the Criminal Procedure Code, simply entitled the person to whom it was directed to search, and that the procedure of the Police in seizing the goods was without jurisdiction and *ultra vires*

**Criminal Ruling* 43 *of* 1893. Criminal Application for Revision No. 299 of 1893.

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No doubt at first sight the words of the section lend colour to that argument "where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search . . . it may issue a search warrant; and the person to whom such warrant is directed may search . . . in accordance therewith and the provisions hereinafter contained". There is no explicit mention in the section or in any provisions hereinafter contained of the duty of the person to whom the warrant is directed seizing and taking possession of the thing found on the search.

But we think that it was manifestly the intention of the law that possession should be taken of the thing found on such search.

Section 96 is to be found in Chapter VII, which is headed "of processes to compel the *production* of documents and other moveable property &c." Section 94 provides for the issue of a summons in the first place to produce. Section 95 provides for the delivery of a document in the custody of Postal or Telegraph authority.

Section 96 provides for the issue of a search warrant:

(*a*) Where the Court has reason to believe that the summons or order to produce will not be complied with, or

(*b*) where the document or other thing required is not known to the Court to be in the possession of any person, or

(*c*) where the Court considers that the purposes of any inquiry trial or other proceeding under this Code will be served by a general search or inspection.

The mere power to search without the power to produce would be valueless in the case described under (*a*). There is nothing to show that the person to whom a warrant is addressed has power to produce under the circumstances described in (*b*), but not under the circumstances described in (*c*). In either case the search warrant is in the same form; and form VIII of Schedule V of the Code (which form is followed by all the warrants in this case) authorises the search for *and production* of the thing required. Similarly in Chapter XIV, relating to the powers of the Police to investigate under section 165, a Police officer may in certain cases, described in the same terms as are to be found in section 96, make a search or section 166 may require another Police Officer to issue a search warrant. "Such officer on being so required shall proceed according to the provisions of section 165, and *shall forward the thing found,* if any, to the officer at whose request the search was made.

The intention of the law being thus clear it is unnecessary to refer to the cases quoted at the bar, in all of which it is assumed without argument that the power to search includes the power to take into possession.

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While, however, holding that section 96 does authorize and compel the production in Court of the property in respect of which a search warrant is issued we think that when property not alleged to be stolen is in the hands of third parties such production can only be sought for the purposes of evidence and ought not be granted for the sole purpose of attaching property the title to which is in dispute. On referring to the applications and affidavits which have been filed it seems that the real object of the former was to obtain the seizure of the property in dispute, not for the purposes of using it as evidence to prove the guilt of the accused persons, but in order to enable the Magistrate subsequently to hand it over to the complainant under section 517 in case he thought that the offence of cheating had been committed in respect of it. But for this purpose the provisions of section 96 do not seem intended. The property had passed out of the possession of the accused into that of a third party the present applicant. It was not stolen property as defined in Indian Penal Code and being in the possession of a third party not charged with any offence the question as to who was entitled to it was one for the determination of the Civil Court. All that the Magistrate had to decide was whether the accused persons who were before him were guilty or not and it is impossible to see how the production before him of all these goods could facilitate the determination of that issue. The goods were seized in June and are still detained notwithstanding the applicant's protests and the proceedings do not show that as yet any use has been made of them for the purposes of evidence against the accused.

Under these circumstances we must now direct that so far as these proceedings are concerned the goods be restored to the person from whom they were taken. If necessary samples may be retained for purposes of evidence in the case still pending before the Magistrate. We are informed that suits have been instituted in the High Court and that orders have been issued in such suits touching the disposal of these goods. If this is so, such orders must of course be obeyed. Our present order merely releases the goods so far as these Magisterial proceedings are concerned.

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2 November 1893. FULTON & STARLING, JJ.

Queen-Empress v. Narayen.*

Criminal Procedure Code (Act X of 1882), Sec. 342—Trying Magistrate—Accused—Examination—Evidence Act (I of 1872), Secs. 21, 25.

A trying Magistrate examined the accused under section 342 of the Criminal Procedure Code, prematurely, at a time when no evidence, sufficient to connect them with the crime with the commission of which they were charged, has been recorded against them :—

*Criminal Ruling 45 of 1893. Confirmation Case No. 28 of 1893; Appeals Nos. 367 371 of 1893.

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Held, that although the Magistrate was wrong in examining the accused under section 342, when it was impossible that they could have been questioned for the purpose of enabling them to explain any circumstances appearing in evidence against them, nevertheless their statements actually made cannot, if apparently, freely and voluntarily given, be rejected as inadmissible in evidence on account of this irregularity of procedure; and that *prima facie*, as admissions, these statements are relevant under section 21 of the Indian Evidence Act, 1872, there being no other section to exclude them, section 29 of the Act going to show that the mere fact of a statement being made in answer to questions, is by itself no ground for its exclusion.

PER CURIAM:—The first question we have to decide is whether the statements made by the appellants on the 31st August are admissible in evidence. They do not purport to have been recorded under section 164 of the Criminal Procedure Code, which applies only to statements or confessions made in the course of an investigation under Chapter XIV or at any time afterwards before the commencement of the inquiry or trial, but to have been taken (ostensibly under section 342) in the course of the Magisterial enquiry. Objection has now been taken to their admission on the ground that the prisoners were examined prematurely at a time when no evidence had been recorded against them and that it was impossible that they could have been questioned for the purpose of enabling them to explain any circumstances appearing in evidence against them. The complainant whose daughter had been murdered had, it is true, given evidence as to the indentity of the corpse and had referred to her intimacy with accused No. 1, but No. 2 had not been mentioned and the statement regarding No. 1 was not in itself sufficient to connect him with the crime. Under these circumstances we think the Magistrate was wrong in examining the accused under section 342 but after carefully considering the matter we hold that we cannot on that account reject their statements as evidence. Our attention was called to the remarks of Mr. Justice *Straight* in *Imperatrix* v. *Hawthorne* (1) but while concurring as to the impropriety of an examination of an accused person otherwise than as permitted by section 342, we think statements actually made cannot if apparently freely and voluntarily given be rejected as inadmissible merely on account of this irregularity of procedure. *Prima facie* as admissions these statements are relevant under section 21 of the Evidence Act and there is no other section which excludes them. Section 26 is inapplicable as they were made in the immediate presence of a Magistrate and section 29 shows that the mere fact of a statement being made in answer to questions is by itself no ground for its exclusion. The remarks of *Littledale*, J. in *Rex* v. *Ellis* (2) show that in England such statements would be admissible though elicited by questions put by the committing Magistrate. Here the questions put were in themselves unobjectionable in their nature. Narayan was simply asked " what have you to say

(1) I. L. R., 13, All., 345. (2) R. & M. p. 432.

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about the case brought against you ? " and the question put the Krishnaji was of a similar kind. There is nothing to indicate that any threat was used or inducement offered.

Objection was also taken to the statements as not bearing the certificate required by section 164 of the Criminal Procedure Code, but that section does not apply to statements recorded in the course of a Magisterial enquiry—as they bear the certificate required by section 364. We must hold that they were properly admitted by the Sessions Judge.

Turning now to the merits of the case we can entertain no doubt as to the correctness of the convictions. The evidence of the informer has been satisfactorily corroborated in the case of Narayen by his statement of August 31 supported as it is to some extent by his statement of September 9 and also by his production of the deceased's bangle and the blood-stained clothes, and in the case of Krishnaji by his statement of August 31. It is impossible to believe that either of the accused would have made the statement of August 31 unless he had been present at the murder, and the circumstances of the case and the evidence of the informer, which has been believed by the Sessions Judge and two out of three Assessors, have no reasonable doubt that both took part in it.

The case for the prisoners was very fully argued by Mr. Robertson and Mr. Rele who on behalf of their clients left nothing unsaid that could be urged in their favour. But after giving the fullest consideration to their arguments, we can come to no other conclusion than that the convictions must be upheld. We think too the sentences must be confirmed. Narayen is young but the brutality of the murder prevents our commuting the sentences.

We must, therefore, dismiss the appeals and confirm the sentences of death.

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16 November 1893. CANDY & FULTON, JJ.

Queen-Empress v. Bai Emma.*

Land Revenue Code (Bom. Act V of 1879), Sec. 214, Rule III clause I (d)—Bombay General Clauses Act (Bom. Act III of 1886), Sec. 3 (13)—Magistrate—Jurisdiction.

An offence committed in contravention of Rule III, clause I, item (*d*), of the rules framed under section 214 of the Land Revenue Code, 1879, is triable, having regard to the provisions of section 3, clause (13), of the Bombay General Clauses Act, 1886, by any person exercising Magisterial powers under the Code of Criminal Procedure, and the decision of *Queen-Empress* v. *Shivram* (1) is no longer an authority.

THE accused were charged with removing earth without permission from Government waste lands. She was tried by a Third Class Magistrate

**Criminal Ruling 46 of 1893. Criminal Reference No. 118 of 1893. (1) I. L. R., 8 Bom., 195.*

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who convicted her under section III clause I (*d*) of the rules under the Land Revenue Code.

The District Magistrate of Broach referred the case to the High Court, as he was of opinion that in virtue of the case at I. L. R., 8 Bom., 591, the case was triable only by a Magistrate of the First Class.

ORDER.—Having regard to the provisions of section 3 clause (13) of Bombay Act III of 1886, it is clear that the Third Class Magistrate had jurisdiction, and that the decision in *Queen-Empress* v. *Shivram* (1) is no longer an authority: the Court, therefore, directs that the record and proceeding be returned.

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21 November 1893. CANDY & FULTON, JJ.

Queen-Empress v. Kasam.†

Indian Stamps Act (Bom. Act I of 1879), *Sec.* 61—*Unstamped Khata—Receipt—Liability.*

The mere receipt of an unstamped *khata* does not constitute an offence under section 61 Indian Stamps Act, 1879. *Queen* v. *Gulam Hussain Saheb* (2) followed.

IN this case the accused were convicted of an offence under section 61 of the Indian Stamp Act 1879, in that accused No. 1 passed a *khata* without affixing a one anna receipt stamp on it to accused No. 2 who duly accepted the same without being duly stamped.

ORDER.—The Court, agreeing with the ruling in *Queen* v. *Gulam Hussain* (2) reverses the conviction and sentence or accused No. 2, Runchod Dulpat, and directs that the fine, if paid, be refunded.

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7 December 1893. JARDINE & RANADE, JJ.

Queen-Empress v. Lakshman.†

Bombay Act. III of 1867, *Sec.* 21—*The Cantonement Act* (*XIII of* 1889), *Secs.* 2, 13—*Whipping.*

Section 21 of Bombay Act III of 1867, having been repealed by Act XIII of 1889, which substitutes a new section (13), containing no mention of whipping, that punishment is not kept alive by section 2 of Act XIII of 1889.

PER CURIAM.—The whipping having been inflicted, we return the record and proceedings to the Cantonement Magistrate. We must, however point out that the sentence of whipping is illegal since the repeal of section 21 of Bombay Act III of 1867 by Act XIII of 1889, which substitutes a new section 13 containing no mention of whipping. That punishment is not in our opinion kept alive by section 2 of Act XIII of 1889.

**Criminal Ruling* 47 *of* 1893. Criminal Review No. 347 of 1893. (2) I. L. R., 7 Mad., 71.
†*Criminal Ruling* 49 *of* 1893. Criminal Review No. 364 of 1893. (1) I. L. R., 8 Bom., 591.

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18 December 1893. JARDINE & RANADE, JJ.

In re Khemchand.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Indian Penal Code (Act XLV of 1860), Sec. 193—Sanction—Magistrate—District Magistrate.

A District Magistrate is not precluded from taking cognisance of offences under section 193, Indian Penal Code, merely because a Subordinate Magistrate in whose Court the evidence had been given had refused to give sanction to prosecute under section 195, Criminal Procedure Code.

In this case, the petitioner lodged a complaint against one Hasambeg of the Matar Police, for theft of a piece of wood, in the Court of a Second Class Magistrate, who discharged the accused under section 253 of the Code of Criminal Procedure.

The Chief Constable of Matar applied for sanction to prosecute the petitioner under section 211, Indian Penal Code; but the Magistrate of Matar refused the application. The District Magistrate of Kaira, then, issued a notice to the petitioner to show cause why sanction should not be granted for his prosecution under section 193 of the Indian Penal Code and granted the same.

PER CURIAM:—In three of these cases the District Magistrate took cognizance of offences under section 193 of the Indian Penal Code after the Subordinate Magistrate in whose Court the evidence had been given had refused to give sanction to prosecute under section 195 of the Code of Criminal Procedure. The District Mrgistrate had in our opinion power to give the sanction, as the other Magistrate is subordinate to him. We follow the reasoning of *Barkat-ul-lah Khan* v. *Reunie* (1).

It is argued that the orders of the District Magistrate are not what they purport to be—sanctions under section 195, because they are not given to private persons. The section itself says the sanction may be given in general terms: it may and often is given to a private person, and the fact that a private person cannot get a Court to take cognizance without the previous sanction, accounts for the language used in some judgments which speak of a sanction, distinguished from a complaint, as a permission to prosecute given to a private person. But in the absence of limiting words in section 195 we do not think this is part of the definition. As the sanction merely allows operation to the ordinary criminal law it can we think as a matter of law be given, before any complainant or other person applies for it. As a matter of discretion we see no reason to interfere.

In the fourth case, that of Krishnalal, we see no reason to interfere. Any defence of limitation or otherwise under section 80 of Bombay Act IV of 1890 may be pleadod before the trying Magsitrate.

*Criminal Applications for Revision Nos. 258, 259, 288 and 306 of 1893. (1) I. L. R., 1 All., 17.

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21 December 1893. JARDINE & RANADE, JJ.

Queen-Empress v. Hanmanta.*

Indian Forest Act (VII of 1878), Sec. 25 (i)—Rules—Government—Shooting.

A conviction recorded under section 25 (i) of the Indian Forest Act, 1878, for shooting in a reserved forest in contravention of any rules which the local Government from time to time prescribe, is illegal, in the absence of any such rules having been passed by Government.

THE accused was found shooting in the Reserved Forest of Adigeri. He was placed before the Second Class Magistrate of Haliyal, who convicted hin under section 25 (1) of Indian Forest Act, 1878.

The District Magistrate of Kanara, in referring this case, for the orders of the High Court, remarked: "The words of this section make punishable any person who in a reserved forest *in contravention of any rules which the local Government may from time to time prescribe* shoots. Government have, however, passed no such rules and accordingly in my opinion no offence has been committed and the conviction is an erroneous one".

ORDER.—The Court, for the reasons stated by the District Magistrate, reverses the conviction and sentence and directs that the fine, if paid be refunded.

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21 December 1893. JARDINE & RANADE, JJ.

Queen-Empress v. Thakordas.†

Bombay District Municipal Act (Bom. Act VI of 1873), Secs. 33, 74—Permission to build—Municipality.

The accused obtained permission from the Surat Municipality to make some alterations in his house, under a *razachithi* dated the 12th May 1892, which allowed a year within which to carry out the work. There appeared to be no bye-law under sections 33 of the District Municipal Act, providing a period within which works were to be carried on. The accused was convicted of an offence under sections 33 and 74 of the Act:—

Held, that the conviction was wrong, so far as it proceeded upon the period of one year having been exceeded, and that it was unnecessary to determine whether such a bye-law would be *ultra vires*.

THE Sessions Judge of Surat in making this reference observed:—"The petitioner prays for reference to the High Court of the case in which he was convicted by the City Magistrate of Surat under sections 33 and 74 of Bombay Act VI of 1873. The case was tried in a summary manner. Petitioner obtained permission from the Surat Municipality to make some alterations in his house. The *razachitti* is dated 12th May 1892. It allows petitioner a year in which to carry out his work. He has been convicted of building after the expiration of the year. He gave the Municipality notice of his intention as required by the Act and also gave

*Criminal Ruling 50 of 1893. Criminal Reference No. 113 of 1893.

†Criminal Ruling 52 of 1893. Criminal Reference No. 113 of 1893.

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them notice that their *razachitti* was illegal. Petitioner was directed in the *razachitti* to have a space of eight feet of his own ground unbuilt on, in order that the road might be widened. No compensation was given him. This order is clearly illegal (I. L. R., 16 Mad., 230). I am of opinion, therefore, that petitioner could not be convicted of disobeying it."

ORDER.—No bye-law providing a period within which works are to be carried under section 33 of the Bombay Act VI of 1873 is relied on by the Municipality or the Magistrate and it is unnecessary therefore to determine whether such a bye-law would be *ultra vires*. The conviction is wrong so far as it proceeds upon the period of one year having been exceeded. The Court quashes the conviction and sentence and directs return of the fine.

1894.

10 January 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Hyderally.*

Criminal Procedure Code (Act X of 1882), Sec. 526—Transfer of case—Magistrate—Bias—Practice.

To justify a transfer of case from a Magistrate it must be established that the Magistrate has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.

The fact that a Magistrate has been served with notice of action because of his surrender of some goods seized in the case, does not constitute a bias sufficient to warrant a transfer.

PER CURIAM:—The trying Magistrate now objects to the transfer; and this Court is always cautious not to transfer a case where the order tends to throw doubt on the impartiality of the Magistrate in whose Court the case is pending. It is argued that the fact that the Magistrate has been served with notice of action because of his surrender of some goods seized in the case may possibly create a bias. But as ruled in *Queen* v. *Handeley* (1), "it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter". The Magistrate's decision of the case cannot interfere with any remedy the applicant may have by civil suit. In the *Dean of Rochester's case* (2), the fact that the Bishop who had been libelled had his remedy by suit for the libel, which could not be affected by any decision he might pass in the visitatory matter before him, was held to be a reason for refusing to prohibit the Bishop from exercising the visitatory jurisdiction over the person who libelled him. We, for these reasons, decline to make an order transferring the case to another Magistrate.

**Criminal Ruling* 1 *of* 1894. Criminal Application No. 358 of 1893.

(1) L. R., 8 Q. B. D., 383, 387. (2) 1 A. & E., 1.

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23 January 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Jethmal Narayan.*

Penal Code (XLV of 1860), Sec. 304—Murder—Prisoner—Probabilities—Conviction.

The Sessions Judge held on the probabilities that it was more likely that the prisoner, rather than the other inmate of his house inflicted the injuries which were proved to have caused his daughter's death, but did not come to any conclusion that the guilt of the prisoner was established by the evidence beyond reasonable doubt:—

Held, that as a prisoner on his trial is merely on the defensive and owes no duty to any one but himself, he could not be convicted because he had not tried to explain to the Court how the death occurred or by whose means.

PER CURIAM:—The Sessions Judge and both Assessors disbelieved the stories of the two persons who say they saw the prisoner beating his daughter Janki. The Judge, differing from the Assessors, held on the probabilities that it was more likely that the prisoner, rather than the other inmate of his house, *i. e.* his mistress, inflicted the injuries which are proved to have caused the death. He has not come to any conclusion that the guilt of the prisoner is established by the evidence beyond reasonable doubt. The prisoner is not to be convicted, because he has not tried to explain to the Court how the death occurred or by whose means. As remarked in *Empress* v. *Dhumie Kazi and another* (1), a prisoner on his trial is merely on the defensive and owes no duty to any one but himself. We are of opinion that there is reasonable doubt whether the prisoner inflicted the injuries and we now reverse the conviction and sentence and direct that he be set at liberty.

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25 January 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Tukaram.†

Prevention of Gambling Act (Bombay Act IV of 1887), Sec. 12—Gambling—Conviction—Double sentence—Imprisonment—Fine.

Where a person is convicted of an offence under section 12, Prevention of Gambling Act, 1887, he can be sentenced to pay a fine or to undergo imprisonment but not to both.

IN this case Mahadu and nine others were charged with having committed an offence under section 12 of the Gambling Act IV of 1887, and were convicted by the Second Class Magistrate of Yeola. The accused No. 9, was sentenced to undergo rigorous imprisonment for 15 days and to pay a fine of 5 Rupees, because he was previously convicted of a similar offence and the other accused were only sentenced to pay fine.

The District Magistrate of Nasik being of opinion that the double sentence passed upon the accused was illegal, referred this case to the High Court, stating:—"The offence is punishable with fine or with impri-

*Criminal Ruling 4 of 1894. Criminal Appeal No. 430 of 1893. (1) I. L. R., 8 Cal., 121.
†Criminal Ruling 5 of 1894. Criminal Reference No. 13 of 1894.

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sonment and therefore, the double punishment of imprisonment and of fine awarded to accused No. 9 is illegal."

ORDER.—For the reasons given by the District Magistrate, the Court sets aside so much of the sentence on Tukaram as impose fine, and directs that the fine, if paid, be refunded.

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31 January 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Kashna.*

Number—Evidence—Body cannot be found—Attempt—Penal Code (XLV of 1860), Secs. 304, 307.

Where a prisoner admits having thrown a girl into a canal, but the body cannot be found, it is inexpedient to convict him of murder: his act would properly be met by a conviction of attempt to murder.

PER CURIAM:—We believe the confession of the prisoner wherein he says that he threw the girl of less than two years of age into the canal where the water was deep, swollen by the monsoon. The body has not been found and there is no evidence of an actual death. Under the circumstances and on referring to the cases in 1 Russell on Crimes, 798, 5th Edition, we are of opinion that the conviction for murder cannot safely be sustained; 2 Hale P. C. 290, *Reg.* v. *Hopkins* (1), *Reg.* v. *Cleverton* (2). The facts of the Liverpool case mentioned in *Rex.* v. *Hindmarsh* (3), in the argument, are very like the present.

We now change the conviction to attempt to murder under section 307 of the Indian Penal Code and the sentence to ten years' transportation.

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1 February 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Bhika.†

Criminal Procedure Code (Act X of 1882), Sec. 364—Magistrate—Accused—Statement—Signature.

The signature of an accused person to a statement recorded under section 364 of the Code of Criminal Procedure should be made in the immediate presence and under the careful control of the Magistrate himself.

To take a signature of the accused, in an adjoining room before a clerk, and not in the immediate presence of the Magistrate, is not a proper compliance with the section.

ORDER.—The Court rejects the application. The Court takes notice of the statement in the Judgment recorded by the trying Magistrate, that the signature of the accused person to the statement made by him before the Magistrate, is taken not in his immediate presence but in an adjoining room before a clerk. This is not a proper compliance with section 364 of the Criminal Procedure Code. The signing by the accused of the record of

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**Criminal Ruling 7 of 1894. Criminal Appeal No. 417 of 1893.*

(1) 8 C. & P., 591. (2) 2 F. & F., 833. (3) 2 Leach., 571.

†Criminal Ruling 8 of 1894. Criminal Application for Revision No. 16 of 1894.

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questions and answers is a very important part of the proceeding and ought to take place in the immediate presence and under the careful control of the Magistrate himself. The District Magistrate should so inform those Magistrates who adopt any contrary practice.

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8 February 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Gulab.*

Penal Code (Act XLV of 1860), Sec. 75—Magistrate—Jurisdiction—Separate sentences.

The accused, who was previously convicted, was again convicted by a Second Class Magistrate of theft under section 379, Indian Penal Code, and was sentenced to suffer six months' rigorous imprisonment under section 379, and further rigorous imprisonment for six months under section 75, Indian Penal Code:—

Held, that section 75, Indian Penal Code, did not authorize the Magistrate to pass a sentence in excess of section 32 of the Code of Criminal Procedure.

THE accused Gulab Hamir was convicted of theft under section 379, for having stolen two gold earrings; and was sentenced to suffer six months imprisonment by the Second Class Magistrate of Ankleshwar. As the accused was previously convicted under section 380, Indian Penal Code, the Magistrate sentenced him to suffer further rigorous imprisonment for six months under section 75 of the Indian Penal Code.

The District Magistrate of Broach referred the case to the High Court, because the Magistrate had no power to sentence under section 75, Indian Penal Code, making the total sentence exceed six months.

ORDER.—For the reasons given by the District Magistrate the Court reduces the total sentence from one year to six months' rigorous imprisonment.

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8 February 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Beera.†

Public Ferries Act (Bom. Act II of 1868), Sec. 14—Ferry, playing of—Criminal Procedure Code (Act X of 1882), Secs. 517, 545—Compensation—Boat, sale of.

When a person is convicted under section 14 of the Public Ferries Act, 1868, it is not competent to a Magistrate to order the sale of the boat under section 517, Criminal Procedure Code, and to award out of the sale proceeds, compensation to the complainant under section 545, Criminal Procedure Code.

THE accused was prosecuted for plying a boat for hire within three miles of a public ferry and was convicted under section 14 of Bombay Act II of 1868 and fined Rs. 5. The Magistrate further directed that the boat so illegally used for hire should be sold and that out of the fine if recovered and the sale proceeds of the boat Rs. 10 should be paid to the complainant as compensation under section 545, Criminal Procedure Code.

**Criminal Ruling* 9 *of* 1894. Criminal Reference No. 16 of 1894.

†*Criminal Ruling* 10 *of* 1894. Criminal Reference No. 15 of 1894.

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The District Magistrate referred the case to the High Court, observing: —"Section 545 of the Criminal Procedure Code allows the whole or any portion of a fine imposed to be granted as compensation in certain cases but does not allow compensation to be paid out of the sale of the property and up to the amount of Rs. 5 if recovered only, the Magistrate's order is in my opinion a proper one. On the Magistrate being called upon to show any authority he states that although not mentioned in the decision the order was given under section 517, Criminal Procedure Code.

I doubt whether that section has so wide an interpretation as the Magistrate has assumed, and that the order was *ultra vires*. The section certainly empowers a criminal Court to make any order it thinks fit for the disposal of any property produced before it regarding which any offence appears to have been committed, and this boat was certainly property concerning which an offence had been committed and the Magistrate had no doubt power to order the sale of the boat but I think having done so he had no further authority to order the proceeds to be given to the complainant."

PER CURIAM:—Section 545 of the Code of Criminal Procedure only justifies the order to the extent of the fine, *i. e.*, Rs. 5. The sale of the boat is beyond the intention of section 517 and no authority to sell is given by the special law, Bombay Act II of 1868. We, therefore, set aside the orders for attachment and sale of his boat and reduce the amount of compensation to Rupees 5.

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15 February 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Bandhu.*

Penal Code (Act XLV of 1860), Sec. 457—Trespass—Adultery—Offence.

The accused was convicted of the offence of house-breaking by night with intent to commit adultery under section 457 of the Indian Penal Code, the owner of the house not being the husband of the woman with whom the adultery was to be committed, and the accused not intending to commit any offence except adultery:—

Held, that the omission of the husband to prosecute for the adultery did not absolve the prisoner from criminal liability under section 457, Indian Penal Code.

IN this case accused No. 1 Bandu was convicted of the offence of house-breaking by night with intent to commit adultery with accused No. 2 Gita in house of the complainant Amin, and was sentenced to three months' rigorous imprisonment and to pay a fine of Rs. 20.

The District Magistrate of Sholapur made this reference to the High Court on the following grounds:—"The house breaking is found to be with intent to commit adultery but the complainant is not the husband of the woman with whom the adultery was to be committed. He has in fact nothing whatever to do with her. From the evidence in the case it is

*Criminal Ruling 11 of 1894. Criminal Reference No. 18 of 1894.

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clear that there was no other intention in the mind of the accused, that is to say, he intended to commit no offence but adultery and nothing was intended in the way of insult, intimidation, or annoyance, to the owner of the house. As, therefore, the husband is not the prosecutor the conviction cannot stand any more than it could if the intent found was merely to commit fornification. It is clear that the accused merely entered the house with the woman as a secret place to prosecute his amour and with no other purpose. Even if there were a technical offence, which in my opinion is not the case, the punishment is too severe."

PER CURIAM:—We agree with the High Court of Madras in a case found at page 325 of Weir's Criminal Rulings that the omission of the husband to prosecute for the adultery, does not absolve the prisoner from criminal liability under section 457 of the Indian Penal Code. But under the circumstances, we reduce the imprisonment to fourteen days.

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1 March 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Revsing.*

Penal Code (Act XLV of 1860), Sec. 425—Mischief—Intention—Knowledge.

The terms of section 425, Indian Penal Code, defining mischief, are satisfied when there is a distinct finding on the point of the prisoner's knowledge and the question of intention is material only as regards the sentence.

IN this case one Revsing Virji was in the day time taking his flock of sheep and goats intended for the slaughter house at Bandora by a public road and while painting with red color his sheep as required by the Municipal rules, a she buffalo belonging to the complainant came to the spot where the accused was engaged in his work and he pushed it aside with both his hands. This caused the animal to fall into the gutter and one of its hind legs was broken. Upon these facts, the Magistrate convicted him of an offence under section 429, Indian Penal Code.

The District Magistrate of Thana being of opinion that the conviction was illegal, made this reference to the High Court, stating:—"To constitute the offence of mischief intention to cause wrongful loss or damage is essential, but in this case, no such intention has been proved, even the Magistrate has not presumed the existence of such intention on the part of the accused. The facts seem opposed to such a presumption. The action of the accused was a natural one under the circumstances and the result accidental. He may be responsible for the loss of the animal to the complainant in a civil suit but I do not think that he is liable to be criminally prosecuted, and his conviction under section 429 appears, therefore, illegal."

**Criminal Ruling* 13 *of* 1894. Criminal Reference No. 28 of 1894.

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PER CURIAM:—The Court points out that the terms of section 425 defining mischief, are satisfied when as in the present case there is distinct finding on the prisoner's knowledge. The question of intention is, therefore, material only as regards the sentence. The prisoner's defence was a denial of the act altogether, not an extenuation thereof. But, under all the circumstances, we vary the sentence by reducing the term of imprisonment in default of payment of fine to 21 days.

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1 March 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Adveppa.*

Criminal Procedure Code (Act X of 1882), Sec. 307—Appeal—Judgment—High Court.

No appeal lies to the High Court from its own Judgment passed under section 307, Criminal Procedure Code.

ORDER.—We reject the appeal on the ground that no appeal lies to this Court from the Judgment of this Court under section 307 of the Code of Criminal Procedure. The prisoner to be so informed.

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7 March 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Dadabhoy.†

Bombay Abkari Act (Bom. Act V of 1878), Secs. 45 (c), 53—License—Breach of the conditions of license—Servant selling by short measure—Liability of the licensee.

The holder of a license for the sale of country liquor cannot be convicted of a breach of his license, merely because his servant, a liquor shop-keeper, has given short measure to a customer, where it is proved that he has taken all reasonable precautions such as reasonable men would use to prevent the commission of such offences by his servants.

PER CURIAM:—The question for the lower Courts to determine was whether the accused had established that all due and reasonable precautions were exercised by the accused licensee to prevent the commission of the offence of sale of liquor by short measure by his shop-keeper. If so he is entitled to acquittal. The Sessions Judge finds against him because there appears to be a practice whereby shop-keepers give presents of money to the licensee's agents although they have to pay over also the amount received for the liquor they sell. The argument is that this practice must induce the shop-keepers to recoup themselves by selling at short measure: and that the licensee is bound to stop this practice of making presents. It seems to us questionable whether he can do so by mere fiat: and it is obvious that the same temptation to fraudulent gain would arise when a shop-keeper gets into debt and in some cases without that cause from mere avarice. But in the present case there is no evidence whatever that the shop-keeper made any present of the kind mentioned.

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*Criminal Ruling 14 of 1894. Criminal Appeal No. 52 A of 1894.

†Criminal Ruling 15 of 1894. Criminal Application for Revision No. 353 of 1893.

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It is proved that the licensee has taken many reasonable precautions; and the Government Pleader has not pointed out any omission which comes within the meaning of the words. They imply such acts as the law requires and as reasonable men would use to prevent the particular offence, such acts as licenses provide for, such as the exhibition of printed tariffs and the keeping of well-known and just measures. We do not think the practice of giving these presents is shown to be a proximate cause of the offence. We reverse the conviction and sentence.

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12 March 1894. JARDINE & RANADE, JJ.

In re Haibati.*

District Police Act (Bom. Act IV of 1890), Sec. 46—Criminal Procedure Code (Act X of 1882), Sec. 435—Magistrate—Sessions Judge—High Court—Government.

When an order has been duly made by a District Magistrate, or Sub-Divisional Magistrate, under section 46 of the Bombay District Police Act, 1890, the Court of Sessions should not call for the proceedings under section 435, Criminal Procedure Code. It appeared unnecessary to determine the powers of the High Court in this case. Any person aggrieved by the order can petition the Governor in Council under whose control the prerogative of keeping the peace is worked by the Magistracy.

THE petitioner Haibati was one of several persons who had taken up their abode in the villages of Devalgaon and Gundagaon. The Police Superintendent reported to the Sub-Divisional Magistrate that they were a source of danger to the public and that some of them had been identified as old convicts and suggested that action might be taken under section 46 of the Police Act IV of 1890. The Sub-Divisional Magistrate thereupon issued a notice ordering them to go to their own houses.

ORDER.—The order of the Magistrate appears to have been duly made under the jurisdiction conferred by section 46 of the Bombay District Police Act IV of 1890. We do not think the Court of Sessions should call for such proceedings under section 435 of the Code of Criminal Procedure. It is unnecessary to determine the powers of the High Court as any person aggrieved by the order can petition the Governor in Council under whose control the prerogative of keeping the peace is worked by the Magistracy.

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15 March 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Syed Mahomed.†

Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 84—Honorary Magistrate—Penalty.

Although under section 84 of the Bombay District Municipal Act, a Magistrate has power to inflict, in addition to arrears of cess or other taxes, a penalty not exceeding in any case one-fourth of such arrears, he has no power to levy any penalty computed as an addition to the expenses.

**Criminal Ruling* 18 *of* 1894. Criminal Reference No 22 of 1894.

†*Criminal Ruling* 19 *of* 1894. Criminal Reference No. 34 of 1894.

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THE accused was tried and convicted of the offence of having failed to pay Rs. 0-12-9 on account of expenses incurred by the Poona City Municipality in removing an *ota* (veranda) under section 84 of the Bombay District Municipal Act; and was sentenced to pay Rs. 0-12-9 on account of expenses, and a penalty Rs. 0-3-9 being one-fourth of that amount.

The District Magistrate of Poona in making this reference to the High Court observed:—"Under section 84 of the Municipal Act, a Magistrate has power to inflict in addition to arrears of cess or other taxes, a penalty not exceeding in any case one-fourth of the *amount of such arrears*, but not of expenses which a Municipality incurs and for the recovery of which makes an application. The Magistrate directed the payment of expenses (Rs. 0-12-9) and also ordered the levy as penalty of Rs. 0-3-2 being one-fourth of that amount. This latter portion of the order appears to be illegal inasmuch as the levy of one-fourth fine does not apply to expenses the whole of which are recoverable by a summary proceeding before a Magistrate in the manner provided in the Code of Criminal Procedure, *vide*, section 84 of the Municipal Act".

ORDER.—The Court is of opinion that the District Magistrate's view of section 84 is correct and that it is well that the errror should be pointed out.

The Court reverses the part of the sentence which imposes penalty of one-fourth and directs a refund of the same.

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29 March 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Jivan.*

Penal Code (Act XLV of 1860), Sec. 195—Criminal Procedure Code (Act X of 1882), Sec. 195—False evidence—Sanction—Practice and Procedure.

Where the sanction for the prosecution of the accused, under section 195 of the Indian Penal Code, related to the giving of false evidence in a long deposition, but not the very slightest indication was given, in the proceeding, as to what story or statement was, in the opinion of the Judge issuing the sanction, false:—

Held, reversing the sanction, that section 195 of the Code of Criminal Procedure ought to be used in such a way as to give the person, against whom the sanction, for prosecution is granted, some means of knowing definitely in what the criminal act consists and that the Judge issuing sanction ought to apply his mind closely to the facts with a view to ascertain whether they really constitute an offence, and also to prevent a sanction issued with one purpose or design being abused to the furtherance of some other.

PER CURIAM.—Section 195 of the Code of Criminal Procedure ought to be used in such a way as to give the person against whom the sanction for prosecution is given some means of knowing definitely in what the criminal act consists: *In re Balaji Sitaram* (1), *In re Har Dial* (2).

**Criminal Ruling* 20 *of* 1894. Criminal Application for Revision No. 43 of 1894.

(1) 11 Bom., H. C., 34. (2) I. L. R., 6 All. 105.

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In the present case the sanction relates to the giving of false evidence in a long deposition : but not the very slightest indication is given in the proceeding as to what story or statement was in the opinion of the Sessions Judge false.

The Judge issuing a sanction for a prosecution ought to apply his mind closely to the facts with a view to ascertain whether they really constitute an offence, and also to prevent a sanction issued with one purpose or design being abused to the furtherance of some other: *Chintamandev* v. *Chintamandev* (3). We, therefore, on the petition of Jeevan Ambaidas revoke the sanction for his prosecution.

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2 April 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Lakshman.*

Bombay District Municipal Acts (Bom. Acts VI of 1873 and II of 1884)—House-tax—Rule—Government, sanction of.

The accused was convicted, under section 84 of the Bombay District Municipal Act, 1873, for non-payment of house-tax, and ordered to pay Rs. 10 for house-tax, and a fine of Rs. 2-8-0 and one anna as process-fee, but it appeared that there was no rule on the subject framed by the Municipality:—

Held, ordering the return of the penalty and the tax levied, that as admittedly the Municipality had not framed a rule for the sanction of Government, as required by the acts and nothing had been submitted to Government, except some general proposals sent up by the Collector of Satara, the conviction was illegal.

THE Municipality of Tasgaon by its Secretary lodged a complaint against several house-holders in the town under section 84 of the Bombay District Municipal Act for the non-payment of house-tax for 1892--93. It was contended on behalf of the house-holders that the original imposition of the said tax in 1882 and its enhancement in 1889 were both illegal, as no rules "regulating the nature and action of the Municipal executive administration" and approved by the Governor in Council, under section 14 of the District Municipal Act, 1876, were in existence nor any rules framed under section 32, clause (*h*) of the amending Act II of 1884 and sanctioned by any one under clause (*k*). The petitioner was, under these circumstances, placed before the Second Class Magistrate of Tasgaon who fined him in a sum of Rs. 2-8-0 and ordered the Municipal dues (Rs. 10) for the said tax to be recovered in the usual way.

The petitioner, thereupon, applied to the High Courts under its extraordinary jurisdiction, contending, among other things, that inasmuch as there were no rules whatsoever regulating the time for payment and mode of collection &c. there could not be said to be in existence any approval by the Governor in Council under section 21 of the District Municipal Act;

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(3) P. J., 1878, 253.

**Criminal Ruling* 21 *of* 1894. Criminal Application for Revision No. 391 of 1893.

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and that as section 84 of the Act applied only to 'arrears' of taxes and there being no time fixed for the payment by any rule, it was difficult to say when any amount due became an arrear.

ORDER.—It is admitted that the Municipality has not framed a rule for the sanction of Govenment as required by the Acts; and that nothing was submitted to the Government except some general proposals sent up by Mr. Moore, the Collector of Satara. The Court, following the case of *Imp.* v. *Anandrao Sadashiv Laji* (Criminal Appeal No. 243 of 1891) Criminal Ruling No. 39 of 31st August quashes the order and directs return of the penalties and taxes levied.

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5 April 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Piso.*

Criminal Procedure Code (Act X of 1882), *Secs.* 285, 295—*Sessions Judge—Assessors.*

A Sessions Judge in a trial with the aid of assessors allowed one of the two assessors to absent himself for one of the days on which the trial proceeded, and to return on the following day:—

Held, that the procedure adopted by the Sessions Judge was contrary to the intentions of sections 285 and 295 of the Code of Criminal Procedure, and the Judge ought either not to have given leave of absence, or should have adjourned till a day when both the assessors could attend.

ORDER.—The Court rejects the appeal. The Court remarks that the Sessions Judge allowed one of the two assessors to absent himself for one of the days on which the trial proceeded and to return on the following day. This procedure is contrary to the intention of sections 285 and 295 of the Code of Criminal Procedure. The Judge ought either not to have given leave of absence or should have adjourned till a day when both the assessors could attend.

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28 June 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Gopal.†

Forest Act (VII of 1878), *Secs.* 25, 63—*Court Fees Act (VII of* 1870), *Sec.* 31—*Forest—Fuel—Loss—Court Fees.*

Accused were convicted of an offence under section 25 of the Indian Forest Act, 1878, and each sentenced to pay a fine of thirteen annas, or in default to suffer one day's simple imprisonment, and all of them were ordered to pay annas five as compensation for the loss of the forest fuel or wood and Rs. 1-4-0 as Court fee expenses under section 31 of the Indian Court Fees Act, 1870:—

Held, setting aside so much order of the trying Magistrate as directed payment of Court Fees, that no Court fees had been paid, as none were due, under section 31 of the Court Fees Act, offences under section 25 of the Indian Forest Act being, under section 63, of the kind for which Police Officers may arrest without warrant.

**Criminal Ruling* 24 *of* 1894. Criminal Appeal No. 60 of 1894.

†*Criminal Ruling* 25 *of* 1894. Criminal Reference No. 71 of 1895.

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THE accused in this case removed fuel without the permission of the forest officers from the Reserved Forest of the village of Nigada and thereby caused damage to the extent of Rs. 5 to the Forest Department. The Third Class Magistrate of Naval, convicted each of the nine accused persons and sentenced each of them to pay a fine of annas thirteen in default to suffer rigorous imprisonment for one day; they were further ordered to pay five annas as compensation for the loss of the Forest Department (section 25, Act VII of 1878). Furthermore they were ordered under section 31 of the Court Fees Act, 1870, to pay Government Court Fee expenses Rs. 1-4-0.

The District Magistrate of Poona in making the present reference to the High Court remarked:—"The order regarding the payment of Court fees is improper none having been incurred in the first instance. Under section 63 of Act VII of 1878 offences under section 25 same Act are cognizable by the Police and Forest officers. No order under section 31 of the Court Fees Act can therefore be passed in cases of convictions under section 25 of the Forest Act. The District Magistrate is of opinion that this portion of the Magistrate's order should be set aside and the amount which has been recovered ordered to be refunded."

ORDER.—No Court fees had been paid as none were due under section 31 of the Court Fees Act of 1870, offence, under Section 25 of Act VII of 1878 being under section 63 of the kind for which Police Officers may arrest without warrant.

The Court, therefore, sets aside so much of the order of the trying Magistrate as directs payment of Court Fees.

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5 July 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Reubin Samuel.*

Criminal Procedure Code (Act X of 1882), Sec. 341—Dumb and deaf accused—Magistrate—Submission of the case to High Court—Procedure.

In submitting a case to the High Court under section 341, Criminal Procedure Code, the Presidency Magistrate must state his view of the conduct of the accused and must take some evidence regarding the previous history and habits of the accused.

THE Chief Presidency Magistrate of Bombay submitted the proceedings in this case to the High Court under section 341 of the Code of Criminal Procedure; stating that the accused appeared to be dumb, but was in his opinion not deaf as he was able to make signs in reply to the remarks addressed to him by the Interpreter and was aware of the nature of the proceedings against him.

The High Court recorded the following order :—"On consideration of

*Criminal Ruling 26 of 1894. Criminal Report of Proceedings No. 26 of 1894.

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the cases of *Queen* v. *Noderchand* (1) and *Queen* v. *Bowker Hari* (2) and of the opinion expressed by the learned Judges in *Empress* v. *Hussain* (3) as also the Judgment in *Regi* v. *Berry* (4), we call on the convicting Magistrate to state his view of the conduct of the dumb accused in the commission of the house-breaking. We are of opinion that he should take some evidence regarding the previous history and habits of the accused. We also require a finding by the Magistrate on the question whether the accused was capable of understanding and did in fact understand the nature of the proceedings, stating whether he understood the purport of the evidence given by the witness, and that he might call witnesses in his defence. As in the *Queen* v. *Bowha* (5) we think it proper to give the accused a further opportunity of being heard in the matter of this reference. Accordingly we direct the Magistrate to give him notice in such manner as he thinks may be best adapted to effect the purpose of this pending reference and that he return the record as soon as he conveniently can."

The Chief Presidency Magistrate, in making the report, said :—"I see no reason to doubt that the accused Reubin Samuel was perfectly aware that in the commission of the offence with which he is charged he was committing an offence. With regard to his previous history, I examined the mother of the accused, who is a person apparently of a very low intellectual standard, and she stated that he has always been deaf and dumb. I have made enquiries as to whether he has been previously convicted and have received a certificate, from the Superintendent of the Common Jail, which states that he is recognized as having been a prisoner in that Jail once on a former occasion, but that his previous conviction cannot be traced in the records owing to his then having been admitted under some other name. With reference to his having understood the nature of the proceedings against him in this Court, I have the honor to report that I obtained the assistance of Mr. Walshe of St. Xavier's College, who is conversant with the habits and means of communicating with deaf-mutes, and he informed me after communication by signs with the prisoner, that he considered the prisoner fully understood the nature of the proceedings against him. I may also state that in the course of these communications, which took place in Court in my presence, the prisoner went through the details of the commission of the offence in pantomime, and Mr. Walshe stated that he (prisoner) admitted committing the offence in the manner alleged by the prosecution."

PER CURIAM.—On consideration of the record of the trial and the two reports submitted by the Presidency Magistrate under section 341 of

(1) 22 W. R., 35. (2) 22 W. R., 35, 72. (3) I. L. R., 5 Bom., 262. (4) L. R., 1 Q. B. D., 447. (5) 22 W. R., 35, 72.

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the Code of Criminal Procedure, we are of opinion that the case does not resemble that of the *Queen* v. *Berry* (1) mentioned in *Empress* v. *Husen* (2). It resembles substantially that of the *Queen* v. *Bowka* (3).

We now pass sentence on the convictions under sections 454 and 380 of the Indian Penal Code before the Magistrate, of 6 months' rigorous imprisonment for each offence *i. e.*, one year's rigorous imprisonment in all.

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12 July 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Mhatarya.*

Sessions Judge—Accused—Plea of guilty.

A prisoner, at the bar of a Sessions Court pleaded guilty but at the same time informed the Judge that he committed the homicide because he was subject to epileptic fits. The Sessions Judge convicted the prisoner of murder on his so-called plea of guilty:—

Held, ordering a retrial, that the prisoner could not be held to have pleaded guilty and could not therefore be convicted of that plea.

PER CURIAM:—The learned Sessions Judge has convicted the prisoner of murder on his plea of guilty and sentenced him to transportation for life. The prisoner appeals on the ground that, at the time of the alleged offence and for some time before, his state of mind was such that he did not know what he was doing. On examining the record we find that, although the prisoner pleaded guilty, he informed the Judge, in reply to the first question put to him, that he committed the homicide because he was subject to epileptic fits. From the record of the Magistrate's inquiry it appears that the prisoner told the Magistrate that he committed the homicide because of his body being then possessed by the goddess Warsu Bai. Several witnessess, called for the defence before the Magistrate, deposed to the prisoner having been subject to fits, and to his behaving in a way possibly suggestive of his mind being unsound. Following *The Queen* v. *Cheit Ram* (4), and *The Emp.* v. *Vaimbilee* (5), we rule that the prisoner cannot be held to have pleaded guilty, and cannot, therefore, be convicted on that plea. We, therefore, set aside the conviction and sentence and direct that the prisoner be retried by the Court of Session on his former plea, which must be treated as one of not guilty. As epilepsy is often the cause of homicidal mania, it is discussed in that connection in medical works and by Sir *J. Stephen*, in 2 History of Criminal Law, 144, 178. We draw the attention of the Sessions Judge of the remarks made in *Emp.* v. *Vaimblilee* as to the manner in which a Court should use its discretion in taking evidence about the question of unsoundness of mind. See also, *Queen* v. *Sheikh*

(1) L. R., 1 Q. B. D., 447. (2) I. L. R., 5 Bom., 262. (3) 22 W. R., 35; 72. (4) 5 N. W. P., 110.
**Criminal Ruling* 27 *of* 1894. Criminal Appeal No. 118 of 1894. (5) I. L. R., 5 Cal., 826.

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Mustafa (3). The need of careful and patient investigation in the interest of justice appears also from *Queen* v. *Lakshman Dagdu* (4), and *Queen-Empress* v. *Venkatasami* (5), and other cases in the reports.

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19 July 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Naran.*

Indian Penal Code (Act XLV of 1860), Secs. 304 A, 336—Rash driving—Causing death by negligence—Compoundable offence—Criminal Procedure Code (Act X of 1882), Sec. 345.

The accused was charged with having driven a carriage furiously through a street and knocked down an old woman who died a few day's afterwards from the injuries she had so received. During the enquiries before the Magistrate, a relative of the deceased came to a compromise with the accused and the Magistrate, treating the clarge as that of an offence under section 338 of tha Indian Penal Code allowed it to be compounded:—

Held, that the offence was not compoundable, as it appeared from the evidence that the death of the woman was caused by her being run over, the offence would be brought under section 204 A, Indian Penal code, or under the definition of culpable homicide, neither of which is mentioned in section 345, Criminal Procedure Code.

In cases of such a nature the Magistrate should find upon the evidence whether the accused should be discharged or charged with an offence, and should decide that only a compoundable offence had been proved before he allows a compounding.

THE accused was said to have been driving a carriage furiously, through the street. He knocked out an old woman who died a few days after as the result of the injuries she received. During the enquiry before the First Class Magistrate of Surat, the relative of the deceased came to a compromise with the accused on the payment of a sum of money and the Magistrate treating the charge as that of an offence under section 338, Indian Penal Code, allowed it to be compounded.

The District Magistrate of Surat made this reference to the High Court obsering:—"I am of opinion that the apparent offence was one under section 304 A which is not compoundable and consequently that the Magistrate's order is illegal."

PER CURIAM:—We are of opinion that Mr. Darashah, the trying Magistrate, has exceeded the limited power given him by section 345 of the Criminal Procedure Code, to allow an offence to be compounded. It is contended for the accused that the offence may fall under section 338, Indian Penal Code, which may be compounded with the permission of the Court. But a further circumstance appears in the evidence that the death of the woman was caused by her being run over; and this would bring the offence under section 304A., or under the definition of culpable homicide : *Reg.* v. *Gorachand* v. *Gope* (1). The general principle of the law of England that felonies and serious misdemeamours shall not be

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(3) 1 W. R., 1. (4) I. L. R., 10 Bom., 512. (5) I. L. R., 12 Mad., 459.

**Criminal Ruling* 28 *of* 1894. Criminal Reference No. 76 of 1894. (1) 5 W. R., 45.

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compounded, *Whitecombe* v. *Farley* (2), is embodied in section 345 of our Procedure Code, which says that no offence not mentioned in the section shall be compounded; and neither that of culpable homicide nor that defined in section 304 A is mentioned there. We do not intend in these remarks to weigh the evidence or prejudge the facts. But we are of opinion that the Magistrate should find upon them and determine whether the accused should be discharged or whether he should be charged with an offence; and that he should make up his mind that only a compoundable offence is proved before he allows a compounding. Otherwise people will be in danger of life from rash driving. We now set aside the order allowing the offence to be compounded, and direct the Magistrate to proceed with it and determine whether the accused drove in a rash or negligent manner.

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26 July 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Raoji.*

Criminal Procedure Code (Act X of 1882), Secs. 345, 560—Compounding of offence—Compensation.

Where an offence is compounded under section 345, Criminal Procedure Code, it is incompetent to a Magistrate to award compensation under section 560 of the Code. As there is neither a discharge nor an acquittal but only a composition, section 560 does not apply so as to enable the Magistrate to award compensation to the accused.

ORDER.—The Court returns the record and proceeding with the remark that as there was neither a discharge nor an acquittal but only a composition section 560 of the Code of Criminal Procedure did not apply so as to enable the Magistrate to award compensation to the accused. If the complaint was as the Magistrate thinks wholly false he ought to have considered whether a criminal prosecution for making a false complaint was desirable in the interests of justice.

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30 July 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Khanderao.†

Penal Code (Act XLV of 1860), Sec. 408—Criminal misappropriation.

In a case of criminal misappropriation, the Court should consider the question—whether the money was kept with a dishonest intention, or only on a wrong opinion that the prisoner was justified in keeping it, as in the latter case, the act of the prisoner would not constitute an offence of criminal misappropriation.

PER CURIAM :—The learned Judge has found that there was a misappropriation, but he has hardly applied himself to the question whether the wrongful detainer of the money was with a dishonest intention, or only on a wrong opinion that the prisoner was justified in

*Criminal Ruling 29 of 1894. Criminal Review No. 165 of 1894. (2) 14 Cox. R., 623.
†Criminal Ruling 30 of 1894. Criminal Appeal No. 165 of 1894.

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keeping back money adjudged to him under a decree. The Jaghirdar, who prosecuted, deposes that when he demanded the money, the prisoner admitted that he had collected it, but told him he meant to retain what was due to him from the Jaghirdar under the decree. The cause of the detainer is thus clear from the first; and the later and inconsistent stories told by the prisoner do not remove the effect of this evidence.

We now acquit the prisoner.

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2 August 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Chonia.*

Workman's Breaches of Contract Act (XIII of 1859), Sec. 5—Magistrate—Specially empowered in this behalf.

Powers under the Workman's Breaches of Contract Act, 1859, can only be exercised, outside the Presidency Towns, under section 5 of the Act, by Magistrates who have been specially appointed in that behalf. The Notification of the Government of Bombay dated 22nd January, 1862, (*Bombay Government Gazette* of 1862, page 140) includes under it such Magistrates only as have been referred to therein as a class, and is not prospective.

PER CURIAM:—Powers under Act XIII of 1859, outside the Presidency towns, can only be exercised under section 5 by officers who have been especially appointed. No such appointment has been made of this Magistrate, nor does he come within the description in the Notification of the 20th January 1862, (*Bombay Government Gazette*, page 140 of 1862) as he was not one of the Magistrates there referred to as a class. We now annul the Magistrate's order as made without jurisdiction. The District Magistrate should cause the person complained against to be so informed.

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15 August 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Sadashiv.†

Criminal Procedure Code (Act X of 1882), Secs. 476, 489, 537—Sanction—Subordinate Judge—Report of the bailiff—Inquiries, necessity of making.

A Subordinate Judge acting upon the report of a bailiff that he was obstructed in executing a warrant of attachment, gave sanction for the prosecution, of the persons obstructing, under section 186, Indian Penal Code, without making a preliminary inquiry into the truth or otherwise of the report, and sent the case to a First Class Magistrate for trial under section 476 of the Criminal Procedure Code:—

Held, that the Subordinate Judge would have better complied with the requirements of Section 476 of the Code of Criminal Procedure, if before acting on the mere report of the bailiff, he had made an enquiry of his own, but having regard to the provisions of section 537 of the Code and the fact that, under the circumstances, the most prompt disposal of the case was likely to be in the Court of the Magistrate, it was not necessary to interfere in revision even if the Court had power to do so.

**Criminal Ruling* 32 *of* 1894. Criminal Reference No. 56 of 1894.

†*Criminal Ruling* 13 *of* 1894. Criminal Reference No. 84 of 1894.

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In the matter of *darkhast* No. 30 of 1894 before the First Class Subordinate Judge, Ratnagiri, a bailiff, who was sent to attach the property of the judgment debtor (defendant) reported as follows:—" The plaintiff named in this warrant pointed out some movable property as belonging to the defendant and Rangnath which I attached. The memo of attachment was attested and while the property was being taken into Court Sadashiv Dhondshet and Sakharam Narayan snatched it out of my hand. I was, therefore, unable to take it to the Court. The memo of attachment and its copy are annexed herewith."

The Subordinate Judge, thereupon, issued notice to Sadashiv and Sakharam to show cause why they should not be prosecuted under section 186, Indian Penal Code. Though the pleaders and witnesses on both sides were present on the day fixed, the Subordinate Judge held that it was not necessary for him to examine them and they were dismissed. Thereupon sanction was given under section 195 (*a*), Criminal Procedure Code, and was sent by the Subordinate Judge to the Ratnagiri City Magistrate.

The District Magistrate of Ratnagiri held, for the following reasons, that the sanction for prosecution in this case was not given according to law and recommended that it be revoked by the High Court.—

" At the beginning of the memo of attachment it is stated that the applicant claimed part of the attached property as his own, while plaintiff said that it belonged to defendent Sakharam Narayan (against whom prosecution has also been sanctioned) claimed another part of the property and produced the key of a box which was attached. It is not stated in the *yadi* of attachment in whose possession the disputed property actually was. It as now contended for the applicant (Sadashiv) that this property was in the possession of the applicant and of the other person alleged by the bailiff to have obstructed him, and that the bailiff acted illegally in attaching it as the property of defendant. It is urged that in such a case, the lower Court, should, after inquiry, have issued (if it appeared proper) an order of attachment under section 268, Civil Procedure Code.

" In any case, having regard to the circumstances disclosed by the memo of attachment, the Subordinate Judge does not appear to have been right in sanctioning prosecution without holding a previous enquiry, but relying merely on the report of the bailiff. In the sanction reference is only made to section 195, Criminal Procedure Code. It seems, however, that, in forwarding this case for enquiry by the Magistrate, the Subordinate Judge acted under section 476, Criminal Procedure Code, and must be held to have himself brought the complaint before the Magistrate.

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"In accordance, therefore, with the ruling in *Imperatrix* v. *Rachappa* and *Imperatrix* v. *Irappa* (1) this Court has no power under section 195, Criminal Procedure Code, to set aside a complaint duly made by a Subordinate Court as compared with a sanction granted to a prosecution by a private individual."

PER CURIAM:—We are of opinion that the Subordinate Judge would have better complied with the requirements of section 476 of the Code of Criminal Procedure if before acting on a mere report of a bailiff, he had made an inquiry of his own. We do not think it necessary, however, to interfere in revision, even if we have the power: *Queen Empress* v. *Rachappa* (1), *Queen Empress* v. *Narakha and others* (2), and *contra In the matter of the petition of Khepu Nath Sikdar* v. *Grishchunder Mukerji* (3). We have also to consider section 537 of the Code. It would appear that under the circumstances the most prompt disposal of the case is likely to be in the Court of the Magistrate who, if there is no evidence against the accused, can pass order of discharge. We return the proceedings.

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15 August 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Fakira.*

Criminal Procedure Code (Act X of 1882), Sec. 421—Appeal—Dismissal—Hearing.

A Magistrate having rejected an appeal under section 421, Criminal Procedure Code, without giving the appellant an opportunity of being heard, his order rejecting the appeal was set aside, and he was directed to rehear the appeal-petition, following the procedure laid down in the section.

THE District Magistrate of Dharwar in making the reference observed:—"Mr. Knight dismissed the appeal, without giving the appellant an opportunity of being heard, as required by section 421, Criminal Procedure Code. This omission appears to me to be a material error. I have, accordingly, the honor to recommend under section 438, Criminal Procedure Code, that the order of the appellate Court be quashed and the appeal ordered to be retried."

ORDER.—For the reasons given by the District Magistrate, the Court sets aside the order rejecting the appeal and directs that the procedure of section 421 of the Code of Criminal Procedure be followed and the appeal petition be reheard.

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(1) I. L. R., 13 Bom., 109. (2) I. L. R., 13 Mad., 144. (3) I. L. R., 16 Cal., 730.

**Criminal Ruling* 34 *of* 1894. Criminal Reference No. 85 of 1894.

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15 August 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Gaudasing.*

Criminal Procedure Code (Act X of 1882), Sec. 438—Old offender—Committal—High Court.

A Presidency Magistrate convicted under sections 457, and 380 of the Indian Penal Code an accused whom he found to be an old offender:—

Held, that the Magistrate should have acted under section 438 of the Criminal Procedure Code and committed the accused to the High Court.

ORDER.—The Magistrate finds that the prisoner is an old offender and the Court thinks he ought to have acted under section 348 of the Criminal Procedure Code. The Court now quashes the conviction and sentence and directs the Magistrate to commit the prisoner to the criminal sessions.

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23 August 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Ganpat.†

Criminal Procedure Code (Act X of 1882), Secs. 195 (b), 215—False charge—Police—Sanction.

A complaint made to the Police by G, accusing some persons of robbery, was reported to the Magistrate to be false on investigation. G was thereupon charged by the Police under section 211 of the Indian Penal Code with having made a false charge to the Police, on which the Magistrate issued process. On the application of G, who appeared before the Magistrate in consequence of the process, the Magistrate enquired judicially into his complaint of robbery and discharged the accused :—

Held, that no sanction was necessary for the prosecution of G under section 211 of the Indian Penal Code, as at the time the Police made the complaint against G there was not in existence any proceeding in any Court.

IN this case one Gunpat made a complaint to the police on 22nd January 1894 accusing Natha and two others of robbery. The police investigated and reported the case as false. The Magistrate classed it as maliciously false. The Police laid a complaint before the same Magistrate on 11th June 1894, against Ganpat, under section 211, Indian Penal Code. The Magistrate issued process. When Ganpat appeared before him, he applied to have his own complaint of robbery judicially enquired into. This was on the 2nd July 1894. Next day the Magistrate granted the application ; and he judicially enquired into the complaint of robbery on 10th and 11th July, and discharged the three men accused of robbery. He then applied to the District Magistrate to transfer the case under section 211, Indian Penal Code, which he had already taken up on the Police complaint. The District Magistrate accordingly transferred the case to another Magistrate who after enquiry committed the case for trial by the Sessions Court.

In the Sessions Court the Public Prosecutor was of opinion that he could not go on with the case, owing to the absence of any sanction under

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**Criminal Ruling 35 of 1894. Criminal Review No. 151 of 1894.*

†Criminal Ruling 36 of 1894. Criminal Reference No. 86 of 1894.

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section 195, Criminal Procedure Code, and consequent want of jurisdiction in the committing Magistrate.

The Sessions Judge, thereupon, made this reference to the High Court.

JARDINE, J.—When the police made the complaint which originated the inquiry on which the accused has been committed for trial, there was not in existence any proceeding in any Court. Therefore the provisions of section 195 clause (*b*) of the Code of Criminal Procedure are inapplicable. There is no ground of law under section 215 to justify the quashing of the commitment by the High Court.

RANADE, J.—Mr. Bhangaonkar's commitment may be regarded as having been made under section 476. The offence was brought to his notice in the course of a judicial proceeding and he could commit himself to the Sessions Court. He could not under section 487 try the offence himself as Sessions Judge suggests. There is no ground for action under section 215.

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10 September 1894. JARDINE & RANADE, JJ.

In re Bai Jadav.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction.

In granting a sanction for prosecution for forging a document produced in his Court, it is competent to the Subordinate Judge to rely upon the opinions expressed by his predecessor in office.

IN this case a Subordinate Judge, after duly hearing both parties and examining a witness on behalf of one of the opponents, and relying on the opinions recorded by his predecessors in office who heard and decided the suit and by the Joint Judge who confirmed it on appeal, gave on the application of the defendant sanction for the prosecution of some of the plaintiffs, the opponents, for the forgery of a document produced by them in a civil suit in his Court, in which his predecessor holding the document relied upon by the plaintiffs not to be genuine dismissed their claim, and in which on appeal the Joint Judge declaring the document to be forgery, confirmed the decision of the Subordinate Judge.

The District Judge of Ahmedabad in cancelling this sanction observed:—"The alleged false document was used in an original suit and by the Sub-Judge declared to be a forgery. The Joint Judge in confirming the decree in appeal declared the bond to be a forgery but left the question of a sanction to the Sub-Judge. The present sanction has been granted by a different Sub-Judge from the one who heard the original suit. It was clearly his duty to hold an independent inquiry instead of which he appears to have granted the sanction entirely on the opinions recorded by

*Criminal Ruling 38 of 1894. Criminal Application for Revision No. 130 of 1894.

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the other Sub-Judge and the Joint Judge. It was competent for the Joint Judge to have ordered a prosecution but failing that a full and fresh enquiry was necessary and not an order based on the *dicta* of the two learned Judges."

The petitioners, thereupon, applied to the High Court.

PER CURIAM:—Being of opinion that the Subordinate Judge who granted the sanction for inquiry into the forgery, used a proper procedure and had material whereon to base his order, we think the reasons given by the District Judge for setting aside the order are wrong. The Court sets aside the District Judge's order in regard to the accused Lallubhai, Vithal and Umerbhai and restores the order of the Subordinate Judge about them. The Court does not interfere with the District Judge's order as regards Parshotam or the accused Mulji on which last the notice has not been served.

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20 September 1894. RANADE & FULTON, JJ.

Queen-Empress v. Antone Fernandez.*

Bombay Act III of 1867, *Sec.* 11, *Rule* 75—*Act XIII of* 1889, *Sec.* 2—*Playing cards for money—Club house—Community.*

A house was rented by some members of the Goanese community in the name of one of the members who kept the house. The use of the house was not open to the public but was restricted to the members. Some members played for money with cards, the member keeping the house not making any profit by way of charge for the use of either the cards or the house :—

Held, that the house was not a "common gaming house" within the meaning of Rule 75, Chapter III, of the Rules passed under Bombay Act III of 1867, section 11, and legalized by section 2 of Act XIII of 1889.

IN this case Antone Fernandez was convicted with seven others under clause 11, of section 11 of Act III of 1869 and sentenced to pay a fine of Rs 5.

The Sessions Judge of Ahmednagar in referring this case to the High Court said :—The conviction is under Rule 75 of the Rules and Regulations passed by His Excellency the Governor in Council of Bombay under clauses 1 to 6 and 8 to 11 of section 11 of Act III of 1867, which are still in force under Act XIII of 1889, section 2, clause 2. If the building where the applicants were playing was a common gaming house, they have been rightly convicted and fined, but the question is whether it has been proved to be a common gaming house. Before the Cantonement Magistrate could hold the building to be a common gaming house, he had to find that the instruments of gaming were kept for the benefit or gain of the person keeping the house—whether by way of charge for the use of the instruments of gaming or of the house, room or place or otherwise howsoever.

**Criminal Ruling* 39 *of* 1894. Criminal Reference No. 100 of 1894.

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"There is however no evidence to show that the building is any thing more than a house for which the Goanese community pay Rs. 2-12-0 per mensem as rent, that it is used by the Goanese community and that on the 8th of each month, the Goanese assemble there to collect monies due, and to despatch business in connection with the community. It is said that the building is rented in the name of Jacques de Souza, but it does not appear that the cards which were the only instruments of gaming found were used for his profit either by way of charge for their use or for the use of the house.

"It does not appear that the building can be regarded as more than a club house, rented in the name of one, but really the property for the time being of all the members of the club, and the cards must be similarly held to be the property of the members of the club.

"I may add that the use of the house was not open to the public but that the use of it was restricted to certain members of the Goanese community".

ORDER.—The Court, for the reasons stated by the Sessions Judge, reverses the convictions recorded against and the sentences passed upon the accused and directs that the fines, if paid, be returned to the accused.

The money found in the possession of the accused should also be returned to them.

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27 September 1894. JARDINE & RANADE, JJ.

In re Chand.*

Criminal Procedure Code (Act X of 1882), Secs. 431, 439—Appellant—Death.

Two persons were tried and convicted by a Sessions Judge of criminal breach of trust and sentenced each to one year's rigorous imprisonment and a fine of Rs. 1,000. Both appealed to the High Court against the conviction and sentence, and one of them died pending the decision of the appeal. The High Court reversed the conviction and sentence passed on the appellant who was alive but passed no order as regards the appellant who had died since the admission of the appeal. The son of the sister of the appellant who had died applied to the High Court that the conviction and sentence passed on the deceased appellant be reversed :—

Held, that the appeal of the deceased appellant abated on his death under section 431 of the Criminal Procedure Code. Under the circumstances the Court did not think it should take up the case under its revisional powers as it depended on appreciation of evidence and the judgment appealed against was not one of the kind about which the Court used that jurisdiction as a general rule. The representatives of the deceased appellant had their remedy by application to the Governor in Council.

ORDER.—The Court records that the appeal of the deceased Nabi Shah Rahimunshah has abated under section 431 of the Code of Criminal Procedure. Under the circumstances we do not think we should take up the case under our revisional powers as it depends on appreciation of

*Criminal Ruling 40 of 1894. Criminal Application for Revision No. 229 of 1894.

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evidence and the judgment appealed against is not one of the kind about which this Court uses that jurisdiction as a general rule. The representatives of the deceased appellant have their remedy by application to the Governor in Council and will be furnished, if they so desire, with a copy of the judgment of this Court in the appeal of the co-prisoner to support any such application.

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1 October 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Vishwanath.*

Bombay District Police Act (Bom. Act IV of 1890), Secs. 44, 54, 68, 71—Criminal Procedure Code (Act X of 1882), Sec. 246—Indian Penal Code (Act XLV of 1860), Secs. 114, 188—Magistrate—Order—Procession—Music, playing of—Presence at the procession—Abetment.

It is not necessary for a Magistrate trying an accused, under section 68 of the Bombay District Police Act, for disobedience of an order issued in proper form by the District Magistrate under section 44 of the Act, to inquire into the expediency of the order, it being only necessary under section 68 to prove the disobedience and not the existence of the danger or other occasion for making the order as is essential under the different words of section 188 of the Indian Penal Code.

Mere presence of a person at a procession in which music was played in contravention of an order of the District Magistrate under section 44 of the Bombay District Municipal Act does not by itself constitute an abetment of an offence under the Act.

JARDINE, J.—The learned counsel has moved us in revision on grounds of illegality, wrong discretion, and mistake in judging the facts; and as I am in a position to give my opinion on most of the points, I will do so at once. He says the District Magistrate's order under section 44 of the Bombay Police Act of 1890 is illegal on two grounds:—firstly, there was no such dispute as section 44 contemplates. That I take to be a matter for the District Magistrate: the words are "It shall appear to the Magistrate" as in the next section about epidemic disease. Section 44 expressly requires all persons concerned to conform to it. The language used is different to sections 133 and 144 of the Code of Criminal Procedure, and under section 68, the punishing section of the Police Act, it is only necessary to prove the disobedience and not the existence of the danger or other occasion for making the order as under section 188 of the Indian Penal Code. *A fortiori* then such decisions as *Elavarisu Vanamamlai Ramanuja Jeyaraswami* v. *Vanamamli Ramanuja Jeeyar* (1); *Queen Empress* v. *Narayan* (2), apply and show that the accused cannot go behind the order; and therefore this Court ought not to consider evidence taken in the case affirming that there was no dispute at Wai; secondly, Mr. *Branson* challenges the order as being absolute and unlimited in regard to future time, calling it such an invasion of the general right of

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* *Criminal Ruling* 41 *of* 1894. Criminal Application for Revision No. 252 of 1894.

(1) I. L. R., 3 Mad., 354. (2) I. L. R., 15 All., 208.

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the subject as no Magistrate can enact, general interference for unlimited time being matters for the Legislature. He cited in this connection *Muthialu Chetti and others* v. *Bapusahib* (3) and *Sundram* v. *Queen* (4), *Ponnuswami* v. *The Queen* (5): see also, *re Atmaram* (6) and *The Queen Empress* v. *Harilall* (7). The certified copy of the District Magistrate's order show, however, though there may be no limitation in the clauses which make the commands, the clear intention is to deal with an existing dispute between Hindoos and Musalmans at Wai, about the music in religious processions likely to cause disturbance of the public peace. All this appears in the preamble. I think then the order is within the scope of section 44 being applicable to the then existing dispute and within the ordinary lawful duty of the District Magistrate to prevent a particular disturbance of the peace, and that there is no occasion to construe it as an edict usurping the functions of the Legislature. Then it is said that though the complaint was under section 68 there are also convictions under section 71 of the Police Act. These convictions are made lawful by express statute, *viz*, section 246 of the Code of Criminal Procedure. Mr. *Branson* next urged that the sentences of simple imprisonment for 15 and 21 days are excessive. The maximum which the trying Magistrate could award under section 78 was three months' imprisonment, rigorous or simple, or fine of Rs. 500, or both. In comparision with the maximum the sentences are not unduly severe. The trying Magistrate gives his reasons for inflicting imprisonments one being that there is a necessity to check such offences. This being a matter where he is responsible and where he has a discretion under the law, I do not think there is any reason to interfere. As to the delay in the complaint, that is a matter of discretion on the part of the prosecuting authorities and is not a circumstance to justify this Court in interference. Section 73 indeed suggests that this law should be enforced in a cool and not a hasty spirit. While I do not deny the right of the accused to come to this Court, I adhere in every respect to the views I have expressed in *Queen Empress* v. *Chagan* (8) as to the propriety of exercising our revisional jurisdiction very circumspectly, especially in matters of fact, in order to avoid lowering the responsibility of the Courts below and swamping this Court with petty matters where the law advisedly prohibits relief by appeal. It is not the law that mere presence at a procession constitutes an abetment. But though the Magistrate seems to think it does, he also states that he believes the evidence that the accused, after the Constable under section 54 had ordered the music to stop playing, came and

(3) I. L. R., 2 Mad., 140. (4) I. L. R., 6 Mad., 203. (5) I. L. R., 6 Mad., 215.
(6) I. L. R., 14 Bom., 25. (7) I. L. R., Bom., 180. (8) I. L. R., 14 Bom., 381.

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cried aloud " play, play," and, thereupon, the men with the cymbals went on playing. If this expression of belief is a solemn finding of the fact, it would justify the convictions for abetment in point of law. But there is some little ambiguity in this part of the judgment and the Court therefore calls on the trying Magistrate to report without delay whether he solemnly found that these words were used by the accused. As my brother *Ranade* thinks the trying Magistrate should have dealt with the question arising under section 71, whether the direction of the constable was reasonable, I concur not without reluctance in calling for the record.

RANADE, J.—I agree with Mr. Justice *Jardine* in thinking that it was not competent to the trying Magistrate to inquire into the legality or otherwise of the District Magistrate's notification. The only method open to have that point tried was a properly constituted civil suit, I am not equally clear on two other points. The trying Magistrate apparently was under the impression that the mere presence of men of influence like the applicants was a sufficient instigation, even if they took no particular steps to instigate accused Nos. 1 and 2 to beat the cymbals. It is true the trying Magistrate says he believes the evidence adduced to show that the applicants shouted out " play, play" to the musicians, but there must always be a considerable element of uncertainty in identifying particular individuals in a large crowd when the arrests are not made on the spot. The trying Magistrate did not apparently deem it necessary to require strict evidence on this point as in his view mere presence was sufficient. This latter view seems to me to be erroneous. It may also be a question whether the charge under section 71, based on a police complaint under section 68, can be sustained when it does not appear that there was only complaint of opposition of direction, of the police officer at the time, or that any arrests were made or attempted. The trying Magistrate does not appear to have made any enquiry as to the reasonableness of such police direction, in interpreting and giving effect to the District Magistrate's notification. The applicants also complain of excessively severe sentences as a ground for revision. I would, therefore, send for the records and proceedings.

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2 October 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Abdul Razak.*

Penal Code (Act XLV of 1860), Secs. 114, 148, 149, 302—Criminal Procedure Code (Act X of 1882), Secs. 287, 303, 342, 364, 374, 376—Confirmation of sentence—Accused, questioning of—Special verdict—Judge—Questioning the jury—Practice and Procedure.

In cases sent up to the High Court for confirmation of sentence of death under section 374 of the Criminal Procedure Code, it is the practice of the Court to be satisfied, on the facts as

*Criminal Ruling 42 of 1894. Criminal Appeal No. 214 of 1894. Confirmation Case No. 18 of 1894.

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well as the law of the case, that the conviction is right, before it proceeds to confirm the sentence.

Section 342, Criminal Procedure Code, imposes on the trying Court an imperative duty of questioning an accused person for the purpose of enabling him to explain any circumstances appearing in the evidence against him.

Where, instead of the ordinary verdict in the form of guilty or not guilty, a special verdict stating facts found by them is returned by the jury, and this special verdict is ambiguous or defective in regard to matters forming part of the offence, *e. g.*, intention, knowledge, common design or abetment, it is the duty of the Judge to ascertain its meaning by questioning the jury under section 303, Criminal Procedure Code. In dealing with a special verdict, the Judge is confined to the facts positively stated in the verdict and cannot of himself supply by intendment or implication any defect in the statement.

PER CURIAM.—On the 29th June 1894 the three prisoners were arraigned at Mombasa before the Consular Judge, who under Her Majesty's Orders in Council of the 16th March, 1892 (published in the *Bombay Government Gazette* of the 19th May, 1892, Page 405) exercises the powers of a joint or additional Sessions Judge under our Code of Criminal Procedure, the jurisdiction being a part of that vested in Her Majesty's Consul General for Zanzibar under Her Order in Council dated the 29th November, 1894, published in the *Bombay Government Gazette* of the 30th April 1885, page 533. The trial was held with a jury of five persons. The charges as amended were as follows:—First, that you on or about the 9th day of August, 1893, and on the two subsequent days, committed the offence of joining an unlawful assembly armed with deadly weapons and of rioting so armed and thereby committed an offence punishable under section 148 of the Indian Penal Code, and within the cognizance of the Consular Court: second, that, in prosecution of the common object of that assembly you on or about the 11th day of August, at Tarki Hill, committed murder by causing the death at Walter Hamilton and Omari *bin* Juma and others and thereby committed an offence punishable under 302 of the Indian Penal Code and within the cognizance of the Consular Court: third, that you Ahida Hamed or some other person unknown having, on the 11th day of August, 1893, committed murder by killing Walter Hamilton on or about the 11th day of August at Tarki Hill, abetted the commission of murder of Walter Hamilton, Omari *bin* Juma, and others and thereby committed an offence punishable under sections 109 of the Indian Penal Code and 302 of the Indian Penal Code and within the cognizance of the Consular Court: fourth, that on or about the 11th August at Turki Hill you attempted to commit murder and thereby committed an offence punishable under section 307 of the Indian Penal Code and within the cognizance of the Consular Court, and I hereby direct you to be tried by the said Court on the said charges. The heads of the charge to the jury are recorded by the learned Judge as follows:—"Jury are warned to discard the evidence of Hamis *bin*

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Athman as unworthy of credit for or against the prisoner. Informed of difference of culpable homicide and murder, and directed that, if anything, this is murder or abetment of murder. Murder against Abdulrazak and Abdulla *bin* Ali, as they were said to be present. Abetment only against Ahmed *bin* Abud, and only a presumption that he was cognizant of the attack and its object. The offence of rioting defined to the jury. The evidence gone through on the different points. That of Jokamba read in full, with comments. The case left to the jury." The jury handed to the Judge their unanimous verdict in the following terms; Re riot at Kismayu and attack at Turkey Hill on which Mr. Walter Hamilton was murdered. (1) We find that the three were present at the riot at Kismayu and that they are guilty of the first charge, *viz*, being members of an unlawful assembly armed with deadly weapons. (2) That Mr. Walter J. Hamilton was murdered by some persons forming part of that unlawful assembly. (3) That the two prisoners, *viz*, Abdulrazak and Abdullah *bin* Ali were present at Turkey Hill and took part in the fight which caused the death of Mr. Walter Hamilton. That Hamed *bin* Abad was a member of the unlawful assembly at Kisamayu, but that we have no evidence that he was at Turkey Hill at the time Mr. Hamilton was murdered, and insufficient evidence that he abetted in any way at that time." The learned Judge accepted the verdict of the jury and passed judgment and sentences thereupon as follows:—On this verdict I order a verdict of *guilty of murder* to be entered against Abdulrazak and Abdulla *bin* Ali; of *guilty under the first charge* against all the three prisoners, I pass the sentence of death upon the prisoners Abdulrazak and Abdulla *bin* Ali, ordering them to be hanged by the neck until they be dead. And of three years' rigorous imprisonment against Ahmed *bin* Abud. The two prisoners sentenced to death are warned of their right of appeal within one week. The two prisoners on whom sentences of death were passed have appealed to this Court in the manner provided by Her Majesty's Zanzibar Order in Council of 1884. Pursuant to that Order, the record and proceedings have been forwarded to this Court for the purpose of confirmation of the two sentences of death under section 374 of our Code of Criminal Procedure. Mr. Manekshah has appeared before us on behalf of the two convicts so sentenced. It being the practice of this Court to be satisfied on the facts as well as the law of the case that the conviction is right before it proceeds to confirm the sentence, he has dealt with the evidence as well as the procedure. The defence of the convicts at the trial appears to have been *alibi*, and *alibi* is asserted in their petition of appeal. Mr. Manekshah has pointed out several defects in procedure. The two convicts were examined

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by the Judicial Officer at Mombasa, who, under the Queen's Order in Council, performs the duties of the District Magistrate. But the examinations were not recorded in the manner prescribed by section 364 of the Procedure Code, and there is nothing in the record of the trial to show that they were tendered by the prosecutor and read as evidence as imperatively required by section 287; thus the Judge did not take the evidence which, if they had been tendered, he would have had to take under section 533. Moreover, there is nothing on record to show that the judge questioned the accused generally after the close of the case for the prosecution for the purposes of enabling them to explain any circumstances appearing in the evidence against them. This Court has in two rulings interpreted section 342 as imposing an imperative duty on the Judge of giving the accused an opportunity of explaining the circumstances. It has been argued that these various omissions of procedure have prejudiced the convicts; and, although we notice that they were assisted by a pleader, it is difficult to suppose that they were *not* prejudiced. The jury ought to have heard what they told the Magistrate, and what they might have been willing to state at the trial. In all trials, especially in the most serious trials known to the law, the Court should see that all the requirements of the law are fulfilled. Mr. Manekshah also contended that the learned Judge is in error in construing murder out of the facts found and language used by the jury in delivering their verdict. That verdict has therefore to be considered in connection with the charges. In the first head of charge no place is mentioned. What this head was meant to include was probably unlawful assembly at Kisamayu on the 9th August 1893. The charge which is meant to let the accused know what he is being tried for ought to have been more definite. But it has been understood by the jury as appears from their verdict; and no objection has been taken here about ambiguity in the first head of the charge, and we do not think that the accused have been prejudiced. In the verdict returned on this charge under section 148 of the Indian Penal Code there is no ambiguity. The conviction being properly passed on that verdict, this Court has power, under section 376, of the Procedure Code, to pass sentence. There remains to be considered the verdict on the second head of charge, which is in the unusual form of a special verdict. This is within the option of the jury under section 303 as interpreted in *Queen-Empress* v. *Dada Anna* (1). The learned Judge below was apparently unaware of any omission in the verdict, and there are no signs on the record that he put any questions to the jury to ascertain the meaning—a means provided by section 303

(1) I. L. R., 15 Bom., 464.

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which we think he ought to have used. It must be noticed, however, that, as a verdict in a special form is very rarely given now-a-days, a Judge has little to guide him in recent reports of cases; and the meaning of the verdict being the chief question argued in this Court, we have had to examine the English precedents some of which dealing with cases like the present, were adjudged in a time very long ago. The Government Pleader has appeared for the Crown and did not gainsay the argument that the language used in the verdict obviously means that neither of the two appellants actually killed Mr. Walter Hamilton. The Government Pleader contended that in clause 3 of the verdict the jury mean that the prisoners were members of an unlawful assembly at Turkey Hill with a common object of murdering Mr. Hamilton or knowing it to be likely that this murder would be the result; therefore, he argues, the Judge was justified in convicting of murder on the verdict, applying section 149 of the Indian Penal Code as a rule of criminal law. To this argument must be opposed the remark that, if this was the view of the jury, they could have given direct effect to it by finding the ordinary verdict of guilty on the second head of charge, which alleges common object or by themselves finding in their special verdict that there was a common object. In dealing with the special verdict, the Judge was confined to the facts positively stated in the verdict and could not supply by intendment or implication any defect in the statement; for the authorities, see Archbold Pleading and Evidence in Criminal Cases, Verdict and Judgment. This is stated more that once in the case decided in the reign of William and Mary, from which the rule of law enacted as section 149 of the Indian Penal Code, is drawn—*Rex* v. *Plummer* (2). There the Judges point out also that, when several persons are together for some unlawful purpose, some common design—a homicide—may take place, and yet it may be no part of the common design nor an act likely to occur in prosecution of the common design as one of them may kill another from his own private malice. On this Sir *Michael Foster* remarks in his Crown Cases page 352: "The others who came together for a different purpose will not be involved in this guilt. And therefore in Plummer's case, this circumstance not being found by the special verdict, nor any other fact found from which the Court could with certainty draw the conclusion that the gun was discharged in prosecution of the design in which the gang was united, Plummer was discharged." Now here it cannot be said with certainty that the words used by the Jury that the appellants "were present at Turkey Hill and took part in the fight which caused the death" mean that their

(2) Kely. Rep., 111.

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common object was to cause the death, or that it was likely to lead to that result. This view is consistent with the summing up of the learned Judge, which makes no allusion to section 149 or the rule it enacts, but lays stress on the fact of presence, one of the facts found in the verdict. Though not suggested in the argument before us, we think we ought to consider whether the jury meant, by the words they used, to apply a doctrine not mentioned in the indictment but enacted as a rule of law in section 114 of the Indian Penal Code. The rule settled in Queen Mary's reign "that when many come to do an act and only one does it and the others are present abetting him or ready to aid him in the facts, they are principals to all intents as much as he that does the fact for the presence of others is a terror to him that is assaulted" (*a*); so that if they all draw their swords and only one strikes him so that he dies thereof, the others shall with good reason be adjudged as great offenders as he that struck him. It may be that the jury could on the second head of charge have found the appellants guilty of murder as abettors present at the murder. The abetment might be by instigation, aid, or conspiracy—see section 107. But in the verdict there is no mention of any abetment: and this part of the law being simple and the rule of section 114 easily understood, it is not easy to understand why, if facts amounting to murder were, in the jury's opinion, proved, they did not say so in plain terms. It has been held in several cases of special verdict that aiding and abetting must be expressly found by the jury, and not to be left to the Judges upon any colourable implication as in the special verdicts in *Green and Bedell's cases*, (3) and in *Rex* v. *Boyce* (4), where at p. 2082 a rule of construction of special verdict is laid down by Lord *Mansfield*: but not such as to allow the Judge to make an inference with respect to facts not found: *Rex* v. *Huggins* (5), cf. *Rex* v. *Oneby* (6) as to malice and for a case of very strict construction, *Rex* v. *Francis* (7). If, as is possible, the Judge in his charge to the jury, commented on the words in the second head of the charge alleging a common object, it was his duty, in applying the rule of section 149, which deals with constructive guilt, to require them to consider whether there was evidence of a common object and to determine what that object was. If, however, the direction of the Judge about constructive guilt was based on section 114, he was bound to call on them to consider whether there was such evidence of abetment of murder by the two appellants as would induce them as reasonable and prudent men to convict on the capital charge. It cannot be inferred with certainty, from the meagre

(3) Kelly. R., 79. (*a*) Plowden's Rep. 97. (4) 4 Burr., 2073.
(5) 2 Ld. Ray., 1574. (6) 2 Ld. Raym., 1494. (7) 2 Str., 1015.

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notes, what directions on these points were given. It would have been wrong of the Judge to direct them to convict of murder, under either rule of constructive guilt found in section 149 or 114, on mere proof of presence and without any proof of the murderous common design or of abetment of murder. This may have been relied on by the pleader for the accused as elementary law. On the evidence recorded the jury may have thought that only *presence* at the fight was proved especially as the Judge appears to have led no stress on any other circumstance: and if so, then on those mingled reasons of sound sense and good law which guided all the Judges of England in *Plummer's case*, they may have declined to convict of murder and agreed to find only the fact of presence at the fight at Turkey Hill, when Mr. Hamilton was killed, by other persons unknown. It is quite clear that the prosecution only alleged constructive guilt as neither the principle witness, Jocumba, the cook, nor witness 12, Sulliman, say they saw either of the appellants fire. The direct evidence comprises that of Sulliman, who says they were among the party who attacked Mr. Hamilton and that he, the witness, at a distance of 120 yards, took note of the fact that they carried a snider and a muzzle loader. The chief witness Jocumba, the cook, says he was awakened by the noise of firing at 3 o'clock in the morning of a Friday, when he saw Mr. Hamilton receive a shot from an arrow, as that gentleman was kneeling outside his house, which was followed by two other shots, presumably from guns. Jocumba was captured, he says, in about 15 minutes and then he noticed that these were about forty Hydarabadies and a great many Somalis present and swears that he could tell all the Hydarabadies of this attacking party, that he also knew the two appellants before and their names and that he recognized them and that they both had guns.

He does not mention any utterence of either of them or any act done by either of them at the fight: but he saw the appellant Abdulla go inside Mr. Hamilton's house and take away that gentleman's shoes. The identification being made by the light of three grass houses which were in flames. This is the statement made at the trial. Before the Magistrate Jocumba said only that he saw Abdulla wearing these shoes next day. Jocumba gives also some evidence of subsequent conduct, asserting that the appellants were with the other Hydarabadies who took him (Jocumba) prisoner and made him go with them to Kailoli and Yondee and, after a lapse of about 9 days, to Kismayu, where they made an unsuccessful attack, firing their rifles, but not succeeding in getting into the barracks or fort there. Jocumba was corroborated by the other captive Hamis, except as to the presence of the appellants; and on this point he afterwards changed his story completely so as to support Jocumba. Hamis was rightly treated

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by the Judge as not a witness to be believed. The statement of Mr. Hamilton's interpreter is more important. He says: "I was with him. He was shot with an arrow and then a bullet. I did not see who shot him. I could not recognize them. There was fire at the time. I did not see the accused there. After Mr. Hamilton was shot we ran away to the bush. It was dark. We went outside the bona. I saw neither Jocumba nor Hamis." There remains some slight evidence about motive, and from it this Court gathers some informations about the events proceeding the murder. On some day in August 1893 the witnesses do not give the date but it appears to have been two days before the murder, the whole of the Hyderabad force under Mr. Farrant at Kisamayu mutinied and danced round the house. Later about midday, about 54 of them broke out of the bona. They took each man a gun, their arms and as much ammunition as they could get. There is no evidence that either of the appellants took part in this affair at Kissamayu. And Mr. Farrant says that the appellant Abdulla had been discharged from the service on 19th July. The mutiny was about arrears of pay which these men of Hydarabad, enlisted at Zanjibar, had been demanding from the headmen whom the witnesses call Akidas. There is nothing in the record of the Sessions trial to show what Mr. Hamilton had to do with these men, what his official position was, or why the mutineers should go to murder him, nor what the distance is between Kisamayu and Turkey Hill. On the whole, this evidence leave the guilt of the appellant to be determined on the direct evidence, almost solely on the statements of the cook Jocumba. Jocumba's statement proves only that the appellants were among the Haidarabadies and Somalies who made the attack at Turkey Hill and that Abdulla stole the shoes. It does not explain the common object. This examination of the evidence shows that there was material on which the jury could find, as they did, that the appellants were guilty on the first head of charge if it be taken as relating to Turkey Hill as well as Kisamayu. The second clause of the verdict does not touch the appellants but imputes the murder to some persons not named and therefore unknown. The third clause only finds that the appellants took part in the fight: it does not say on which side, and it makes no allusion to common object or to abetment. We think the words "which caused the death of Mr. Hamilton" can easily be construed as a mere description of the occurrence, in the absence of any plainer language suggesting that the appellants had a design to cause the death or that they abetted the murderers unknown. A prisoner is not to be convicted on doubtful construction of the language; and we take the real meaning of the verdict not to be one of murder, but of acquittal. The jury stopped

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short of finding anything but presence at the fight. The Court has power to order a new trial, but does not think any useful purpose would be served by so doing, having regard to the evidence. The Court annuls the convictions for murder and the sentences of death passed on the two appellants and acquits them on the charge of murder. The Court, acting on the verdict of the jury and the convictions for roiting with a deadly weapon, sentences each of the appellants to rigorous imprisonment for three years.

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4 October 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Kila.*

Criminal Procedure Code(Act X of 1882), Secs. 195, 215—Sanction—Magistrate—Committal to sessions.

A sanction was given by a Sessions Judge for the prosecution of A, B and C under section 193, Indian Penal Code. The sanction for the prosecution of A. was, on his application, revoked by the High Court. B was discharged after trial by a Magistrate but C was committed to the Court of Session for trial. On a reference by the Sessions Judge, that the sanction which was the same for all the accused having been found to be bad in law in the case of accused A, the committal of C be quashed by the High Court under section 215 of the Criminal Procedure Code:—

Held, that "as a Magistrate after inquiry had found reasons for committing for trial on the merits, the Court declines to quash the committal."

IN this case three persons were arraigned for giving false evidence in this Court in a case of rape. The sanction was given by J. B. Alcock Esq. on the 8th February 1894, for the prosecution of three persons:—(1) Bai Divali, (2) Kila Vandravan, and (3) Jivan Ambaidas. On the motion of Jivan Ambaidas the High Court quashed the sanction as regards his prosecution in their Revision No. 43 of 1894. Bai Divali was tried by the First Class Magistrate of Surat and discharged under section 209, Criminal Procedure Code. Kila Vandravan was, however, committed to the Sessions Court of Surat to take his trial.

The Sessions Judge of Surat being of opinion that the committal was improper, referred the case for the orders of the High Court, under section 215 of the Code of Criminal Procedure, observing.—

"Their Lordships, will observe that Mr. Alcock's order for sanction of the two men was one and the same and it is in my opinion futile to proceed with a trial based on a sanction which their Lordships have held to be bad in law."

ORDER.—As a Magistrate after inquiry has found reasons for committing for trial on the merits, the Court declines to quash the committal.

**Criminal Ruling* 43 *of* 1894. Criminal Reference No. 109 of 1894.

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11 October 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Jamnadas.*

Bombay District Municipal Act (Bom. Act VI of 1873), Sections 48, 74—Municipal Act—Sentence.

The Municipal Act is intended to check many offences, petty in their nature but which may cause grievous injury to the neighbourhood as by facilitating fires or serious annoyance as when a householder blocks up a street. The sentences passed for breaches of the provisions of the Act ought not only to be punitive but also deterrent and the fine should bear some proportion to the amount awardable by the law.

JAMNADAS Lakshmidas was found guilty of obstructing the public street by erecting a shop board projecting to a distance of three feet five inches; for this, the Honorary Magistrate fined him in a sum of four annas.

The District Magistrate of Surat in making the reference, remarked :—"The obstruction is of a permanent nature. The Magistrate inflicted a fine of four annas which is absolutely futile.—The case is one of a series which I am submitting to-day, and they in their turn are only selected as examples of the imperfect manner in which the law is enforced by Honorary Magistrates. The general result is that the Municipality is paralyzed in its efforts to prevent fires which are so frequent and disastrous in Surat and to preserve the public streets from obstruction and appropriation."

ORDER.—The Court on consideration of the District Magistrate's opinion thinks it necessary to make the following observations for the guidance of the Honarary Magistrate. The Municipal Act is intended to check many offences petty in their nature but which may cause grievous injury to the neighbourhood as by facilitating fires or serious annoyance as when a house-holder blocks up a street. The sentences passed ought not only to be punitive but also deterrent and the fine should also bear some proportion to the amount awardable by the law. Fines of from two annas to eight annas do not fulfil these conditions at all. The District Magistrate points out that the fines of this sort merely hamper, the Municipality and the Court is of opinion that they have a tendency to increase the number of prosecutions to an extent which would be avoided if severe fines were inflicted in order to check the prevalent offences.

With these remarks the Court returns the records and proceedings in this case and in Reference Nos. 115, 117, 118 and 119 of 1894.

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11 October 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Danji.†

Confessions—Retracted confessions—Evidence—Practice.

It is the practice of the High Court of Bombay to deal with confessions in connection with

*Criminal Ruling 45 of 1894. Criminal Reference No. 113 of 1894. †Appeal No. 240 of 1894.

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all the facts of the particular case; and while not ignoring the difficulties that surround retracted confessions, it has not avoided these difficulties by applying any stringent rule.

PER CURIAM:—This Court admitted the appeal of the Governor in Council against the acquittal on the ground of misdirection. The Sessions Judge in charging the Jury said—"It is necessary for me to tell you that a confession duly taken before a Magistrate is evidence against the accused although retracted in the Sessions Court. But it must corroborated by independent evidence to support a conviction".

We are of opinion that as there is no rule of law which requires a duly proved confession to be corroborated, the above direction was wrong. We must point out also that this High Court has never laid down a rule of practice or prudence such as has been apparently adopted by the learned Judges of Madras: *Queen-Empress* v. *Ravji* (1) and *Queen-Empress* v. *Bharmappa* (2).

The practice of this Court has been to deal with confessions in connection with all the facts of the particular case; and while not ignoring the difficulties that sourround retracted confessions, it has not avoided these difficulties by applying any stringent rule. In directing the Jury the Sessions Judge should have considered the terms of *Reg.* v. *Balvant* (3) and *Imp.* v. *Sangapa* (4).

The Government Pleader has also pointed out the extreme conciseness of the remarks dealing with the medical evidence about the wounds: as contrasted with the directions given by this Court in *Reg.* v. *Fattehchand* (5). We are of opinion that the other evidence for the prosecution ought to be considered in connection with the confessions made on the 13th and 16th March last but retracted at the trial. For this purpose we set aside the acquittal of the prisoner and direct a new trial.

As the prisoner denied having made the confessions it may be proper to take some evidence about them and on the point why he was first taken to a Magistrate of the Second Class and not before a Magistrate having jurisdiction to enquire into the offence.

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25 October 1894. JARDINE & FARRAN, JJ.

Queen-Empress v. Mahadhu.*

Criminal Procedure Code (Act X of 1882), Secs. 164, 297, 342—Confession—Police custody—Sessions Judge—Charge—Jury.

A confession under section 164, Criminal Procedure Code, made to a Magistrate other than the committing Magistrate, if tendered on the part of the Crown, cannot be rejected on the sole ground that the accused had been a long time in the hands of the Police.

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(1) I. L. R., 10 Mad., 295. (2) I. L. R., 12 Mad., 123. (3) 11 Bom., H. C. 137. (4) Cr. R., 22 of 1889.
*Criminal Ruling 46 of 1894. Criminal Reference No. 104 of 1894. (5) 5 Bom., H. C., 85.

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It is necessary for the Court to examine an accused at the close of the case for the prosecution, section 342 of the Code of Criminal Procedure being imperative, as it is a means of enabling the accused to explain what appears against him.

Under section 297 of the Code, the Sessions Judge is bound to sum up the evidence for the defence as well as for the prosecution, this being essential to a proper charge to the jury.

PER CURIAM :—The Sessions Judge having differed from an unanimous verdict of the Jury has referred this case under section 307, Criminal Procedure Code. In his reasons he remarks that the accused had confessed to the committing Magistrate that they had received part of the plunder. No such statement occurs in those confessions : but it is found in earlier confessions made to another Magistrate under section 164 of the Code of Criminal Procedure. The Sessions Judge, however, records that he refused to allow these earlier confessions to go to the Jury, because the prisoners had been a long time in the hands of the Police. Unless the detention was illegal, this was not a sufficient reason for rejecting these confessions, if tendered on the part of the Crown. At the close of the case against them the Sessions Judge omitted to examine the prisoners thinking it unnecessary. But this Court has in two Criminal Rulings interpreted section 342 of the Code of Criminal Procedure as imperative, it being a means of enabling the accused to explain what appears against them. The Sessions Judge in his charge referred to section 94 of the Indian Penal Code in its bearing against the prisoners. He ought also to have pointed out that the witness Mawjia was a convicted but unsentenced accomplice ; and he ought also to have considered and to have asked the Jury to consider whether the Patil, a man of the same caste, as the robbers and who delivered the two persons robbed into their hands, was an accomplice or not, the section 94 being dealt with as in *Queen-Empress* v. *Maganlal* (1) and *Queen-Empress* v. *Chagan* (2). Under section 297, Criminal Procedure Code, the Sessions Judge was bound to sum up the evidence for the defence as well as for the prosecution : and of course this is essential to a proper charge : *Reg.* v. *Fattechand* (3). The Sessions Judge ought, therefore, as he mentioned the witnesses who said they saw the prisoners with the robbers, to have noticed also that the persons robbed, the very important witnesses Vaman and Vithu, said they had not seen the prisoners. On consideration of all the circumstances the Court directs a retrial of these three prisoners.

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25 October 1894. JARDINE & FARRAN, JJ.

Queen-Empress v. Francis R. Thompson.*

Indian Railway Act (IX of 1890), Sec. 101—Guard—Driver—Starting an engine without whistling—Overrunning a boy on the line—Penal Code (Act XLV of 1860), Sec. 304A.

A railway guard failed to give to the engine driver a signal to sound his whistle before

(1) I. L. R., 14 Bom., 115. (2) I. L. R., 14 Bom., 334. (3) 5 Bom., H. C. R., 94.

**Criminal Ruling 47 of 1894. Criminal Reference No. 99 of 1894.*

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starting the engine, which he was bound to do under section 244 of the Railway Rules. The engine having been put in motion caused a boy, who was painting a waggon on the line, injury which resulted in his death. The Magistrate convicted him under section 101, Indian Railway Act, of endangering the safety of persons by a rash and negligent act, and sentenced him to undergo simple imprisonment for one day and to pay a fine of Rs. 20:—

Held, ordering a new trial, that as the trying Magistrate found that as the injury to the deceased boy was caused by the negligence of the accused and that the boy died thereupon, section 304A, Indian Penal Code, appeared more applicable, especially as the trial under it must take place before a higher tribunal.

THE accused was convicted under section 101 of the Indian Railway Act, 1890, of endangering the safety of persons by a rash or negligent act, and sentenced to undergo simple imprisonment for one day and to pay a fine of Rs. 20. The facts were that some carriages were being shunted and the accused was acting as guard in charge of them. It was his duty to give the required signal to the driver to sound his whistle before starting the engine (section 224). He failed to do so. The driver, thereupon, put his engine in motion without sounding his whistle. A boy who was painting a waggon on the line was in consequence run over and killed and other workmen only escaped injury with difficulty.

The District Magistrate of Dharwar being of opinion that the sentence passed upon the accused was very light, recommended to the High Court to pass on him a heavy sentence under section 439, Criminal Procedure Code.

The High Court issued a notice to the notice to the accused to show cause why a new trial should not be ordered, recording the following order.—

"The trying Magistrate of the Second Class though he found that the deceased boy's injury was caused by the negligence of the accused and that the boy died thereupon, treated the offence as coming under section 101 of Act IX of 1890: whereas section 304 A of the Penal Code which deals with cases where death is caused (not where life has been merely endangered) appears more applicable, especially as the trial must on a charge under section 304 A take place before a higher Magistrate. We draw the trying Magistrate's attention to *Queen-Empress* v. *Gundya* (1).

"The Court directs notice to issue to the accused (with a copy of these remarks) requiring him to shew cause why the conviction and sentence should not be set aside and new trial ordered before a Magistrate of the First Class."

The notice having been duly served upon the accused, the High Court passed the following order.

ORDER.—The Court sets aside the conviction recorded against and the sentence passed upon the accused and orders a new trial of the accused before a Magistrate of the First Class.

(1) I. L. R., 13 Bom., 505.

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8 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Purshotum.*

Criminal Procedure Code (Act X of 1882), Sec. 257—Charge—Accused—Cross-examination—Prosecution witness—Magistrate.

A Magistrate, trying an offence under section 323, Indian Penal Code, refused an application to re-summon the complainant and his witnesses for cross-examination, made by the accused a day after the charge had been framed against them, on the ground that it was evidently made for delaying the case, and convicted and sentenced them :—

Held, that the trying Magistrate should re-open the case from the stage where he made the formal charge and should allow the accused such opportunities of calling and recalling witnesses as the law gives them.

THE First Class Magistrate of Surat convicted Purshottam Vanmali and Jivun Vanmali of causing hurt to a Municipal servant and sentenced them under section 323, Indian Penal Code, to undergo ten days rigorous imprisonment.

The Sessions Judge in referring the case to the High Court, reported the following irregularities in the Magistrate's proceedings :—

"Further the Magistrate First Class refused to re-summon the complainant and his witnesses for cross-examination when requested to do so by the accused after the charge had been framed against them and they had engaged a pleader to defend them.

"The reason assigned by the Magistrate First Class for his refusal *viz* : that 'the time had gone by' for cross-examination, does not meet the requirements of section 257, Criminal Procedure Code."

ORDER.—The case appears like the one *In the matter of the Petition of Sats Nadain Singh and another* (2). The Court sets aside the conviction and sentences and directs the trying Magistrate to reopen the case from the stage where he made the formal charge. He should also consider whether a count should be added under section 332 of the Indian Penal Code on the grounds stated by the Sessions Judge. The accused must be allowed such opportunities of calling and recalling witnesses as the law gives them.

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8 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Kala.†

Criminal Procedure Code (Act X of 1882), Secs. 109, 118—Order for security—Want of means—Subsistence—Magistrate—Jurisdiction.

Evidence of mere want of ostensible means of subsistence is not of itself a sufficient reason for passing the order under section 118, Criminal Procedure Code ; a Magistrate, however, is bound by the section to consider whether the order, is really necessary in order to secure good behaviour which is a matter for the Magistrate's own judicial discretion.

**Criminal Ruling* 48 *of* 1894. Criminal Reference No. 110 of 1894.

†*Criminal Ruling* 49 *of* 1894. Criminal Reference No. 134 of 1894. (2) I. L. R., 3 All., 392.

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THE accused was reported by the District Police Inspector to have no ostensible means of subsistence on which ground he should be required to give security for his good behaviour under section 109, Criminal Procedure Code. The accused was ordered to furnish security for good behaviour under sections 109 and 118, Criminal Procedure Code, by the First Class Magistrate of Dhandhuka and on his failing to do so was committed to jail to suffer rigorous imprisonment for six months under section 123, Criminal Procedure Code.

The District Magistrate of Ahmedabad, being of opinion that this order was illegal, made this reference to the High Court, observing:—

"The Magistrate took the evidence of a Police Constable only and the statement of the prisoner and on the opinion of the Police Constable that prisoner had no ostensible means of subsistence required prisoner to give security in Rs. 25 to be of good behaviour for six months, and on prisoner's stating his inability to find security the Magistrate committed him to jail to suffer rigorous imprisonment for six months".

"The only evidence against the accused is the statement of a Police Constable that he is wandering about without means of subsistence coupled with the accused's own reply to the Magistrate that he could not show cause why he should not be called upon to furnish security for his good behaviour. The Police Constable was not cross-examined nor was the accused put any question which might show an ignorant man how he could show cause, *e. g.*, whether he did any work and if so what as far as the case before the Magistrate goes and it comes to this that a man has been committed to prison for six months, because a Police Constable thinks he is a vagrant. It is obvious that such a proceeding as this should not be allowed."

ORDER.—Concurring with the District Magistrate in his views as to the spirit in which the law should be administered, the Court quashes the order passed and directs the trying Magistrate to make fresh inquiry by questioning the accused and taking evidence. The Court also points out to the trying Magistrate that mere proof of want of ostensible means of subsistence is not a sufficient reason for passing the order he has passed. He was bound by section 118, Criminal Procedure Code, to consider whether the order is really necessary in order to secure good behaviour. This is a matter for the Magistrate's own judicial consideration; and he ought not to fill the jails merely because the opinions of the police witnesses are unfavourable to the accused.

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8 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Hussein.*

Criminal Procedure Code (Act X of 1882), Secs. 242, 262, 264—Summary trial—Judgment—Appeal cases.

In summary trials, the procedure for summons-cases and warrant-cases provided by section 262, Criminal Procedure Code, should be followed, and in a case in which an appeal lies a judgment should be recorded, containing what section 264 of the Code requires.

THE accused in this case was charged by the First Class Magistrate of Surat under sections 33 and 74 of Bombay Act VI of 1873, but was acquitted by the said Magistrate, who recorded the following judgment. "I have seen the place. The accused has done nothing which goes against the *razachitti*. He is, therefore, discharged."

Against this acquittal the Government of Bombay appealed to the High Court, contending, *inter alia*, that the lower Court has not given any reasons for holding that the accused has done nothing which goes against the *razachitti*.

ORDER.—The procedure used by the Magistrate is not that of section 242, which is applicable under section 262, Criminal Procedure Code: The judgment does not embody the substance of any evidence as section 264 of the Code requires. The Court sets aside the acquittal and orders a new trial.

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15 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Manik.†

Criminal Procedure Code (Act X of 1882), Sec. 560, (a), (b),—Compensation—Magistrate—Procedure.

In a proceeding under section 560, Criminal Procedure Code, the procedure provided by clauses (*a*) and (*b*) of the section should be strictly followed.

An order directing payment of compensation to an accused under section 560, Criminal Procedure Code, ought not to be made without calling on the complainant to show cause against it, as required by clause (*a*) of the section.

THE accused were tried summarily on the complaint of theft under section 379, Indian Penal Code. The Magistrate found that there had been *no theft* and that the complaint was malicious and vexatious: and discharged the accused under section 253 and fined the complainant in a sum of Rs. 30, awarding Rs. 15 thereof to each accused in compensation under section 560, Criminal Procedure Code.

The Sessions Judge of Nasik in making this reference to the High Court, observed—"Before directing complainant to pay the compensation, the Magistrate does not appear to have complied with provisos (*a*) and (*b*) to section 560 of the Code which are imperative. Proviso (*b*) appears to re-

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*Criminal Ruling 50 of 1894. Criminal Appeal No. 248 of 1894.

†Criminal Ruling 53 of 1894. Criminal Reference No. 136 of 1894.

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quire some special reason for the award, beyond the mere fact that the accusation in the Magistrate's opinion is frivolous, malicious, or vexatious; as, *e. g.*, that the accused has been actually damnified or injured in some way by the accusation."

ORDER.—The Court is of opinion that the fine ought not to have been inflicted on the complainant until he had been called upon to show cause against it as section 560 of the Criminal Procedure Code enacts. The procedure of clauses (*a*) and (*b*) should be strictly followed. In order that this may now be done by the trying Magistrate, the Court quashes the order of fine and directs the Magistrate to proceed under section 560 and pass a fresh order on the merits.

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22 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Gopala.*

The Reformatory Schools Act (V of 1876), Secs. 7, 8—Juvenile offender.

A direction to confine a prisoner in a Reformatory School can be made under section 7 of the Reformatory Schools Act, 1876, only after passing a sentence of transportation or imprisonment. *Imperatrix* v. *Purshotam* (1), followed.

In cases under sections 7 and 8 of the Act, the age of the prisoner should be ascertained in order that the limit of age provided by section 10 of the Act be not exceeded. *Empress* v. *Manaji* (2) followed.

It is not every juvenile offender in respect of whom the order under sections 7 and 8, should be made, and the inmates of a Reformatory ought not to be obliged to associate with a person convicted of a serious offence under the Indian Penal Code.

PER CURIAM:—After rejecting the convict's appeal, the Court called for the record in revision and now points out the errors in procedure. The direction that the prisoner should be confined in a Reformatory School could only be made under section 7 of Act V of 1876: and then only after a sentence to transportation or imprisonment; and here is there no such sentence: *Imperatrix* v. *Purshotam* (3). It has been ruled in *Queen-Empress* v. *Manaji* (4), that the age of the juvenile offender should be ascertained in cases under section 8. The reasoning applies to cases under section 7: and here there is no clear finding.

The omission is more serious, as, if the offender is about 14 years of age, the confinement directed by the Sessions Judge of five years will not expire till he is about 19 years of age, which age is greater than section 10 of the Act allows. The order of the Sessions Judge cannot stand in its present form.

We have to consider what order should be passed. We think the inmates of a Reformatory ought not to be obliged to associate with a person

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**Criminal Ruling 54 of 1894. Criminal Review No. 279 of 1894.* (1) Cr. R., 41 of 1890. (2) I. L. R., 14 Bom., 381. (3) C. R., 41 of 1890. (4) I. L. R., 14 Bom., 381.

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convicted of the offence of rape. We have to consider the reason why Reformatories are established.

The Court annuls the order of the Sessions Judge directing confinement in a Reformatory and sentences the prisoner to one year's rigorous imprisonment.

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22 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Kasai.*

Penal Code (Act XLV of 1860), Sec. 318—Birth, concealment of—Child, birth of.

A Magistrate was held to have rightly convicted a woman of concealment of birth of child in the case of a miscarriage in the sixth month of pregnancy.

THE accused in this case was a widow. As a result of illicit intercourse she conceived a child. She had a miscarriage in the sixth month of her pregnancy and the child was born dead. She concealed the dead body under some Kardai chaff and thus she was charged under section 318 of the Indian Penal Code, and convicted and sentenced to three months' rigorous imprisoment by the Second Class Magistrate of Bhimthadi.

The District Magistrate of Poona made this reference to the High Court, observing:—

"The Hospital Assistant states that there were no signs of miscarriage having been induced by means of a medicine, that it is likely that it was the result of the vomitting caused by excessive fever, that the child was born dead, that it was not as well developed as a foetus of six months ordinarily is, that it appeared to have been a quick child while in the womb and that there were no marks of violence on it.

"In these circumstances the Ruling of the Madras High Court (4 Mad. App. 63) quoted at p. 1001 of Woodman's Digest would seem to apply to the case. Under this and the other ruling quoted at p. 301 of Mayne's Penal Code the conviction appears to be improper and the District Magistrate therefore recommends that it be quashed and the accused set at liberty."

PER CURIAM.—As there has been no argument, we refrain from deciding whether the construction placed on the word "child" in section 318 of the Penal Code in the case noted in 4 Mad. H. C. Appendix 63 is correct. It follows *Reg* v. *Berriman* (1) which interprets the same word in 9 Geo. IV, c. 31. That case however was doubted in *Reg* v. *Colmer* (2) and in a later case *Reg* v. *Hewett* (3) the question whether what was concealed was a child or a foetus was left to the Jury.

**Criminal Ruling 55 of 1894. Criminal Reference No. 143 of 1894.*

(1) 6 Cox., 389. (2) 9 Cox., 506. (3) 4 F. and F.

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As, however, there are no aggravating circumstances and the District Magistrate has ordered release on bail, we reduce the sentence to six weeks' rigorous imprisonment.

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22 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Ramdin.*

Criminal Procedure Code (Act X of 1882), Secs. 164, 288—Accused—Statements—Cross examination—Evidence Act (I of 1872), Sec. 145.

Section 288 of the Code of Criminal Procedure does not extend to Courts of Magistrates nor to depositions not taken in presence of the accused: it is a section requiring very careful use by Courts of Session, and its real scope is explained in *Reg.* v. *Arjun* (1). Such statements may be recorded after cross-examination upon them of the witnesses who made them, which would reveal discrepancies, or used, under section 145 of the Indian Evidence Act, as a basis of cross-examination.

IN this case the accused were convicted by a Second Class Magistrate under section 25 of the Indian Forest Act, 1878, and fined in a sum of Rs. 50 each. The conviction and sentence were confirmed in appeal by a Sub-Divisional Magistrate, First Class.

PER CURIAM.—The Judgment and record of evidence show that in both the Courts below the convictions were really based upon certain statements of witnesses Deu, Bhou and others made before a Magistrate apparently under section 164 of the Code of Criminal Procedure he not being the trying Magistrate. They were examined by the latter, and the general tenor of their depositions amounts to a repudiation of their earlier statements. The appellate Court thought these earlier statements were admissible on the analogy of section 288. We think its view on this point have prejudiced the accused. Section 288 does not extend to the Courts of Magistrates nor to depositions not taken in presence of the accused. It is a section requiring very careful use by Courts of Session: its real scope is explained in *Reg.* v. *Arjun* (1). The earlier depositions may be recorded after the cross-examination upon them which reveals discrepancies. The trying Magistrate might have used them under section 145 of the Evidence Act as a basis of cross-examination. But he went too far in using them at the beginning of the examinations in a way likely to stop the witnesses from telling their own story. In basing the convictions on these retracted statements the two Courts below have gone too far, as upon them only they are not sustainable in law.

We are of opinion that the Court of appeal ought to have examined these witnesses *de novo* in the usual and correct manner; and that it should do so now on a retrial and pass a new judgment on the merits.

**Criminal Ruling* 56 *of* 1894. Criminal Applications for Revision Nos. 259, 260, and 261 of 1894.

(1) 11 Bom. H. C., 281.

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The Court, therefore, sets aside the judgment and orders passed by the Magistrate in appeal and remands the cases to his Court for re-trial of the appeal.

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29 November 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Oomer.*

City of Bombay Municipal Act (Bom. Act III of 1888), Secs. 394 (1), 471—Commissioner—License—Fire-wood—Presidency Magistrate.

A Presidency Magistrate may, under section 471, City of Bombay Municipal Act, convict and punish any person contravening any provision of section 394, sub-section 1, as for instance, using any premises for any of the purposes mentioned in that sub-section without a license from the Commissioner.

The questions whether the Municipal Commissioner refused the accused a license, and whether the refusal was legally justified are irrelevant to the determination of a case under the section.

THIS was a reference by the Acting Fourth Presidency Magistrate of Bombay, who stated—

In this case "the Municipal Commissioner has prosecuted one Oomer Essa under clauses (*b*) and (*d*) of section 394 of the Bombay Municipal Act of 1888 for using a place for sale or storage of firewood for which the Municipal Commissioner will not grant a license. The defendant pleaded not guilty and said that Commissioner wrongfully withholds license. I ordered him to vacate the place within fifteen days and postponed the case for further hearing to November 13th on which day Mr. S. G. Velinkar appeared for the defendant and argued that the Commissioner had no power to refuse a license under section 394 and referred to section 390 of the present Act in which express provision for refusal is made; and to section 225 of Act III of 1872 in which power of refusal was expressly given. In support of his argument Mr. Velinkar cited I. L. R., 17 Bom., 731. I was inclined to think that as section 394 of the present Act distinctly states that no person shall use any premises &c. without a license, the question whether the Commissioner's refusal was right or wrong could not be gone into in these proceedings, and that on the accused's admission that he had no license he was liable to conviction under the section; but as there was room for doubt I refer for the opinion of the High Court the following questions:—

(1) Whether under section 394, the Municipal Commissioner has the power to refuse the grant of a license, on the money being tendered for the same.

(2) Whether a Magistrate is not bound to convict under the section a person admitting that he holds no license, but pleading that he has tendered money for the license which money is refused by the Commissioner."

**Criminal Ruling 57 of 1894. Criminal Reference No. 147 of 1894.*

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ORDER.—The question whether the Municipal Commissioner refused the accused a license and whether the refusal was legally justified are in the opinion of the Court irrelevant to the determination of this case.

A Presidency Magistrate may under section 471 of Bombay Act III of 1888, convict and punish any person contravening any provision of section 394, sub-section 1, as for instance, using any premises for any of the purposes mentioned in that sub-section without a license from the Commissioner.

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3 December 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Balappa.*

Criminal Procedure Code (Act X of 1882), Secs. 298, 418—Retracted confession—Sessions Judge—Charge—Jury—Indian Evidence Act (I of 1872), Sec. 24.

When a retracted confession of an accused is tendered in evidence at the trial of a case tried by a jury, it is the duty of a Judge to determine the question of its admissibility, under section 298 of the Criminal Procedure Code and section 24 of the Indian Evidence Act.

Where a confession is retracted by the accused on the ground that it was induced by torture, and especially the confession, after admission, is to be taken into consideration against his co-accused under section 30 of the Indian Evidence Act, and the accused has marks of violence on his body, it may be the proper course for the Judge to take evidence about the circumstances before admitting the confession in evidence.

In a case of a retracted confession, if the committing Magistrate finds marks of violence on the body of the accused, he should ascertain from the Medical Officer in charge of the Jail whether, on arrival of the accused there, the marks of violence on the body of the accused were then visible.

Section 418, Criminal Procedure Code, gives finality to the verdict of a jury when there has been no error of law nor misdirection and when the Judge has concurred with the majority of the Jury.

THE accused was charged before the Sessions Judge of Belgaum with murder in that he and his companion waylaid Ningappa, the Patel of Kemankar, as he was returning from home from another village, and after assaulting him threw his body into a river. Owing to a statement made subsequently by the second assailant the river was dragged and a skeleton recovered from its depth, which was alleged by the prosecution to be that of the Patel. The Sessions Judge in charging the jury said there was insufficient proof, in his opinion, that the skeleton was not of Ningappa, but agreeing with the verdict of the majority of the jury sentenced the prisoner to transportation for life.

The accused preferred an appeal to the High Court. The High Court in admitting the appeal recorded the following judgment.

"In this case the Sessions Judge convicted the prisoner on a verdict of guilty of murder, being the verdict of 3 out 5. On reading the Sessions Judge's charge it would appear that the identity

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**Criminal Ruling 58 of 1894. Criminal Appeal No. 294 of 1894.*

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of a skeleton found as that of the man supposed to be murdered was chiefly supported by the retracted confessions of the present appellant and his co-prisoner; that the prisoner's retracted confession was almost the sole evidence on which he could be held to be a murderer: and that as regards the two retracted confessions the Sessions Judge left it to the jury to determine when coming to their verdict whether or not they were irrelevant under section 24 of the Indian Evidence Act, on the ground that they were the result of bodily ill-treatment. One of the grounds of appeal is that the prisoner's confession was improperly admitted in evidence. The objection to admissibility does not appear to have been taken at the time the confession was tendered in evidence, nor does there appear to have been any ruling on the point by the Court, *i. e.*, the Sessions Judge, at that time or afterwards. The question of admissibility was apparently one for the Court, under section 298 of the Code of Criminal Procedure, and section 24 of the Indian Evidence Act: and as ruled in *Reg* v. *Navrojee* (1), see too Field's Law of Evidence under section 24 for that and other cases; also *Imperatrix* v. *Rupya* (2); and *Imperatrix* v. *Tulsaji* (3), as to the duty of a Judge under section 298 of the Code of Criminal Procedure; Desai's Digest of Criminal Rulings, Cols. 70, 162, and Taylor on Evidence, section 22. The question whether the Sessions Judge rightly admitted the retracted confessions, being one of law and of the highest importance in this particular case, the Court admits the prisoner's appeal."

After hearing the case, the Court recorded the following judgment.

PER CURIAM.—We admitted this appeal from the verdict of a Jury for reasons given in our previous order, chiefly with a view to see from the record whether the retracted confession had been rightly admitted in evidence by the Sessions Judge. The record shows that before he recorded the confessions, he took the evidence of the Magistrate before whom they were made; and although the prisoners were defended by a pleader, no objection was raised to the documents being read and recorded. The only objection raised in the evidence to the confession of the appellant Ballappa was that it was never made: and as regards that of the acquitted prisoner Rama, the objection that it had been induced by torture stated by that prisoner to the committing Magistrate, was not urged by the pleader at the time the Judge had to determine of the admissibility under section 298 of the Code of Criminal Procedure. The Jury might himself before admitting it have taken evidence about the torture especially as the document was to be taken into consideration against the other prisoner

(1) 9 Bom. H. C., 358 (2) Cr. R., 62 of 1886 (3) Cr. R., 61 of 1889

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Balappa under section 30 of the Evidence Act. This would have been the more proper course, especially as the prisoner Rama had marks of violence on his body. But as no objection was made at the time it is difficult to hold that the Judge committed an error in law. We notice also that in his charge to the Jury he placed before them very clearly the reasons tending to show that the confession of Rama was not made voluntarily, which doubtless tended to induce the jury to acquit him, while they convicted the appellant Ballappa. The responsibility for the verdict was thus rightly cast on the jury. Section 418 of the Code of Criminal Procedure gives finality to the verdict where there has been no error of law nor misdirection and where the Judge has concurred with the majority which in this case was 3 against 2.

It is to be regretted that the committing Magistrate did not ascertain from medical officer in charge of the jail whether on his arrival there the marks which the Magistrate found on the body of Rama were then visible. See our Criminal Circular Orders page 3, para 8.

The Court notices that the recommendation to mercy made by the three Jurymen was based on several weak points in the evidence.

The Court dismisses the appeal.

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6 December 1894. JARDINE & RANADE, JJ.

Queen-Empress v. Pandurang.*

The Indian Stamp Act (I of 1879), Sec. 3 (17), Arts 52, 54—Receipt—Stamp.

Held, on the facts of the case, that the document was not a renunciation of a claim, and did not come within the definition of "release" in Article 54, Schedule I, of Indian Stamp Act, 1879. The language used in the document brought it within the words in the definition of "receipt" which include an acknowledgment of satisfaction of a debt. The fact that a separate document was used rather than an endorsement on the sale deed of the same date did not distinguish the case from Reference from the Board of Revenue under section 46 of the Indian Stamp Act, 1879—I. L. R., 10 Mad., 64.

IN this case A and B had dealings between them. On the accounts being made up, Rs. 4,994 were found due by A to B. A, instead of paying this amount in cash, sold some of his lands to B for Rs. 5,499 and executed a deed of sale which was duly registered. A, thereupon, obtained from B the surplus amount in cash and a receipt for the sum of Rs. 4,994, for the purchase-money. The receipt contained the following words:—"The said amount, I have received in full. There now remains this day nothing due by you to me in any manner whatsoever." It bore an adhesive stamp of one anna. The Collector being of opinion that the document was "a release" and chargeable under article 54, schedule I of the Indian Stamp Act, 1879, gave B an opportunity of paying the proper stamp duty and a penalty. B

*Criminal Ruling 61 of 1894. Criminal Application for Revision No. 207 of 1894.

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having failed to pay the same, the Collector sanctioned his prosecution. B was, thereupon, convicted and sentenced by a Magistrate under section 61, para 2 of the Act. B, thereupon, applied to the High Court under its extraordinary jurisdiction.

PER CURIAM.—The document treated by the Magistrate as a Release under the definition in Act I of 1879, Schedule 154 is not in our opinion a renunciation of a claim. The language used brings it within those words in the definition of "Receipt" which include an acknowledgment of satisfaction of a debt. The fact that a separate document was used rather than endorsement on the sale deed of the same date does not distinguish the case from Reference from the Board of Revenue under section 46 of the Indian Stamp Act 1879: I. L. R., 10 Mad., 64. Holding the document to be a receipt and properly stamped and not to be a release, we reverse the conviction and sentence.

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20 December 1894. JARDINE & RANADE, JJ.

Municipal Commissioner of Bombay v. Cawasji Byramji.*

City of Bombay Municipality Act (Bom. Act III of 1888), Sec. 402, sub-sections 1 & 2; 471 —Market—License—Commissioner.

The words of section 471, of the City of Bombay Municipal Act, 1888, provide a punishment for contravening any provision of section 402 (1). A person who does what is so distinctly prohibited by clause (2) does, by usurping the powers vested in the Corporation by clause (1), contravene that last mentioned clause. The two clauses must be read and interpreted together in order to give effect to the policy and object of the Legislature.

THIS was a reference by the Acting Fourth Presidency Magistrate of Bombay, whose report ran as under:

"The Municipal Commissioner has prosecuted one Cowasji Byramji Gorwala for having established a new private market on his premises at Parel, without the sanction of the Municipal Commissioner in contravention of section 402, sub-section 2 of the Bombay Municipal Act.

"The defendant admitted that a new private market has been established by him without sanction but he contended that the market had been established more than three months prior to the issue of process in this case and that therefore under the provisions of section 514 of the Act these proceedings are time-barred, in other words he had committed no offence whatever.

"I have found on the evidence that the market was established within three months before the issue of process in the case and that the defendant thereby committed an offence in that the establishment was without the sanction of the Municipal Commissioner as required by the Act. But looking to the fact that according to the penal schedule to section 471 of

*Criminal Ruling 64 of 1894. Criminal Reference No. 157 of 1894.

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the Act an offence under section 402, sub-section 1, is punishable while nothing is mentioned as to the punishment to be inflicted for an offence under sub-section 2. I have consented with the concurrence of both parties to submit for the opinion of the High Court the following questions :—

(1) Whether in view of the fact that in the schedule to section 471 the fine to be inflicted is for an offence under section 402 sub-section 1, sub-section 2 can be so read with sub-section 1, as to make the offence of establishing a new private market without the sanction of the Commissioner, in a portion of the City not specified by the Corporation as a place where a new market may be permitted, punishable with the fine set against sub-section 1 ? and if not

(2) Is the offence punishable in any and if so in what manner ?

ORDER:—The words of section 471 of Bombay Act III of 1888 provide a punishment for contravening any provision of section 402, clause 1. A person who does what is so distinctly prohibited by clause 2 does, by usurping the powers vested in the Corporation by clause 1, contravene that last mentioned clause. The two clauses must be read and interpreted together in order to give effect to the policy and object of the Legislature.

1895.

10 January 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Abdul Rahiman.*

Criminal Procedure Code (Act X of 1882), Sec, 560—Framing a charge—Frivolous complaint—Magistrate.

The fact that a Magistrate has framed a charge, under section 254, Criminal Procedure Code, against an accused does not of itself prevent him from holding after full inquiry that the charge is frivolous and vexatious under section 560 of the Code of Criminal Procedure.

IN this case a complaint was made by one Jusub against Abdul in the Court of the special Magistrate, First Class, in the Cantonement of Poona of an offence of cheating under section 420, Indian Penal Code, in respect of two *sadras*. The Magistrate acquitted the accused under section 258, and ordered the complainant to pay Rs. 25 to the accused as compensation for bringing a "false and vexatious" charge against him.

The Sessions Judge of Poona being of opinion that the order was illegal and improper made this reference to the High Court, observing—

"The Magistrate framed a charge against the accused, and therefore it must be presumed with a reference to the provisions of sections 253 and 254 of the Criminal Procedure Code, that upon the evidence for the prosecution the Magistrate was of opinion that there was ground for

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* *Criminal Ruling 2 of* 1895. Criminal Reference No. 166 of 1896.

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presuming that the accused had committed the offence, and that the Magistrate was not of opinion that there was no case made out which if unrebutted would warrant the conviction of the accused. After the charge was framed some evidence was recorded for the defence, but one of the witnesses then examined gave evidence tending indirectly to corroborate part of the evidence for the prosecution ; and the evidence of the other two was apparently not believed by the Magistrate, but he does not refer to them in his judgment. Their evidence must be checked by the accused's own admission that he was taken off at once to the police station evidently in connection with this charge. It does not appear that the evidence adduced for the defence had any effect on the Magistrate's mind and he has in his judgment disposed of the case solely with reference to the evidence for the prosecution, which was before him when he framed the charge. The Magistrate has given no reasons for this change of opinion, as to the quality of that evidence ; and it is difficult to understand how an accusation supported by evidence which the Magistrate considered sufficient to justify the framing of a charge, and which is practically unaffected by any rebutting evidence, could be described as frivolous or vexatious.

ORDER.—The fact that the Magistrate framed the charge does not of itself prevent him from holding after full inquiry that the charge was frivolous and vexatious. The record and proceedings are therefore returned.

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24 January 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Posha Hari.*

Indian Penal Code (Act XLV of 1860), Section. 304—Charge—Jury—Sessions Judge.

The prisoners were arraigned on a charge of culpable homicide not amounting to murder under section 304, Indian Penal Code. In his charge to the jury the Sessions Judge omitted to point out that the section is made up of two parts, and the verdict of guilty which the jury gave, failed to shew to which part it was meant to apply. The Judge treating the verdict as found on the first part of the section sentenced each prisoner to transportation for life :—

Held, that there being nothing in the evidence or the charge to suggest that the offence would have been murder but for one of the exceptions to the definition in section 300 of the Penal Code, and as every thing pointed to the offence being culpable homicide not amounting to murder and without reference to these exceptions, the verdict must be treated as a finding on the second part of section 304 and the sentences of transportation for life were therefore illegal.

PER CURIAM.—The Sessions Judge ignored section 342 of the Code of Criminal Procedure, but as the accused had a vigilant pleader there was probably no prejudice. In the charge the Judge failed to point out to the jury that section 304 of the Penal Code is made up of two parts : and the verdict, therefore, fails to show to which part it was meant to apply, a matter of great importance as regards the punishment. The judge has

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*Criminal Ruling 4 of 1895. Criminal Appeal No. 312 of 1894.

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treated the verdict as found on the first part. Having regard to Criminal Ruling 62 of 27th November 1890 this Court called for the record under section 421 and afterwards admitted the appeal of two of the prisoners. There is nothing in the evidence or the charge to suggest that the offence would have been murder, but for one of the exceptions to the definition in section 300 of the Penal Code: every thing points the offence being culpable homicide not amounting to murder and without reference to those exceptions. We think, therefore, the verdict must be treated as a finding on the second part of section 304 in which view the sentences of transportation for life are illegal. The Court alters the sentences passed on the prisoners Poshu and Narya to five years' rigorous imprisonment.

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11 February 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Bharmia.*

Criminal Procedure Code (Act X of 1882), Secs. 298, 299 and 302—Sessions Judge—Jury—Law to be taken from the Judge and the jury cannot consult commentary on the Act—Questioning the Jury.

The jury are not entitled to resort to a commentary on the law during their consultation about the verdict.

The different duties of the Judge and the jury are made clear in sections 298 and 299 of the Code of Criminal Procedure: the jury should take the law from the Judge.

Questions put to a Jury by the Sessions Judge demanding their reasons for acquitting the accused on the charge on which the jury have delivered an unanimous verdict, without any uncertain sound, exceed the limits of questioning which the law contemplates: as to the charge where the jury were not unanimous it was open to the Judge to require them, under section 302 of the Code of Criminal Procedure, to retire for further consideration, the Judge giving at the same time further directions on matters of law.

PER CURIAM.—The prisoner Bharmia was tried in the Sessions Court at Belgaum on a charge of murder. The record of the verdict is as follows:—"The Jury state through their foreman that they find unanimously that the accused is not guilty of murder: and further they find by a majority of four to one that the accused is guilty of voluntarily causing grievous hurt, the remaining juror being of opinion that the accused is guilty of culpable homicide not amounting to murder." The Sessions Judge being of opinion that the prisoner is guilty of murder has referred the case to the High Court under section 307 of the Code of Criminal Procedure. The careful charge delivered by the learned Judge shows that he left it to the jury to consider whether the prisoner was guilty or not guilty of murder, or culpable homicide not amounting to murder. It appears that during their consultation the jury referred to a copy of *Mayne's Penal Code* and especially the section 320, clause 8 about grievous hurt. The learned Judge believes that this examination of the law book was accompanied

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*Criminal Ruling 5 of 1895. Criminal Reference No. 7 of 1895.

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by an overlooking of the points to which the attention of the Jury was directed in the charge. We are of opinion that the jury are not entitled to resort to a commentary on the law during their consultation about the verdict. The different duties of the Judge and the jury are made clear in sections 298 and 299 of the Code of Criminal Procedure. The jury should take the law from the Judge, and, therefore, when cases had been cited to the Judge in a legal argument, and he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's counsel to them: *Reg* v. *Parish* (1). Where the jury were in need of directions and the Judge made over to them a copy of the Indian Penal Code leaving them to decide under what section the offence fell, it was held that he had failed in his duty of "laying down the law": *Jaspath* v. *Queen-Empress* (2). In a civil case where a jury had been allowed to take away with them an Act of Parliament, that circumstance was treated by Lord *Lyndhurst* as favouring the view that the jury had mistaken the law and a new trial was ordered: *Gregory* v. *Tuffs* (3). When the verdict had been delivered the learned Judge put a number of questions to the jury giving section 303 as the authority for that procedure. That section only authorises "such questions as are necessary to ascertain what their verdict is." As the question of provocation had been raised in the arguments and discussed in the charge and the verdict does not state which of the sections 325 or 335 of the Penal Code about grievous hurt was in the opinion of the four jurymen applicable to the case, the Judge might well, after reading to them those sections and giving proper explanations, have put the question to those four. As the fifth juryman did not say of which of the two sorts of culpable homicide mentioned in section 304, the prisoner was, in his opinion, guilty, the same procedure might have been applied to him. We think some of the questions actually put to the jury demanding their reasons for acquitting of the charge of murder, on which charge the jury had delivered an unanimous verdict without any uncertain sound, exceeded the limits of questioning which the law contemplates: *Dada Anna's case* (4). As the jury were not unanimous the proper course was, as in the matter of *Jhubboo Mahton* (5), to require them under section 302 of the Procedure Code to retire for further consideration. We are also of opinion that the Judge might, at the same time, have given further directions on matters of law. It remains for this Court to determine whether the evidence shows so clearly that the offence committed by the prisoner was murder or culpable homicide not amounting to murder as to justify us in holding the verdict of the four jurymen to be manifestly

(1) 8 C. & P., 94. (2) I. L. R., 14 Cal., 164.
(3) 1 C. M. & R., 310. (4) I. L. R., 15 Bom., 452. (5) I. L. R., 8 Cal., 754.

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wrong. Although every witness has been allowed to state the date with great vagueness, it appears from the first judicial confession of the prisoner that the death of his wife took place on the night of the 16th November last. On the morning of the 17th November she was found dead: and there are several neighbours who depose that on that occasion the prisoner confessed that he had "struck" her because she had not seen properly to his food the evening before. The Canarese and Mahratta verbs used by these witnesses do not necessarily mean "kill," but this evidence shows that the prisoner connected the death with the assault. On the same day he confessed to the Magistrate at Gokak that after beating her on the head with a great stone as she lay asleep he crushed her throat until death ensued. On the 19th November he told another Magistrate that he struck her with a stone, and that she died at once. He was not asked on this occasion about the suffocation. On the 14th December he put forward statements adhered to at the trial that the stone had slipped accidentally out of his hand on to his wife's head, and he denied that he had ever said he choked her. The medical witness examined the dead body on the 17th November. In his opinion the bruises on the head, not having fractured any bones, were not by themselves sufficient to cause death. The appearance that he had observed pointed to suffocation. On consideration of the evidence it is clear that the defence of misadventure is an afterthought. The prisoner's earlier and repeated story was that he had killed the woman he being at the time exasperated against her. The means used and the deadly result combine to raise the safe inference that his intention was to kill. We, therefore, concur in the opinion recorded by the Sessions Judge. The child who depose to seeing her father killing her mother, may be a true witness; but we cannot place much reliance on her statements. It is also difficult to form a full opinion on all the circumstances acting on the prisoner at the time. The Court, therefore, refrains from passing sentence of death; but convicts the prisoner of murder, and under section 302 of the Indian Penal Code, sentences him to transportation for life.

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14 February 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Dhondi Manku.*

The Bombay District Police Act (IV of 1890), Section 62—Cruelty—Interpretation.

To support a conviction under section 62 of the Bombay District Police Act, 1890, it should be found as a fact that pain or suffering has been inflicted.

ON the 25th March, 1894, the accused, a driver employed by one *dak* Contractor, drove a phaeton from Wathar Station to Circle Wadi

*Criminal Ruling 6 of 1895. Criminal Reference No. 18 of 1895.

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(a hamlet at about 6 miles distance) with two ponies at 2 P. M. He again drove his empty Phaeton with the same ponies from Circle Wadi to Wathar at about 10 P. M. and for a third time the same ponies were driven back to the hamlet at about 2 A. M. on the morning of 26th. He was, therefore, charged with cruelly treating the animals under section 62 of Bombay Act IV of 1890.

The District Magistrate of Satara referred the case to the High Court observing:—"The journey of about 18 miles which the pair of ponies was required to travel within 12 hours, *i. e.*, from 2 P. M. to 2 A. M. is not excessive as the ponies has had rest in the meantime and the road is very good one. There was, therefore, no ill-treat ment within the meaning of section 62 and section 1 of Bombay Act IV of 1890."

PER CURAIM :—We are of opinion that the view taken by the District Magistrate in this reference is correct, being supported by *Ford* v. *Wiley* (1) where the meaning of the word "cruelly" in 12 & 13 Vict. c. 92 section 2 is fully discussed. It is obvious that the language of section 62 of Bombay Act IV of 1890 has been adopted from that section from the Act of Parliament. We think it is essential to a conviction that it should be found as a fact that pain or suffering has been inflicted and that as this has not been found, the conviction is bad. The Court, therefore, sets it aside and directs that fine be returned.

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20 February 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Vali Mahomed.*

Criminal Procedure Code, (Act X of 1882,) Sec. 421—Appeal—Dismissal—Non-appearance of appellant.

It is not competent to a Sessions Judge to reject an appeal under section 421, Criminal Procedure Code, without perusing the record on the ground that there was no appearance for the appellant either by counsel or in person, because if the appellant is content to leave the question of admission or rejection to be determined by the Sessions Judge on the papers, the Sessions Judge is bound to peruse them, and the appellant is not bound to appear a second time, either by counsel or in person.

THE accused was convicted under section 498, Indian Penal Code, by the City Magistrate of Ahmedabad.

Against this conviction he presented an appeal to the Sessions Court at Ahmedabad, but that Court dismissed his appeal on the ground that there was no appearance for the accused either by counsel or in person.

The accused, thereupon, applied to the High Court under its revisionary powers for an order to have his appeal reheard by the Sessions Court.

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* *Criminal Ruling 7 of* 1895. Criminal Application for Revision No. 28 of 1895.

(1) L. R., 23 Q. B. D., 203.

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PER CURIAM:—Following *Empress* v. *Deshunkar* (1) and *Queen Empress* v. *Pohpi and others* (2), the Court sets aside the order of the Sessions Judge rejecting the appeal under section 421 of the Code of Criminal Procedure.

We are of opinion that if the appellant was content to leave the question of admission or rejection to be determined by the Sessions Judge on the papers, the Judge was bound by Section 421 to peruse, he was within his rights. He may have had nothing further to show to the Sessions Judge and was not bound to appear a second time either personally or by his counsel.

The Court now directs the Sessions Judge, after appointing another day whereof notice should be given, to rehear the appeal.

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21 February 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Vasta Jebhan.*

The Bombay Village Police Act (VIII of 1867), Sec. 11—Inquest—Police Patel—Duty.

The inquest which section 11 of the Bombay Village Police Act, 1867, requires, must be held *forth-with*, so that all the circumstances of the murder may be reported forth-with to the District Police.

This law, which imposes on the Police Patel the duty of holding an inquest, and arresting the murderers, and empowers him to take evidence on oath, is obviously intended to make justice effectual by means of prompt inquiry in the face of all the villagers, and by delivery of a verdict of men not open to the suspicions of undue zeal often alleged against the District Police. Like any other Coroner's inquest, it saves the innocent from false charges, as people are not likely to bring such charges against an innocent man, when they have kept silence at the inquest.

PER CURIAM.—There can be no doubt that Purshotam was murdered under the noonday sun in one of the fields of Sisodra on the 14th November, 1894. The serious question which the Courts have to decide is whether the prisoners Vasta and Bapudia committed that murder. They have denied it from the beginning and they asserted the defence of *alibi*. Before dealing with the evidence of the two eye-witnesses and the other two men who saw the two prisoners before and after the murder, three important considerations present themselves: (1) The defence has never suggested any other person as the murderer; (2). No attempt has been made to prove the defence of *alibi*; on the 24th November both the prisoners told the Magistrate that none of the four important witnesses were at enmity with them. It has also been argued that many other people must have been within sight and hearing of the murder. If so, these people might have been called by the prisoners. There is nothing in the evidence to show that there were other persons near the scene ploughing, manuring or sowing the field or eating the mid-day repast.

(1) Cr. R., 11 of 1892. (2) I. L. R., 13 All., 171.

**Criminal Ruling 8 of 1895. Confirmation Case No. 1; Criminal Appeal. No. 17 of 1895.*

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At the trial the prisoner Bapudia alleged enmity on the part of all the four witnesses. The prisoner, Vasta, however, had nothing to say against the eyewitness Rupa and the Koli cultivator Parbhu who says he saw the two prisoners in the neighbourhood carrying bill hooks. After consideration of Mr. *Manekshah's* arguments on behalf of the prisoners, we see no reason to differ from the careful estimate of the evidence of the four witnesses formed by the learned Judge below. Their statements are corroborated by most of the other witnesses, and also by a report which the Police Patel made to the Chief Constable of the Ankleshwar Taluka the same afternoon (Exhibit B) which mentions that the witness Deva came and informed that Parshotam had been killed by the two prisoners. Mr. *Manekshah* has led great stress on the fact that in an earlier report sent by the Police Patel to the Panoli Police Station neither the name of the informant nor the murderers is given. This report does not corroborate the Police Patel's evidence contradicted by Bhagu, that it was Bhagu who first informed him of the fact of the murder. The Patel swears that he sent off this first report which he says he wrote himself, before he had been told by any body who had committed the murder, and that he did not even take the trouble to ask Bhagu who had done it, such behaviour on the part of a Police Officer may well arouse suspicion of partiality or corrupt motive. It helps to screen the guilty, as it is a plausible argument that, if the Patel had been given the names of the murderers by the eye witness, he would have mentioned them in the report written immediately afterwards, and that the omission in the report to name the murderers that they were not named at the time by the eye witness, but afterwards and falsely and under corrupt and factious influence. Again such behaviour of a Police Officer tends to put innocent people in jeopardy as there is no written evidence of the eye witness's statement and it is thus easier for him to change and to name innocent men as the murderers under the corrupt and factious influence which abound in such a village as Siedora. The Patel did not even proceed at once to the place where the corpse lay or take any measures to arrest the murderers. He sent several village Policemen to the spot merely to verify the information about a murder having been committed. He confirms the statement of Purshotam's widow, Bai Kesar, that she raised her voice and openly taunted him with his manifiest indifference in the matter. It would appear that he sent off both the reports before he had viewed the corpse. The widow, other relations and villagers had collected around it; and the names of the murderers had been made public by the time when, after writing his first report the Patel was going to the place of the corpse. An old man Ganesh, the Patel of another village called Kulladra, having

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been sent for by the widow had arrived on horse-back from that village before him, and after seeing the corpse was riding on to Sisodra when he met the Patel and upbraided him for his delay in doing his duty and insisted on his reporting the names of the murderers. Whatever corrupt intentions the Patel may have had at first appear to have been frustrated by the publicity the names of the murderers had got through the mouths of Deva and the widow who had been told these names by Bhagu the witness who saw the murderers running away and by the assistance of the Patel of the other village that this Police Patel should do his duty. The latter was thus forced to report the names ; and, albeit his evidence is relied on for the prisoners to discredit the eye-witnesses, the Patel, however partial his intentions may have been, was, in the face of this report unable to screen the prisoners by denying that they were named as the murderers that very after-noon before even the Patel had viewed the corpse lying in the field, and also unable to put innocent men in jeopardy by alleging that they, and not the prisoners, had been named. The Patel deposes, that he made no inquiries about the horse on which the murdered man was riding or about the cloth and shoes which had fallen off. This accounts for the absence of evidence fully explaining how Purshotam parted from the horse. The eye-witness say nothing about this, the murder took place in a field, and it would seem that until the dismounted Purshotam sought safety by running on foot, he must have come along the lane which is shut off as the Patel says, from the field by high hedges. No inquest on the dead body was held by the Patel. None was held by the Police till the next day. Here again, as the Police Patel admits, he completely failed in the duty imposed on him by clear statute law. This law which imposes on the Police Patel the duty of holding an inquest and arresting the murderers and empowered him to take evidence on oath is obviously intended to make justice effectual by means of prompt inquiry in the face of all the villagers and by delivery of verdict of men not open to the suspicions constantly cast on the District Police. Like any other Coroner's inquest, it saves the innocent from false charges, as people are not likely to bring charges against an innocent man when they have kept silence at the inquest. Like the Coroner's inquest it also records the evidence and circumstances justifying the accusation of the man denounced or appearing to be the murderer. The law to which we allude was enacted as statute in Regulation 4 of 1818 which professes to be founded upon ancient usage of the country. It was re-enacted in 1827 by the Government of Mr. Mountstuart Elphinstone, and again in Bombay Act VIII of 1867, sections 10 to 13, the Village Police Act, promoted by a Government of which Sir Bartle Frere and Sir B. Ellis were members.

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These eminent statesmen knew the usages of the country well and Mr. Elphinstone's report on the Deccan shows in detail the immense value of the Village Police establishment and how the Patel through its means knows all that goes on. The procedure by local officers and jury of the vicinage much resembles that of the old English jury. The directions given by the laws framed by these Governors of Bombay bear many resemblances to those in the statue De Officio Coronatoris 4, Edward I, as any one may see in the chapter on Coroners in 2 Hawkins' Pleas of the Crown. At that time in England, as in Gujarath and the Deccan to-day, there was great risk that murderers would remain undetected unless the local officers made prompt and skilful inquiry and the superior Courts has, as that old statute shows, to grapple with the injury to justice caused by the laziness, corruption, and stupidity of Coroners; and the indifference and corruption of the people of the place where the dead body lay. But the Parliament, the Crown, and the Courts continued to compel both Coroner and people to do their duty; so that now it is a rare occurrence for a Coroner to refuse to hold an inquest in a proper case of sudden or suspicious death. In this country, both in Gujarath and the Konkan and the Deccan such omissions have lately been frequent, and for years it has been the practice of this Court, without, we believe, assuming a jurisdiction over the Patels, in these matters to draw the attention of the authorities to their illegal omissions. We have lately had to comment on a number of such cases in which with a dead body lying murdered in the village the Patel has held no inquest to all. We have also lately had several cases in which immediately on the occurrence of a murder false slatements were made sometimes by means of a conspiracy in order to convince of a capital crime perfectly innocent relations of the man-slayer. The public order depends on every officer doing such duty as the law assigns to him, and those who have to detect crime may not at mere caprice refuse to do this duty: *In Re Ganesh Sathe* (1). Nor is a Magistrate of any grade to be listened to if he excuses his illegal omission to act by some corrupt motive or by pleading cowardice: *Queen-Empress* v. *Maganlal* (2). Until the law is repealed it must be acted up to. Duty is very often to be performed under irksome circumstances even at risk and danger. No one ever said that the path of duty lay all among the roses. But then the Public office, besides its emoluments, for this reason carries honour with it which other people do not enjoy, and if a man is too stupid or too corrupt or too cowardly to perform the duties the various laws compel him to do what is right or punish him and remove him from office. There is, as the learned Judge points out, a need of better justice at Sisodora than

(1) I. R., 13 Bom., 608. (2) I. L. R., 14 Bom., 132.

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now exists. In the murder of which the deceased Purshotam was in 1893 acquitted by this Court no inquest appears to have been held—a fact of great importance in connection with the reasons why all the persons charged were, acquitted either at the Sessions or by the judgment of *Bayley* and *Fulton*, JJ., in appeal. The man Manchhi then murdered had, it appears, also been accused or discharged of a murder himself. The present grievous crime, the third of these murders, and one committed in broad day would possibly have gone undetected if the Patel of Kuldra had not by his personal action forced this reluctant Patel of Sisdora to do the very small part of his duty which consisted in reporting the names of the murderers and his informant to the Chief Constable. It may be that strong influences of faction pervade the village and that this Police Patel is afraid to act against the supposed views of a powerful villager, although apparently this Patel can read and write. The refusal to hold the inquest which section 11 of Bombay Act VIII of 1867 requires to be held *forthwith*, so that all the circumstances of the murder may be reported *forthwith* to the District Police, is in the present case made more startling by the great delay of the Patel in even going to look at the corpse and his confessed and culpable indifference as to who the murderers were. All this behaviour stops the production of evidence in the village and enables the guilty to escape from the village; and as the District Police must be greatly hampered by not getting the full report in writing of the inquest under section 11, the murderer may escape from the District altogether, as on such a report as that first sent by this Patel they are unable to inform the other Police stations of the names and descriptions of the murderers. What is meant by the words "all the circumstances of the case" in the Village Police Act can be understood if we look at what the Coroners had to do (See Reeves History of English Law; I-122, II-66) and the authorities mentioned in Hawkins, P. C. about these words. We think, therefore, that whether or not the Governor in Council has yet directed any inquiry by the Collectors and Magistrates as to the disregard of the rules of the Village Police Act about the Patel's duties when a murdered corpse is found, the present case, more than most others in which we have commented on the neglect of those rules, is one to which we should direct the attention of that high authority, this being apparently the third murder, the last murderer having remained unpunished in 1893. We are of opinion that the convictions of the two prisoners for murder are justified by the evidence which we have considered in the utmost detail and with the help of all the arguments. Our constant dealing with these cases does not lighten this labour; our experience even makes it hevier, as it opens more avenues

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for suspecting evidence, however clear and plausible it seems. We think, however, that the evidence in this case justifies, not only the convictions, but also the two sentences of death and these we confirm.

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21 February 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Abdul Aziz.*

District Municipal Act (Bom. Act VI of 1873)—Penal Code (Act XLV of 1860), Secs. 425, 434—Mischief—Removing a barricade placed by Municipality.

It is no mischief if a person innocently removes a barricade placed by a Municipality on a piece of land in front of his house, which impares his ingress and egress to or from the said house.

THE accused was convicted of the offence of mischief under section 434, Indian Penal Code, and sentenced to pay a fine of Rs. 20, under the following circumstances. The Surat Municipality acquired under Act X of 1870 certain pieces of open ground for widening a street from Nasrudin, father of the accused amongst others and the awards were determined by this Court on the 26th October 1891. Subsequently, the Municipality came to the conclusion that the road was wide enough without the newly acquired pieces of open ground and resolved to sell them. In persuance of this resolution a barricade was on the 24th November last erected in front of Nasruddin's shop. For removing this barricade the accused was convicted and fined.

The Sessions Judge of Surat, made this reference to the High Court, observing:—"I have visited the place and I must say that no grosser infringement of private rights by a corporate body than this has ever been brought to my notice. The barricade which has been re-erected by the Municipality practically bars all access to the premises of the accused man from the public road. He can, it is true, squeeze himself in between the last post and the wall, but the Municipality have obviously no authority to interfere with the open right of way he has always enjoyed. It is, I think, certain that a Municipality has no legal authority to obstruct any one's right of way as they have done here, and I am of opinion that the accused committed no offence whatever in pulling down the barricade in question."

PER CURIAM.—The conviction is bad as the intent described in section 425 of the Indian Penal Code is not found by the Magistrate and cannot reasonably be inferred from the evidence by this Court. The accused appears to have thought he was abating a nuisance: and the case of the *King* v. *Russel* (1) somewhat supports that view. The Court reverses the conviction and sentence.

**Criminal Ruling* 10 *of* 1895. Criminal Reference No. 25 of 1895. (1) 6 B. & C., 506.

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13 March 1895. JARDINE & RANADE JJ.

Queen-Empress v. Vaja Raiji.*

Criminal Procedure Code (Act X of 1882) Sec. 209—Practice.

Section 209, Criminal Procedure Code, 1882, commented on.

IN this case, the prisoners were committed to the Court of Sessions for trial under sections 148, 149, 307, 325, 326, Indian Penal Code, and convicted under sections 147, 148, 149, and 325 of the Code.

PER CURIAM.—We regret that the time of the Court of Sessions and the High Court should have been taken up by this case. The Magistrate had jurisdiction over all the charges except that of attempt at murder raised on the evidence of witnesses about Gaba being thrown into a well. Neither the Judge nor the assessors believe that story at all: and it is far too flimsy for any one to believe it. Gaba was not in the least hurt: and it is clear that if he ever was in the well he jumped in of his own accord and he knows how to swim. We think the attention of the Magistrate should be drawn to *Queen* v. *Krishto* (1) and *Lachman* v. *Juala* (2) as interpretations of section 209 of the Code of Criminal Procedure Even if the judgment of *West* J. in *Queen-Empress* v. *Namdeo Satiaji*(3), where that section is interpreted in the light of very different words of an English Statute is a correct interpretation of the law, we think that if the Magistrate had examined the witnesses more carefully, he could have seen that there was no truth in their story about this harmless ducking. There was doubtless a fight in which Soma and Amra got hurt. But the circumstances are not those deposed to by Soma and his witnesses; and we quite agree with the assessors in their reasons for holding that on such very false and contradictory depositions it would be unsafe to convict the prisoners. As one among these many glaring discrepancies we may refer to a deliberate statement of Soma that two of the persons charged, one of them being the prisoner did not strike him.

We reverse all the convictions and sentences and acquit all the prisoners.

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13 March 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Berkia Mankia.†

Criminal Procedure Code (Act X of 1882), Sec. 303—Sessions Judge—Charge—Jury—Verdict.

In a trial by the Jury, the Sessions Judge ought to call on the Jury under section 303 of the Code of Criminal Procedure, to return a verdict on each one of the heads of charge.

If the trial is for murder of two persons, and the jury return a verdict of guilty, the

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* *Criminal Ruling* 13 *of* 1895. Criminal Appeal No. 30 of 1895.

(1) 14 W. R., 16. (2) I. L. R., 5 All, 161. (3) I. L. R., 11 Bom., 372.

†*Criminal Ruling* 14 *of* 1895. Criminal Reference No. 30 of 1895.

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Sessions Judge ought to ascertain whether the verdict relates to the killing of one or the other, or both.

PER CURIAM.—Under section 303 of the Code of Criminal Procedure the Sessions Judge ought to have called on the jury to return a verdict on each one of the heads of charge: and he should have ascertained whether the verdict of guilty of murder related to the killing of Rama, Cuji or both. The Judge has differed from the verdict as regard the prisoners 1 and 2 and referred their case under section 307. It appears from his charge that the evidence was placed in full detail before the jury. The verdict of guilty shows that the jury disbelieved the defence of prisoners 1 and 2, who at the trial pleaded complete ignorance and *alibi*. The Judge also believes the eye-witnesses as to the presence of three prisoners at the murder and also believes the retracted confessions. We see no reason to differ from him on these points. The pleader for the appellants has admitted that they must have been present, and has relied on the excuse stated in those confessions that three prisoners were present as unwilling lookers on coerced by prisoners 3 and 4 and are not liable as abettors. The Judge stated to the jury that prisoners 1 and 2 were in his opinion mere unwilling lookers: on and after the convicting verdict the Judge adheres to this view and thinks they should be acquitted on the ground that they are in precisely the same position before the law as the innocent witnesses who were roused from their sleep by the burning of the house and the murder of the inmates. The jury are the judges of the facts, and we are of opinion that on the facts their verdict is subsequently right. The case of prisoners 1 and 2 is not at all like that of all the innocent sleepers who were present on lawful occasions being roused from their beds, whereas these prisoners had come from a distance with the prisoners 3 and 4 at their invitation after the murderous purpose was disclosed. The confessions are fully corroborated by the eye witnesses; and this evidence being believed by both Judge and jury enables this Court to estimate their conduct. They confess they went with prisoners 3 and 4 to see these other two commit a murder, and that they stood by and witnessed all that occurred and then they left, but waited further on till they were rejoined by the other two. The common knowledge before and association after the killing point to conspiracy. They are not like the two eye-witnessess helpless women, though present they did nothing to prevent the crime. It was, therefore, reasonable for the jury unanimously to infer that prisoners 1 and 2 were present in pursuance of the conspiracy; and that what was done was with their aid. This makes sections 109 and 114 of the Penal Code apply. There was no reason why prisoners 3 and 4 should make them go with them unless they were friendly to the evil

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design: as no man who commits a murder or arson forces unwilling witnesses to go and see him do it. Although prisoners 1 and 2 did not touch the inmates or set fire to the house, the jury may reasonably have thought they went there to help if need be, to encourage the other two, to over-awe, or overcome possible opposition. The case is not at all like that of a casual passer-by who sees a prize fight going on and walks up to look on—*The Queen* v. *Coney and others* (1). The verdict on the facts is amply justified by the remarks of *Peacock*, C. J., in *Reg* v. *Gorachund* (2). The prisoners 1 and 2 are guilty of the murder of both of Rama and Cuji under sections 114 and 302 of the Indian Penal Code. Their excuses made in their retracted confessions are not to be believed. They may have been afraid of the prisoners: but there is nothing to show that any force was used to make them go to and stay at the crime, or that they required much persuation. There was a willingness to aid though perhaps a reluctant willingness. Not even fear of death to one's self is an excuse before the law for the killing of some one else. See the cases of *Queen Empress* v. *Maganlal* and *Queen Empress* v. *Chagan* (3), which are authorities overruling the Judges doubts on the application of the law. Of the two punishments allowed by the law we consider transportation for life the proper one under the circumstances, and convicting the prisoners Barkia and Dharmia under section 302 of the Penal Code we pass that sentence upon each.

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21 March 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Menga Budhia.*

Criminal Procedure Code (Act X of 1882), Secs. 297, 298, 299—Evidence Act (I of 1872), Secs. 24-29—Sessions Judge—Charge to Jury.

In trials by Jury, the Judge, in his charge, should not state his own view of important matters of fact so positively as to leave the jury no loop-hole for taking any other view. Section 297, Criminal Procedure Code, requires the Judge to sum up the evidence for the prosecution and the defence, but section 299 leaves it to the jury to decide which view of the facts is true. The duty of the Judge is to lay down the law authoritatively to the Jury and to decide on the admissibility of evidence.

PER CURIAM.—We are of opinion that the charge delivered by the Jury is open to some of the objections urged by the learned counsel for the appellants Sowar and Menga. The learned Judge has stated his own view of certain important matters of facts so positively as to leave the jury no loop-holes for taking any other view—*Queen Empress* v. *Rajcoomar* (4): as where he directed that it was impossible that Luji might have met her death by the fall of a beam, and that if the prisoners committed the

(1) L. R., 8 Q. B. D., 534. (2) B. L. R., Sup. Vol., 466. (3) I. L. R., 14 Bom., 115, 331. (4) 10 Ben., L. R., Apx., 39. *Criminal Ruling 15 of 1895. Criminal Appeals Nos. 36 and 37 of 1895.

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arson it was impossible not to hold them guilty of the killing. Section 297 of the Code of Criminal Procedure requires the Judge to sum up the evidence for the prosecution and the defence; for the manner see *Reg.* v. *Fattechand* (2) but section 299 leaves it to the Jury to decide which view of the facts is true. It was for the jury to decide whether these appellants were present, whether the two-eye-witnesses to the actual killing of Luji by Menga were to be believed, whether the very scanty statements of the eye-witnesses about the presence of Sowar were to be believed whether if he was present that circumstance was consistent with innocence or beyond doubt in indication of guilt: see *Queen-Empress* v. *Maganlal* (3). It was for the jury to decide whether supposing the eye-witnesses were honest, their eye-sight was to be trusted as to the identity of each prisoner. The duty of the Judge is to lay down the law authoritatively to the jury and to decide on the admissibility of evidence (see section 298, Criminal Procedure Code, section 136, Indian Evidence Act, 1 Taylor on Evidence, section 26, *e.g.*,) whether a statement is admissible under sections 24 and 29 of the Evidence Act, and whether it was relevent as against any person other than the maker, under section 30 as amended by Act III of 1891. We think the learned Judge ought, following *Queen-Empress* v. *Maganlal*, to have given clearly directions on the law of abetment, and called on the jury decide upon section 34 of the Indian Penal Code, whether the prisoners if present had a common intention and what that intention was; for, as we lately pointed out in an appeal from Zanzibar Criminal Ruling 42 of 2nd October 1894, a murder committed in an unlawful enterprize may be the design and act of one person only to gratify his private grudge, as in Plumer's case, from which definition of the law of England section 149 is taken. The summing up of the evidence ought therefore to have been special as to each prisoner; the question whether each prisoner had a design to kill required much careful consideration, and was one for the jury as judges of the facts and not to be withdrawn from them by the Judge giving positive direction that it was impossible not to hold that on proof of the arson the guilt of homicide was to be inferred. As Mr. Branson points out the testimony against Sowar is extremely scanty and the jury ought to have been told that as the witnesses had at first denied knowledge, it was for them to judge whether they were honest and credible as to identity of each prisoner. We think the jury may have been influenced, the testimony against Sowar being so scanty and after earlier denial, by the unsworn statements of the other prisoners—Barkia and Dharmia—the Judge ought to have given proper directions as to the caution with which the statement

(2) 5 Bom., H. C., 85. (3) I. L. R., 14 Bom., 125.

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of accomplices should be treated and the need of independent corroboration as against each prisoner, as well as regards the circumstances of the crime. The reported judgments such as *Queen-Empress* v. *Chagan* (4) bind the Courts below for which they are intended as guides. There was the greater need for these directions, because Barkia and Dharmia were less satisfactory than accomplice witnesses, as they were prisoners, not on oath nor subject to cross-examination: *Queen-Empress* v. *Does* (5) and besides their accusations of Sowar and Menga were made in their own defence, to throw the blame on the others, as should have been pointed out to jury. On the whole we think the Judge has given too positive and overruling directions on matters of fact and insufficient and incorrect directions on matters of law. We think the trial by the jury was thus made imperfect and that these appellants have been seriously prejudiced. The Court, therefore, reverses the convictions and sentences passed on the prisoners Sowar and Menga and directs that they be retried on the same charges.

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16 April 1895. CANDY & RANADE, JJ.

Queen-Empress v. Bhagya.*

Evidence—Pardoned Accomplices—Conviction—Criminal Procedure Code (Act X of 1882), Sec. 338—"Supposed"—Interpretation.

The evidence of pardoned accomplices taken with the statements of unpardoned co-prisoners is not sufficient by itself to warrant the conviction of those who never confessed.

The word "supposed" in section 338, Criminal Procedure Code, 1882, only excludes those who have been actually convicted and, therefore, the tender of pardon to a person or persons who had pleaded guilty but not convicted, is not prohibited under the section. *Queen-Empress* v *Kalla* (7), followed.

CANDY, J.—The independent evidence as to the personal identification of the dacoits being, in the opinion of the Sessions Judge, worthless, the question simply is whether the evidence of the pardoned accomplices, taken within the statements of the unpardoned co-prisoners, is sufficient for the conviction of Bhagya and Ganu, who have never confessed. In *the Queen* v. *Elahi Baksh* (6) *Peacock*, C. J. said: "If two or three persons should be apprehended at different places at long distances from each other and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence. The evidence of the several accomplices so corroborated might be sufficient to satisfy a jury, although the evidence of any one of them alone could not have been safely acted

(4) I. L. R., 14 Bom., 331. (5) I. L. R., 10 Bom., 231. (6) B. L. R., Sup. Vol., F. B., 459.
*Criminal Appeals Nos. 34 and 36 of 1895. (7) I. L. R., 7 All., 160.

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upon." These remarks were afterwards embodied in the further illustration to illustration (*b*) of section 114 of the Indian Evidence Act. If they could be applied to the evidence of all three pardoned accomplices and the statements of the co-accused in the present case then I am not prepared to say that the convictions of Bhagya and Ganu would be bad. But that evidence is just what is wanting. Having regard to Criminal Circular No. 48, the present case was one in which it was specially necessary to examine the police officer or officers by whom the investigation had been conducted. The circumstances under which all alleged dacoits were arrested and made statements might have shown that there was no ground for presuming collusion or that the accused had been induced to include the names of Bhagya and Ganu. Admittedly the object with which the Sessions Judge tendered pardon to three of the prisoners was to obtain sworn evidence as to the identity of the persons who took part in the dacoities. But the value of this sworn evidence could hardly be appreciated unless it was shown that the circumstances under which these pardoned men had from the first made their statements were such as to render previous concert highly improbable. It is much to be regretted that the trial was so defective. It may be remarked that it is impossible to identify the items of property as described by the Sessions Judge in the depositions recorded by him with the lists of property filed in the Sessions Court proceedings. The convictions of Bhagya and Ganu must be reversed and those prisoners set at liberty.

RANADE, J.—The prisoners Bhagia and Gania were along with several others charged before the Sessions Judge of Nasick under section 395 in respect of two dacoities at Dewli and one at Khambala. They were accused Nos. 11 and 12 in Sessions Case No. 412 and accused Nos. 10 and 11 in Sessions Case No. 40. The other co-accused all pleaded guilty to the several charges brought against them, and three of them were granted pardon under section 338 and turned into Queen's evidence. The Sessions Judge held, agreeing with one and differing from another assessor, that the confessions of the unpardoned co-accused and the sworn statements of the pardoned criminals overwhelmed the denials of the present appellants, and they were accordingly sentenced to two years' rigorous imprisonment in each of the three charges of dacoity in which they were concerned. Their chief ground of appeal is that the Koli and Thakors' witnesses have trumped up the charges out of enmity, and that they took no part in any of the dacoities. Mr. *Branson*, who appeared for the prisoners, argued that the Sessions Judge improperly tendered pardon to three of the co-accused, as they had pleaded guilty to the charges, and therefore could not properly be regarded as coming within the category of persons

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"*supposed* to be directly or indirectly concerned in, or privy to, such offence" (section 338). The Allahabad High Court has, however, ruled that the word "supposed" in this section only excludes those who have been actually convicted and that the tender of pardon to a person or persons who had pleaded guilty but not convicted was not prohibited under this section: *Queen-Empress* v. *Kallu* (1). We see no reason to differ from this interpretation of the section. It was next contended on behalf of the appellants that the Sessions Judge was in error in basing his conviction solely on the statements and confessions of pardoned or unpardoned accomplices without requiring such evidence to be corroborated in material particulars by other less tainted testimony or circumstantial evidence or evidence of conduct &c. This contention derives some force from the fact that the judgment of the Sessions Judge, while characterizing the sworn statements of the pardoned accomplices and the confessions of the unpardoned co-accused as overwhelming the denials of Bhagia and Gania, describes the evidence of identification given by the dacoited complainants as worthless. It is no doubt true that under section 133 an accomplice is a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. At the same time the presumption laid down in section 114 (*b*) that an accomplice is unworthy of credit unless he is corroborated in material particulars has been generally given effect to by the Courts: *Queen-Empress* v. *Maganlal* (2) *Queen-Empress* v. *Chhagan* (3) *Queen-Empress* v. *Ram Saran* (4), *Queen-Empress* v. *Baldeo* (5) *Queen-Empress* v. *Govardhan* (6). In the present case there is no substantial difference between the sworn statements of the pardoned accomplices and the confessions of the unpardoned co-accused accomplices: *Reg.* v. *Malapa* (7), which last can be taken into consideration under section 30 of the Evidence Act, but are not by themselves sufficient to support a conviction. Independent corroboration is necessary in both cases: *Queen* v. *Elahi Bux* (8), corroboration not only about personal identity, but also as to the *corpus delicti*, *i. e.*, the circumstances which constitute the participation of the accused tried in the offence charged. No such corroboration is furnished by the evidence of the complainants Hazarimal and Kasturchand and their witnesses. Kasturchand did indeed state that he recognized Gania as following the gang singly and walking lame. As Kasturchand, however, had never seen the man before, this recognition cannot be of much probative value, more especially as it appears that

(1) I. L. R., 7 All., 160. (2) I. L. R., 14 Bom., 115. (3) I. L. R., 14 Bom., 381.
(4) I. L. R., 8 All., 306. (5) I. L. R., 6 All., 559. (6) I. L. R., 9 All., 525.
(7) 11 Bom., H. C., 196. (8) B. L. R., Sup. Vol., F. B., 459.

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the Bhils were mustered by the Police at Egatpuri three weeks before and the complainants had opportunities to see the men they suspected. The next witness, Shrimal, professed that he could identify both Bhagia and Gania. A man who looked like Gania is said to have taken off the earrings, while Bhagia, it is alleged, stood near the oil casks with a *patta* in his hand and Gania had a stick in his hand, Shrimal also admitted that he did not know the robbers before. Hazarimal, complainant in one of the dacoities, identifies Bhagia as the person who dragged him down and beat him. He did not know Bhagia before, and he did not know his name till it was mentioned to him by the Police. The thieves according to Hazarimal had their blankets hooded over their faces, but he professes to have seen their faces, as they uncovered them when beating him. In regard to this statement of Hazarimal, he was flatly contradicted by the pardoned witness Aba, who said that Bhagia did not go upstairs and did not beat Hazarimal. These are the only witnesses, not accomplices who gave evidence against Bhagia and Gania. It is plain that no reliance can be placed upon such corroborating evidence. The Sessions Judge rightly characterized this independent evidence as worthless. There remains the sworn statements of the pardoned Aba and two other witnesses and the confessions of the unpardoned co-accused. Aba's evidence does indeed show that Bhagia and Gania actively participated in the dacoities, but it may be noted that Aba admitted that there were some disputes between him and Bhagia, that Bhagia's father had detained Aba's brother many days in the village as being the cause of cholera. Two curious Marathi documents were produced to the Police in this connection. Aba's acquaintaince with Gania is very slight as he comes from another village. Neither Bhagia nor Gania appear to have received any share of the loot or the cash into which it was converted after the last dacoity. The other two pardoned witnesses are near relations of Aba and gave similar evidence. It may be further noted that, while the pardoned accomplices stated that Bhagia had a pistol with him, the unpardoned co-accused charge him only with having a *patta* in his hand when they all went out to commit these dacoities. This circumstance shows that the pardoned accomplices have improved upon the other co-accused in their desire to implicate Bhagia and Gania. Bhagia and Gania admittedly possess many lands, and the main incentive of starvation which suggested these dacoities was certainly wanting in their case. Lastly, the fact that no stolen property, save an empty earthpot without jaggery in it and a stick, were found in their houses must be allowed some weight in their favour. Taking all these circumstances into consideration, we feel satisfied that the uncorroborated evidence of

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the pardoned accomplices and the confessions of the unpardoned co-accused being so full of contradictions and coming from tainted sources are not sufficient to bring home the charges satisfactorily to Bhagia and Gania, and that the benefit of the doubt must be given to these accused. We, accordingly, reverse the conviction and direct that they be set at liberty.

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10 May 1895. PARSONS & RANADE, JJ.

Queen-Empress v. Shapurji Ratanji.*

Abkari Act (Bom. Act V of 1878), Sec. 45—License—Condition—Breach—Farmer—Agent—Interpretation.

A licensee was convicted of having broken the condition of his license, which provided that the licensee should deliver the juice of the trees as soon as drawn to the farmer, inasmuch as he delivered the juice to a servant of the farmer who came for the juice on behalf of the farmer as his agent:—

Held, that the conviction was bad since under the terms of the license a delivery to the farmer in person was not essential, but that the latter could depute a servant or agent to take delivery of the juice drawn.

IN this case, the accused was charged with the offence of a breach of license and sentenced under section 45 (*c*) of the Bombay Abkari Act V of 1878. He was charged with having contravened the third condition of his license to tap toddy trees which stood as follows:—"The licensee shall deliver the juice of the trees as soon as drawn to the farmer". In this case, the accused delivered the juice to a servant of the farmer who came on behalf of the farmer as his agent. The District Magistrate of Surat, being of opinion that the conviction and sentence were illegal, referred this case, observing—"The accused did not thereby contravene the condition because the term 'farmer' includes 'his agent' also".

PER CURIAM:—We agree with the District Magistrate that a delivery to the farmer himself in person is not essential but that the latter can depute a servant or agent to take delivery of the juice drawn. We, therefore, reverse the conviction and sentence and acquit the accused.

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10 May 1895. PARSONS & RANADE, JJ.

Queen-Empress v. Ningappa.†

Workman's Breach of Contract Act (XIII of 1859), Sec. 2—Bond—Repayment of the sum by instalments—Default in instalment—Construction.

The defendant executed a deed of contract whereby he agreed in consideration of Rs. 62, paid in advance to work as a weaver for 31 months repaying each month Rs. 2 out of the wages he might earn, and the bond extended the time of service in case of default of payment. For a breach of this contract without repaying the amount, the Magistrate directed the defendant to perform the work according to the terms of the contract, under section 2 of the Workman's Breach of Contract Act, 1859 :—

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* *Criminal Ruling* 17 *of* 1895. Criminal Reference No. 56 *of* 1895.

† *Criminal Ruling* 18 *of* 1895. Criminal Reference No. 57 *of* 1895.

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Held, that the contract was not within the Act as the sum of Rs. 62 was not money advanced on account of work contracted to be performed. It was a loan to be repaid by monthly instalments of Rs. 2 each, out of the wages earned during the contracted period of service. The bond having provided that the defendant was to serve as long as any of the money borrowed remained unpaid, the case came within the terms of the case at 7 Mad., H. C. R. App. xxx.

The accused had executed a deed of contract whereby he agreed in consideration of an advance of Rs. 62 to work as a weaver for 31 months repaying each month Rs. 2 out of the wages he might earn. He only worked for 8 days and did not pay anything, and fled away leaving the work and though asked by the complainant to return to his work he declined to do so. He was, thereupon, charged with an offence under section 2 of Act XIII of 1859. He was tried before the First Class Magistrate of Sholapur for breach of this contract. The District Magistrate of Sholapur referred the case to the High Court observing:—"It has been held in Madras High Court Proceedings of the 9th January, 1888,—*Weir*, 455—that a contract made in consideration of what is ostensibly an advance but is in reality a deposit or loan to be refunded does not fall within the terms of the Act. A ruling on the same principle was given in 7 Mad., H. C. R., 30. In the present case the contract is for repayment of the amount advanced, and the amount though ostensibly an advance for work is strictly a loan repayable in sums of Rs. 2 each month in 31 months. The case, therefore, does not properly seem one for disposal under section 2 of Act XIII of 1859. To bind a man to work for 31 months for an advance of Rs. 62 is hardly fair. The ordinary wages of a weaver are about 8 or 10 annas per day, and the advance would not at this rate last for more than four months. By introducing a slow rate of repayment the advance is made to last for 31 months; but this additional stipulation removes the contract beyond the scope of section 2 of the Act and the penalties mentioned in the section cannot be forced for its breach. The order of the First Class Magistrate ought, therefore, in my opinion to be cancelled."

PER CURIAM.—The sum of Rs. 62 was not money advanced on account of work contracted to be performed. It was a loan to be repaid by monthly instalments of Rs. 2 each out of the wages earned during the contracted period of service. (*cf.* Madras H. C. P. 9th January 1880, *Weir*, 455). In case of any default the time of service is extended. In fact the bond says that the borrower is to serve as long as any of the money borrowed remains unpaid. It thus comes within the purview of such a case as that reported in 7 M. H. C. R., App. xxx. We reverse the order as illegal.

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11 May 1895. PARSONS & RANADE, JJ.

Queen-Empress v. Daji Mahadhu.*

Penal Code (Act XLV of 1860), Secs. 411, 412—Stolen property, receiving of—Offence.

To support a conviction under section 412 of the Indian Penal Code, it is not sufficient to show that the accused knew the property to be stolen property; it must be proved that they knew or had reason to believe that its possession had been transferred by the commission of dacoity or that being stolen property they received it from a person who they knew or had reason to believe belongs or belonged to a gang of dacoits.

ORDER.—The Sessions Judge has acquitted the appellants Nos. 2–5 Nos. 4, 5, 6 and 9 of the charge of dacoity and has convicted them of dishonest retention of property stolen in a dacoity. The possession of the property in question is only presumptive evidence that the appellants were the dacoits, but the Sessions Judge has not treated it as such. While there are circumstances in the case which show that the appellants knew that the property was stolen property, there are none to show that they knew its possession had been transferred by dacoity (as to which see Criminal Ruling of the 11th October 1882). The Court, therefore, in the case of each of the appellants, alters the convictions to ones under section 411 and the sentences to ones of three years' rigorous imprisonment.

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30 May 1895. BAYLEY AG. C. J; & PARSONS & RANADE, JJ.

Queen-Empress v. Mathur Kuber.†

Confession—Retracted Confession—Confession obtained by deceit—Admissibility—Evidence.

A confession otherwise voluntarily made is not inadmissible merely because it was induced by deceit.

RANADE J:—This is an appeal by Government against an order of acquittal passed by the Joint Sessions Judge agreeing with the assessors in respect of the charge of murder brought against accused No. 1, and of a charge under section 201, Indian Penal Code, against accused No. 2, the wife of accused No. 1. Though the appeal was preferred in respect of the acquittal of both the accused, the Government Pleader in the course of the argument before us stated that it was by a mistake that the appeal included the name of the accused No. 2, and it is only necessary, therefore, to consider the grounds of appeal as far as they relate to the charge of murder brought against accused No. 1. The main ground on which the Government Pleader laid stress before us was that the Joint Sessions Judge did not properly consider the effect of the retracted confessions made by accused No. 1, first on 21st October, and again on 31st October, 1894. It was contended before us (1) that these confessions were by themselves sufficient to warrant conviction, and that they needed no corroboration, as was erroneously supposed by the Joint Sessions Judge; (2) that the confessions

*Criminal Ruling 19 of 1895. Criminal Appeal No. 65 of 1895.

†Criminal Appeal No. 104 of 1895.

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were voluntarily made, and were not due to ill-treatment, and that the Joint Sessions Judge erred in holding them to be otherwise; (3) that if corroboration was needed, there was such corroboration in the evidence of Kasandas, and that the conflict between the confession of accused No. 1 and Kasandas's deposition admitted of a satisfactory explanation. There was one other point urged in appeal in respect of the circumstantial evidence furnished by the ornaments admittedly made over by accused No. 1 to witness Lalchand. It was stated in the petition of appeal that these ornaments belonged to the deceased woman, but the Government Pleader admitted before us that he was not in a positon to support that allegation, and this ground was, therefore, given up. The questions we have to consider in this case are these: (1) Whether the confessions of accused No. 1 of 21st and 31st October, 1894, were voluntary and credible evidence? (2) And whether they needed any corroboration? If so, whether there was such corroboration in this case? The Joint Sessions Judge has found that the confession was made late, and under suspicious circumstances, that it was on the face of it incredible, and the probabilities were all against the accused No. 1 having acted in the way he is alleged to have done in these confessions on the night of the alleged murder. I do not think that, sitting in appeal as we do here, we should be justified in setting aside a verdict in which the Judge and assessors concur, merely because it is conceivable that if we had ourselves to try the case we might have appreciated the evidence differently. The privilege of appeal against acquittal conferred by law on Government has certainly to be exercised with a very cautious reserve. See on this point Punjab Rules and Orders, p. 377, N. W. P. Regulations and Rules, p. 223. The principles which disallow such appeals on questions of fact in cases tried by jury (*Russick Das* v. *Preonath* (1), and *Queen-Empress* v. *Bibhuti Bhushan* (2)) should govern cases tried by assessors also where Judge and assessors concur. In this particular case the Judge has given his reasons in full in a very careful judgment, and I am of opinion that they fully justified the suspicions he entertained about the voluntary character and truth of the confessions. Nearly all the prosecution witnesses in this case had to be treated by the Government Prosecutor, who conducted the case in the Sessions Court, as hostile witnesses. The case for the prosecution was that the accused No. 1 had a serious misunderstanding with the deceased. Witness Aju stated that accused and deceased were on good terms, and the quarrels between them were not serious, and he was cross-questioned as a hostile witness on this and other points. Another witness Shambhu was sought to be similarly discredited, because

(1) I. L. R., 10 Cal., 102-9. (2) I. L. R., 17 Cal., 485.

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he stated that he had seen the old woman go out for a natural purpose on the night of the alleged murder. This witness stated that he did not tell the fact to the Police from fear of beating. The next witness Ramloo also complained of Police pressure and had to be dealt with as a hostile witness. Witness Kasandas was characterized by the Police Prosecutor in the lower Court as a by no means very reliable witness. If the prosecution witnesses had thus to be treated as hostile witnesses, and they themselves complained of ill-treatment by the Police in the Sessions Court and were otherwise unreliable, the Judge had good grounds for not absolutely discrediting the statement made by the accused that his previous confessions were not voluntary and were due to pressure. Looking at the contents of the first confession it is certainly open to the remark that some of the questions put to the accused No. 1 were not for the purposes contemplated by section 342, and seem calculated to fasten the guilt on him: *Hossein Buksh* v. *The Empress* (3). It is also suspicious that it was made much about the time that Kasandas was induced to make his own statement. Accused admittedly is deficient in sight, and the statement made by him makes him take the corpse of the murdered woman to a great distance through the streets, right across a watchman's station, unquestioned and unchallenged. Kasandas's story, instead of corroborating accused No. 1, increases the improbability of the story, for he makes accused No. 2, and not No. 1, take the corpse herself all the way, while accused No. 1 only walks behind. He also professes to have seen more men behind accused No. 1, but cannot recognize them. Further he says he challenged the watchman at the time, and yet they did not move, and he remained himself quiet for two days. The place, the hour, and the surroundings are certainly not very agreeable to the theory of the prosecution. The absence of motive, at least of adequate motive, has also to be considered. The Joint Sessions Judge, on a careful consideration of these circumstances, was satisfied that the confessions were not voluntary, and the statements made therein not credible, and that the attempted corroboration only created more doubt as regards the truth of the confessions. This Court has, no doubt differing in this respect from the High Court of Madras and Calcutta (*Queen-Empress* v. *Ranji* (4), *The Queen* v. *Amaunlen* (5)), held in several cases that if a confession is duly made, and there is no suspicion of improper inducement, conviction may be based on it, even if there is no corroboration: *Reg.* v. *Balvant* (6); *Queen-Empress* v. *Ganapabhat* (7); *Queen-Empress* v. *Sangappa* (8). Notwithstanding

(3) I. L. R., 6 Cal., 96. (4) I. L. R., 10 Mad., 295. (5) 12 Beng. L. R., 15.
(6) 11 Bom. H. C., 137. (7) Vide *ante*, p. 456. (8) Vide *ante*, p. 463.

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the confirmation of the first confession before the committing Magistrate, I do not think that the retracted confessions which are the only evidence in this case are above suspicion, and they are, therefore, in the absence of other corroboration, not sufficient to justify us in holding that the view of the Joint Sessions Judge and assessors was wrong on this point, and that the confessions were voluntarily made and were true as statements of fact. I am accordingly of opinion that this appeal must be dismissed.

PARSONS, J.—I am unable to concur. The principle on which an appeal of this kind should be decided is clearly and correctly laid down in the case of *The Queen-Empress* v. *Bibhuti Bhusan Bit* (1). On the evidence I can come to no other conclusion than that it is clearly proved that the accused did commit the murder charged. In the first place there is the confession of this murder made by the accused himself on the 21st October to a Magistrate of the First Class and repeated on the 31st October to the committing Magistrate, but withdrawn in the Court of Sessions on the 19th November. The Sessions Judge thinks that either force or deceit was used to obtain that confession, and that the confession itself on the face of it is not credible. This is a sample of the way in which the Sessions Judge has dealt with all the evidence. It does not seem to have occurred to him that the police would hardly have been so foolish as to use either force or deceit in order to obtain an incredible confession. The chief reason given by the Judge for holding the confession incredible is that the accused is so short-sighted that he does no field work and has always to carry a stick with him. The accused, however, can see well enough to be able to walk about the village very well by himself, and it seems to me absurd to say that because a person is short-sighted he could not have killed a weak and emaciated old woman and carried her corpse some three or four hundred paces. As to the route it is proved that the only road to the well was the one the accused says he took; if then he had determined to hide the body in this well, he must have gone by that road, for he could go by no other. Then as to the use of deceit or force. If deceit only was used, the confession would not, I think, be inadmissible. The Judge, however, does not say how and what deceit could have been used to make the accused confess at such length and detail to a murder he had not committed. The accused says he knows nothing about his confession of the 21st October, and he does not know whether his confession of the 31st is correct or not, as he was very much beaten and had, therefore, become confused. The Judge does not deal with this allegation of beating. He only says

(1) I. L. R., 17 Ca.. 4 85

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that it is very strange that the accused should not have said anything to the Mukhi on the 18th or 19th, although repeatedly questioned, and then suddenly confessed immediately after the Foujdar's arrival. But the confession itself explains how it came to be made when it was. The accused confessed to the Mukhi before he confessed to the Foujdar. He had, he says, given ornaments to one Lalchand to square the Mukhi. When he found out by the arrival of the Foujdar that the Mukhi had not been squared, the conversation with the Mukhi deposed to by the latter naturally took place, and the guilt of the accused being thus demonstrated the confession followed; nor was it until the trial in the Sessions Court that that confession was ever denied or retracted, and then only by a statement which on the face of it is false and concocted for the occasion. The allegation of police beating is absolutely untrue. It must take some little time to beat a man into a confession of a murder of which he is innocent and to invent and teach him to repeat all the details of the mode in which the crime was committed. There was no such time available in the present case; the confession was immediate on the arrival of the Foujdar when the accused knew that his attempt to square the Mukhi had failed. Then the Judge distrusts the confession because it does not agree with the evidence of Kasandas, and yet at the same time he says he can't believe Kasandas at all. If Kasandas is a liar, then I should have thought that the very truth of the confession depended on its disagreement with his evidence. In my opinion, however, the Sessions Judge has wrongly disbelieved Kasandas, and in the only point in which his evidence is opposed to the confession I believe Kasandas, and disbelieve the confession. No doubt Kasandas did not disclose his information till he was sent for by the police, but that is a very common occurrence, and ought not, I think, to totally condemn a witness. What Kasandas says about the watchmen may be considered incredible, but it is not a thing that would be invented by a witness concocting a false story. There is clearly a strong feeling for the accused in the village, and it impossible to say what influence the accused may not have brought to bear on the watchmen, or it may be that the watchmen were indolent and did not think it worth while attending to the call of Kasandas. The material discrepancy is this. Kasandas says that the wife of the accused was carrying the body. Accused says that he himself carried it to the well. Inasmuch, however, as the accused would not, if he could possibly keep it, incriminate his wife, this discrepancy tends, I think, to show how voluntary the confession is. I do not think it necessary to deal at length with any other evidence. Witnesses who have committed themselves to certain statements they

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wish to avoid invariably allege police pressure, and generally, I think, as in this case, falsely. The giving of the ornaments to Lalchand is a fact, though of course Lalchand will not criminate himself by admitting that the purpose for which they were given was what the accused says it was. The motive for the crime is stated by the accused, and it is sufficiently borne out by the evidence. The witnesses could not possibly be as intimately acquainted with the relations that existed between the accused and the deceased as the former was. Believing, as I do, the general truth and voluntary nature of the confession of the accused and the evidence of Kasandas, I would convict the accused of the murder charged, and sentence him to transportation for life. As, however, we differ on this point we lay the case before the Acting Chief Justice under the provisions of section 429 of the Code of Criminal Procedure.

The ACTING CHIEF JUSTICE (*Bayley*, C. J.,) to whom this case was referred, after hearing the Government Pleader for the appellant, the Government of Bombay, and the counsel for the accused, agreed with the opinion expressed by the Hon. Mr. Justice *Parsons*, and convicted the accused of the offence of murder.

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18 June 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Bala bin Kashaba.*

Registration Act (III of 1877), *Sec.* 82 (d)—*Penal Code (Act XLV of* 1860), *Sec.* 182—*False personation—Village Registrar—Abetment.*

Abetment of personation before a Village Registrar, appointed under the Dekkhan Agriculturists Relief Act, 1879, is not punishable under section 82 (*d*) of the Registration Act, 1877; as the section does not, by itself, apply to such abetment.

B appeared before a Village Registrar and falsely personated W, and in such assumed character, expressed a desire to execute a lease in favour of A, who was present and assented to take the lease. When B made some mistakes in giving the area of the land, C corrected him. E identified B as W before the Village Registrar and he and D assured the attesting witnesses that B was W:—

***Held*, that C D and E could not be convicted under section 82 (*d*) of the Registration Act 1877, but that they committed an offence under section 182, Indian Penal Code.**

IN this case there were five persons concerned. Accused Naru, No. 2, was charged with having falsely personated one Vithu Kushaba and with having in that assumed character presented a document for Registration before the Village Registrar, the other accused Pandu, Bala Kushaba, Bala Lukhaba and Ranu being present and abetting him in doing so—offences falling under section 82 (*c*) and (*d*) of the Registration Act III of 1877. They were convicted by the Frst Class Magistrate of Satara.

***Criminal Ruling 22 of 1895. Criminal Applications for Revisions Nos. 89, 95, and 96 of 1895.**

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PER CURIAM.—It is conceded for the Crown that section 82 (*d*) of Act III of 1877 does not apply of itself to abetment of personation before a Village Registrar—an officer not known to that Act. Then the question is whether the Deccan Agriculturists' Relief Act, 1879, makes that section applicable. It does not do so by specific words; nor by any such general reference as section 74 of the last Act makes to the Code of Civil Procedure. The Courts below have held that section 60 implies a general incorporation of the Act III of 1877: but section 60 appears to us to deal specifically with a different matter, in no way connected with the penal clauses of section 82. Therefore the convictions and sentences as passed cannot stand.

We think, however, that the evidence and findings of facts show that the accused committed an offence punishable under section 182 of the Indian Penal Code as interpreted in *Queen-Empress* v. *Ganesh Khanderao and another* (1) which case is approved of in *Queen-Empress* v. *Shoshi Bhushan* (2). The Court, therefore, convicts the accused under that section and reduces the sentences to six months' rigorous imprisonment.

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18 June 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Ramdin.*

Retracted statements—Previous trial—Conviction.

A conviction based on previous statements of witnesses who retracted them at the trial cannot be sustained in law.

THE accused were convicted of an offence under section 25 of the Indian Forest Act VII of 1878 and section 109, Indian Penal Code, for felling and abetting the felling of Government trees in the Government reserved forest at Jhither, by the Second Class Magistrate of Bassein.

The accused appealed to the Sub-divisional Magistrate of Thana, but he dismissed their appeals.

The accused, thereupon, moved the High Court under its revisionary powers on the ground that the convictions were based really on the retracted statements of four witnesses taken before a Third Class Magistrate under section 164, Criminal Procedure Code, and the convictions based on these retracted statements only were not sustainable in law.

PER CURIAM.—These convictions being based on previous statements of witnesses who retracted them at the trial cannot be sustained in law. The Court, therefore, reverses the convictions and sentences and directs the return of the fines if levied.

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(1) I. L. R., 13 Bom., 506. (2) I. L. R., 15 All., 210.

*Criminal Ruling 23 of 1895. Criminal Application for Revision No. 97 of 1895.

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24 June 1895. JARDINE & PARSONS, JJ.

Queen-Empress v. Naran Narsing.*

District Municipal Act (Bom. Act VI of 1873), Sec. 68—Criminal Procedure Code (Act X of 1882), Sec. 29—Third Class Magistrate—Jurisdiction.

A Magistrate of the Third Class has under section 29 of the Code of Criminal Procedure, jurisdiction to try an offence under section 68 of the Bombay District Municipal Act, 1873, which makes the offender liable to the penalty prescribed by section 273, Indian Penal Code.

PER CURIAM.—Section 68 of the Bombay District Municipal Act makes the offender liable to the penalty provided by section 273 of the Indian Penal Code. The maximum penalty thereunder is six months' imprisonment of either description or a fine of Rs. 1000 or both. Under section 29 of the Code of Criminal Procedure, a Magistrate of the Third Class would have jurisdiction.

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27 July 1895. JARDINE & PARSONS, JJ.

Queen-Empress v. Shekh Ahmedbhai.†

Prevention of Gambling Act (Bom. Act IV of 1887), Sec. 5—Common gaming house.

Section 5 of the Prevention of Gambling Act, 1887, refers to persons found in a common gaming house; it does not refer to persons who are in the habit of assembling in various places for the sole purpose of gambling.

THE acting Sessions Judge of Ahmednagar, in making this reference, stated, "In order to constitute an offence under section 5 of the Gambling Act it is necessary that the gaming should take place in a common gaming house. In the present case there is no evidence to show, nor has the Magistrate found, that the shed in the Fort in which the accused are said to have been found, was a common gaming house, as defined in section 3 of the Act."

PER CURIAM.—The Magistrate has convicted these accused of being "in the habit of assembling in various portions of the Cantonement for the sole purpose of gambling" and has sentenced them under section 5 of Bombay Act IV of 1887. This section applies however to punish only persons found in a common gaming house; and the Magistrate has not found that the accused were in such a place. The Court, therefore, sets aside the convictions and sentences and directs the return of the fines if levied.

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5 July 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Abdul Rahiman.††

Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Widow of deceased—Practice.

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*Criminal Ruling 24 of 1895. Criminal Reference No. 81 of 1895.
†Criminal Ruling 25 of 1895. Criminal Reference No. 84 of 1895.
††Criminal Ruling 26 of 1895. Criminal Appeal No. 124 of 1895.

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It is not competent to a Judge to award, in cases of death, compensation to the widow of the deceased out of the fine imposed upon the accused.

ORDER.—We reverse the convictions under section 107, we affirm the conviction of accused No. 1 under section 326, and the convictions of 2, 3 and 4 under section 323. We alter the sentence passed in No. 1 to seven years' rigorous imprisonment and the sentences passed on 2, 3 & 4 to six months each the sentence of fine and imprisonment in default remaining unchanged. We reverse the order of compensation to the widow and heirs of the deceased the same not being legal under section 545, Criminal Procedure Code: see, *In re Lutchmaka* (1). We notice that the Sessions Judge did not take the opinion of the assessors as to the guilt of the accused No. 1 of the offence of which he convicts him though he says he concurs with them.

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5 July 1895. PARSONS & RANADE, JJ.

Queen-Empress v. Appaji Narayen.*

Penal Code (Act XLV of 1860), Sec. 166—Disobedience, of an order—Mamlatdar—Village Kulkarni—Mamlatdars' Court Act (Bom., Act III of 1876), Sec. 17.

To satisfy the requirements of section 166, Penal Code, there must be a wilful disobedience of an express direction of law; a disobedience to an order is not sufficient, even though that order may be one that is given under a provision of law.

Where a village Kulkarni disobeys the orders issued to him by the Mamlatdar of the Taluka, under the Mamlatdars' Court Act, 1876, he cannot be convicted under section 166, Penal Code.

PER CURIAM:—The applicant was charged under section 166 of the Indian Penal Code with having knowingly disobeyed the order issued to him by the Mamlatdar of Sangamner under the Mamlatdar's Act and was convicted. The charge we notice was not sufficiently explicit: see *Imperatrix* v. *Baban Khan valad Mhaskoji* (2). The point, however, before us is, whether the conviction is legal. It is argued by the Government Pleader that as section 17 of the Mamlatdar's Act gives the Mamlatdar power to issue orders to the village officers, it creates an obligation on the latter to execute such orders, which amounts to a direction of law that they shall execute them. We are unable to assent to this argument. We think that there must be an express direction of law to satisfy the requirements of section 166 and that a disobedience to an order is not sufficient, even though that order may be one that is given under a provision of law. We, therefore, reverse the conviction and sentence.

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*Criminal Ruling 27 of 1895. Criminal Application for Revision No. 110 of 1895.

(1) I. L. R., 12 Mad., 352. (2) I. L. R., 2 Bom., 142.

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15 July 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Raji.*

Penal Code (Act XLV of 1860). Secs. 190, 268—Public nuisance—Solicitation of chastity.

Bare solicitation of chastity is not a public nuisance, as it proves or suggests no fact relating to any *common* injury, danger, or annoyance, which is a part of the definition of public nuisance in section 268 of the Indian Penal Code.

THE accused solicited prostitution in the Regimental Barracks of Belgaum. She was, thereupon, convicted, under sections 290 and 172 of the Indian Penal Code, by the Cantonement Magistrate of Belgaum, and sentenced to pay a fine of Rs. 25 or in default to undergo rigorous imprisonment for one month,

The High Court called for the proceedings in this case and recorded the following judgment.

PER CURIAM.—Bare solicitation of chastity is not a public nuisance. This was, we believe, laid down in several cases coming to this Court from Belgaum when Colonel Lawrence was Cantonement Magistrate. In the present case no fact is proved or suggested relating to any *common* injury, danger or annoyance, which is part of the definition of public nuisance in section 268 of the Indian Penal Code. We think the law is correctly interpreted in *The Queen* v. *Musumat Begum* (1). The Court sets aside the conviction and sentence under section 290, Indian Penal Code, and directs return of the fine if levied.

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18 July 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Appa valad Ganu.†

Criminal Procedure Code (Act X of 1882), Secs. 120, 123—Security for good behaviour—Convict undergoing sentence.

Under sections 120 and 123 of the Code of Criminal Procedure, a convict undergoing a sentence of imprisonment cannot be obliged to give security for good behaviour until the period of that imprisonment ends; nor can the order for imprisonment in default be made till then.

IN this case Apa and Amba were ordered by the First Class Magistrate of Ahmednagar to give security for good behaviour under section 118, Criminal Procedure Code, for a period of three years; and the proceedings were laid before the Sessions Judge, Ahmednagar, under clause 2 of section 123 of the said Code. The learned Judge confirmed the Magistrate's order with regard to Appa, but modified the order with regard to Amba by reducing the period for which security was required to 12 months. The learned Judge, having subsequently found out that Appa and Amba were arrested together, and that when the Magistrate's order requiring security for good behaviour was made he had already convicted them of an offence

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* *Criminal Ruling* 28 *of* 1895. Criminal Review No. 162 of 1895. (1) 2 N. W. P., 349.

† *Criminal Ruling* 29 *of* 1895. Criminal Reference No, 105 of 1895.

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under section 19 (*c*) of the Arms Act and sentenced them each to undergo rigorous imprisonment for six months, made this reference to the High Court, observing:—

"In view of this fact I am of opinion that my order in each case is premature and should therefore be set aside as illegal for the following reason.

"Under section 120 of the Criminal Procedure Code, Apa and Amba having been already sentenced to imprisonment, the period for which security is required must commence from the date on which their sentences expire, which date has not yet arrived, and further from the conditions stated, at the commencement of section 123 of the Code, it seems clear that no order can be made under that section until the person ordered to give security has failed to give such security *on* or before the date on which the period for which such security is to be given commences. The second clause of section 123 seems to be governed by the same condition, and it is in my opinion not competent to the Magistrate to issue his order for the detention of the person concerned or to submit his proceedings to the Sessions Court under that section until the commencement of such period."

ORDER :—Under sections 120 and 123 of the Code of Criminal Procedure, the convict who has been sentenced to six months' imprisonment under the Arms Act is not obliged to give the security until that period ends, nor can the order for imprisonment in default be made till then. The Magistrate ought to re-submit the proceedings under section 123 to the Sessions Judge at the end of that period in the event of the security not being given. The Court now annuls the order of the Sessions Judge as premature.

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19 July 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Dadubhai.*

Indian Penal Code (Act XLV of 1860), Secs. 299,300—Culpable homicide—Murder—Grave and sudden provocation—Judge—Jury—Charge—Criminal Procedure Code (Act X of 1882), Sec. 299.

The fact that the accused was angry at his wife's resistance to the act of sexual intercourse is not such a provocation as would make his causing her death an offence less grave than murder. Her denial of a charge of adultery is not sufficient to constitute grave provocation; and the irritable or revengeful state of mind caused by mere jealous suspicions is not a fact which makes the homicide less than murder.

In a trial for murder, where grave and sudden provocation causing a loss of the power of self-control is suggested for the defence, it is the duty of the Judge, as is clearly set forth in section 299 of the Code of Criminal Procedure, to explain the distinctions between murder and culpable homicide, and the Jury as Judges of the facts have to decide the issue about sufficient provocation.

**Criminal Ruling* 30 *of* 1895. Criminal Confirmation Case No. 16 of 1895.

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PER CURIAM :—The prisoner Dadubhai *walad* Imambhai has been sentenced to death by the Sessions Judge of Poona upon conviction of murder by a verdict of a Jury. This Court has to deal with all questions of law and fact in order to be satisfied whether the sentence ought to be confirmed. There is no reason to doubt that the wife of the prisoner Lalbi was strangled on the night of Sunday, the 3rd June last, in her husband's house, and that she was about the same time branded all over her body, and that the bones of her head were also broken. The prisoner's mother and sister were the other inmates of the house that night. Lalbi was of an age between 11 and 13 years; and though it appears that the prisoner had previously had intercourse with her, her mother and the medical officer say that her body was immature. On the 5th June before a Magistrate of the 2nd Class, and on the 12th June, before the Committing Magistrate, the prisoner made confessions which admit that he strangled Lalbi with his turban. On the 24th June, at the trial, he said he had made these confessions through maltreatment by the Police; and being asked what his defence was, he said he did not know how she died. The grounds of appeal are similar. The mother and sister of the prisoner on the 10th June deposed to the Magistrate that they had seen prisoner committing the murder; but at the trial they denied this, alleging beatings by the Police. Although the Sessions Judge did not give the usual caution to the jury to weigh the statements of these women with the utmost caution, it is evident that he considered them to be accomplices, and that he directed the jury to convict on the confessions made by the prisoner. These confessions are the principal evidence against him. We have now to consider what Mr. *Chaubal* has urged on behalf of the prisoner in this Court. As to the suggestion that he was insane at the time, we notice that this was made by his mother and sister on the 10th June. But on such vague statements as appear in evidence we do not find it proved that there was any unsoundness of mind. Mr. *Chaubal's* next suggestion was that some provocation was given by Lalbi, which to an excitable and jealous person like the prisoner would be so grave and sudden as to deprive him of self-control, and thus reduce the offence to culpable homicide. The number and variety of the injuries inflicted negative this view and point to reflection and preparation. There are two suggestions about the provocation. One is that he was angry at her resistance to the act of sexual intercourse. This view is accepted by the Judge. The other is that stated in his first confession that the girl had some days before mis-conducted herself with another man in the prisoner's sight, and that she had denied this when at times he questioned her. The first is not such a provocation as in our opinion would make the offence less

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than murder. The second must be considered along with the variety of injuries: the confession does not suggest that the prisoner acted suddenly or in warm blood. The law as to excitement in the case of an irritable and unreasonable man is discussed in *Queen-Empress* v. *Sakharam* (1). It is not to be believed that the prisoner saw Lalbi in the act of adultery; her denial of such a charge is not what is meant by grave provocation; and the irritable or revengeful state of mind caused by mere jealous suspicions is not a fact which makes the homicide less than murder, as was laid down in strong terms by Baron *Rolfe* in *Reg.* v. *Kelley* (2). "To take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would unquestionably be murder." The dread of the punishment of death doubtless restrains many ill-tempered persons from taking human-life on slight provocation, and prevents jealous and tyrannical husbands from being, not only the judges of their wife's misconduct, but also executioners and assassins. Finally we may observe that, as is clearly set forth in section 299 of the Code of Criminal Procedure, it is the duty of the Judge to explain the distinctions between murder and culpable homicide, and then the jury, as judges of the facts have to decide the issue about provocation. This course was followed; and the verdict of murder shows that the jury took the same view as the Judge, and did not believe in any grave and sudden provocation. We are of opinion that the verdict is not only proper in the sense of being such as a reasonable set of men might find, but is most in accord with the probabilities, and appears to be correct. Murderers are often vain, and seek by false stories about provocation to make the brutal act of revenge or ill-temper seem a wild justice: and they often shrink from admitting even in their confessions the more shameful barbarities proved to have happened—like the branding in this case or the fractures of the skull. We see no reason to distrust the confessions. For these reasons the Court confirms the sentence of death.

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22 July 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Keru.*

Criminal Procedure Code (Act X of 1882), Secs. 256, 262—Warrant case—Summary trial—Accused, naming his witnesses—Charge, framing of.

To a warrant case tried summarily, the rules about warrant cases apply, under section 262 of the Code of Criminal Procedure. In such a case, though a *formal* charge need not be framed, the accused person cannot be called dilatory if he delays to name his witnesses until

(1) I. L. R., 14 Bom., 564. (2) 2 C. & K., 814.

**Criminal Ruling* 31 *of* 1895. Criminal Reference No. 108 of 1895.

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he has heard the evidence for the prosecution, and found that the Magistrate considers the evidence a substantial basis for charging him.

PER CURIAM :—This is a warrant case tried in a summary way: yet the rules about warrant cases applied under section 262. The trying Magistrate had no right to expect the accused to have their witnesses ready when the trial began as in a summons case under section 244. Until a definite charge is framed by the Magistrate in a warrant case the accused is not called upon to make his defence under section 256: he cannot justly be called dilatory if he delays to name his witnesses until he has heard the evidence for the prosecution and found that the Magistrate considers that evidence a substantial basis for charging him although a *formal* charge need not in a summary trial be framed. The Court concurs with the District Magistrate and sets aside the convictions and sentences and directs return of the fines.

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29 July 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Leandro Mascarenhas.*

Penal Code (Act XLV of 1860), Sec. 499—Defamation—Good faith—Newspaper comments—Admission by accused or counsel—Evidence Act (I of 1872), Sec. 58.

Where a defamatory statement is published in a newspaper, any exception on the ground of good faith or public good fails. *Imperatrix* v. *Janardan* (1), followed.

An accused person is bound by the admission which is unqualified.

There is nothing to prevent a person on being questioned under section 342, Crimina Procedure Code, to make an admission, and it is obvious that some admissions on formal matters of law can be better trusted to his legal adviser, and there seems to be no reason in principle why when the admission has been so made in his presence at the trial, so as to dispense with the attendance of witnesses for the prosecution, it should not be held to bind him.

THE accused was convicted of defamation on three separate charges and sentenced to imprisonment for one month and to pay a fine of Rs. 150 in respect of each of the said three charges by the Presidency Magistrate of Bombay.

He preferred an appeal to the High Court alleging that as regards the second and third charges the Magistrate was in error in convicting him upon the strength of an admission stated to have been made by his attorney to the effect that the appellant accepted responsibility for the conduct of the *Anglo Lusitano* Newspaper; that the appellant was, at the date of the publication of the articles, the subject of the second and third charges, absent from Bombay and had prior to their publication no knowledge whatsoever of the said articles having been published or submitted for publication; that as regards the first charge the Magistrate was in error in holding that the appellant could not consistently base his

*Criminal Ruling 34 of 1895. Criminal Appeal No. 188 of 1895. (1) Cr. R. 60 of 1890.

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defence upon the first and ninth exceptions to section 499 of the Indian Penal Code at one and the same time.

PER CURIAM.—When beginning his argument for the appellant Mr. *Lowndes* urged that the convictions on the 2nd and 3rd heads of charge were bad, as the appellant was not proved to have been the actual editor of the newspaper, on the dates of publication of the two later defamatory letters. The Magistrate had held that the accused was bound by an admission made at the trial by his solicitor that the accused did not repudiate the responsibility. The Magistrate was satisfied that the admission was unqualified, and we take the same view, adopting the statement in the judgment. Mr. *Lowndes* then urged that the accused could never be bound by his own admission, much less by that made for him by his solicitor, as such a thing would be contrary to the understanding of the profession, and cited *Reg.* v. *Bertrand* (1). We are of opinion, as we intimated, that section 98 of the Indian Evidence Act, an Act which extends to all judicial proceedings in or before any Court, supported the Magistrate's view. In England formal admissions by Counsel at a trial have been allowed in order to dispense with mere formal proofs, as appears from Lord *Abinger's* remarks in *Reg.* v. *Thornhill* (2). In India there is nothing to prevent a prisoner on being questioned under section 342 of the Code of Criminal Procedure to make an admission; and it is obvious that some admissions on formal matters of law can be better trusted to his legal adviser, and there seems to be no reason in principle why when the admission has been so made in his presence at the trial, so as to dispense with the attendance of witnesses for the prosecution, it should not be held to bind him. If the repudiation of the admission as to the second and third heads of charges had been made at once on the charge being read, the Magistrate might, under section 58, have considered whether he should require the prosecution to prove the fact. But as it was, we cannot say that the Magistrate failed to use his discretion properly. Mr. *Lowndes* rests the defence in this Court not on the truth of the imputations, but on the ground that they were made for the public good after such due inquiry as indicates good faith. Exceptions 1 and 9 to section 499 of the Indian Penal Code were relied upon. These involve issues of fact, and we see no sufficient reason to differ from the conclusions of the Magistrate. The occasion was not privileged, as in *Harrison* v. *Bush* (3), and the case about publishing of rumour cited by the Magistrate, *Watkin* v. *Hall* (4), is in point. See, too, *Dickeson* v. *Hillelard* (5). Any exception on the ground of good faith or public good fails, because the

(1) L. R., 1 C. P., 520. (2) 8 C & P., 575. (3) 5 E & B., 344.
(4) L. R., 3 Q. B., 396. (5) L. R., 9 Ex., 79.

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publication was made in a *newspaper* as ruled on section 499 by this Court in *Imperatrix* v. *Janardhan*, (6). On that authority and for the other reasons the Court confirms the convictions. As regards the punishment the Magistrate was rightly influenced by the fact that the imputations were published in three different issues of the newspaper, and the prisoner failed to publish the letter denying them. Moreover, they were published in Bombay, although they relate wholly to matters in a town under the dominion of another Crown. There are no reasons for sympathy with the prisoner; but to prevent the sentence appearing at all excessive the Court alters it so far as to remit the sentence of imprisonment passed on the third head of the charge.

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7 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Sahadu Lakshman.*

Murder—Confession—On-looker—Statements of accomplices—Evidence Act (I of 1872), Sec. 30—Bombay Village Police Act (VIII of 1867)—Police Constable—Coroner.

A confession by an accused of his mere presence at a murder as a neutral on-looker is not, in the absence of any other evidence, sufficient to convict him of that murder.

Statements of accomplices, co-prisoners, who may not be cross-examined and who may have motives in telling lies against the other co-prisoners, cannot be accepted as the criterion of guilt or innocence of the accused, especially in a capital case and where they have retracted their stories.

There is no law to authorize a Police Constable to take upon himself any part of the duties of the Village Patil as a Coroner under the Bombay District Police Act, 1867.

PER CURIAM.—The Court is of opinion that the confessions recorded by the Magistrate on the 20th March were made voluntarily. They are in sufficient accord also with the evidence about the position of the corpse when found, and the marks of injury upon it. The Court takes the same view as the learned Judge and assessors took regarding the guilt of the confessing prisoners Nos. 1, 3, 4 and 5 and dismisses their appeal. The prisoner No. 2, Maruti, has never confessed any participation in the murder. He has admitted his presence and said that it took place under his eyes, and he seems to have been from his own account a neutral on-looker. There is no other fact of importance against him and no other allegation that need be considered, except those made by the co-prisoners, who were jointly tried. We are of opinion that their statements ought not to turn the scale. If the prosecution allege that the prisoner did more than is stated in his confession there should be some evidence of that: *Regina* v. *Clewes* (1). We are not aware of any cases in which the statements of accomplices, co-prisoners who may not be cross-examined, and who may have motives for telling lies against the other co-prisoners,

(1) 5 E. & B., 344. (4) L. R., 3 Q. R., 396. (5) L. R., 9 Ex., 79. (6) Cr. R., 60 of 1894.
(1) 4 C. & P., 221. **Criminal Ruling* 35 *of* 1895. Criminal Appeal No. 177 of 1895.

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have been accepted as the criterion of guilt or innocence, especially in a capital case, and where, as in the present case, they have retracted their stories. We think it would be against the principle of the well known rule of evidence to give these statements such weight. The Government Pleader has not contended to the contrary. The Court, therefore, sets aside the conviction and sentence passed on the prisoner Maruti and acquits him. We draw the District Magistrate's attention to the fact that the *panchnama* among the papers purports to have been taken before a Police Constable as well as the Police Patel. There is no law to the duties of the Village Patel as a coroner under Bombay Act VIII of 1867. The District Police officer's powers are separate under section 174 of the Code of the Criminal Procedure.

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7 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Ganesh Bhikaji.*

Penal Code (Act XLV of 1860), Sec. 464—Forgery—Evidence Act (I of 1872), Sec. 101—Criminal case—Judge—Evidence, weighing of—Burden of proof—Accused—Defence.

The concluding words "or at a time at which he knows that it was not made, signed, sealed or executed" of clause 1 of section 464, Indian Penal Code, are to be read distributively, and are not governed by the preceding words "by or by the authority &c."

The Court ought not to adjudge a criminal case on mere probabilities as if it were a civil action, or contravene the well-known principle of law that the burden of proof lies on the Crown, not at all on the accused; and, unless the evidence is such as to enable the Court to judge rather than conjecture, the accused should not be called upon to make his defence.

PER CURIAM:—The Sessions Judge has held that it may be forgery under the Indian Penal Code to make a document fraudently with a false date, when the date is a material part of the document, although the document is in fact made and executed by and between the persons by and between whom it purports to be made and executed. It has been argued that this is a wrong interpretation of section 464, clause 1. We are of opinion that the concluding words, "or at a time at which he knows that it was not made, signed, sealed or executed;" are to be read distributively, and are not governed by the preceding words "by or by the authority &c." They are illustrated by Illustration (*h*). This view is supported by Sir *Barnes Peacock's* remarks in *Maharajah Moheshur Bux Sing Bahadoor* v. *Bhikha Chowdry* (1) and by *Lock*, J. in *Queen* v. *Sookmoy Ghose* (2). This interpretation makes the Penal Code accord with the law of England as interpreted in *Regina* v. *Ritson* (3) a case where all the authorities on the present point are considered.

It was next urged that the Courts below have adjudged this case on

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**Criminal Ruling 36 of 1895. Criminal Applications for Revision Nos. 136 and 137 of 1895.*

(1) 5 W. R., 64. (2) 10 W. R., 24. (3) L. R., 1 C. P., 200.

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mere probabilities as if it were a civil action, and have thus contravened the well known principle of the law, illustrated in section 101 of the Indian Evidence Act, that the burden of proof lies on the Crown in a criminal case, not at all on the prisoner. See, 1 Taylor on Evidence, section 97A about the presumption of innocence and *In the matter of the Petition of Dhunno Kazi and another* (4) followed in *Imperatrix* v. *Jethmal* (5). This contention appears to be sound as regards the first prisoner Ganesh. The proper issue was whether beyond reasonable doubt the prosecution had proved that the receipt had been ante-dated with intent on the part of the writer to commit a fraud. Unless the evidence was such as to enable the Court to judge rather than conjecture, the prisoner ought not to have been called upon for his defence: *Imperatrix* v. *Vajiram* (6). He has been convicted on the ground that as the second prisoner Ramchandra was not a tenant in the year to which the receipt relates the document must be fraudulent. But this finding about tenancy is chiefly based on statements made by the second prisoner in pleadings and otherwise which are not evidence against Ganesh. The conviction and sentence passed upon him must therefore be reversed and the prisoner acquitted.

As regards the prisoner Ramchandra the materials are somewhat more perplexing for a Court of Revision. The weight of the previous admissions depends much on circumstances as it is well known that parties to litigation often make false statements. The case is one in which the appellant was placed in jeopardy by the failure of the Court of appeal to deal fully with the evidence by the light of the established rules applying to criminal cases, in a proper judgment, in the form which sections 367 and 424 of the Code of Criminal Procedure require. The judgment recorded does not fulfil the requirement. Following *In Re Shivappa* (7) the Court sets aside the order confirming the conviction and sentence passed on Ramchandra and directs the Sessions Judge to rehear the appeal.

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8 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Abdul Husen.*

Criminal Procedure Code (Act X of 1882), Sec. 188—Certificate—Political Agent—Siam.

There being no Political Agent in Siam, within the meaning of sections 188 to 190 of the Code of Criminal Procedure, a Sessions Court in British India, otherwise competent, has jurisdiction to try a Native Indian Subject of Her Majesty, for an offence committed within that territory, without a certificate under the proviso to section 188 of the Code.

PER CURIAM :—There is no averment nor affidavit that there is any Political Agent in Siam within the meaning of sections 188 to 190 of the

(4) I. L. R., 8 Cal., 121. (5) Cr. R., 4 of 1894. (6) I. L. R., 16 Bom., 414.

*Criminal Ruling 37 of 1895. Criminal Appeal No. 209 of 1893, and Criminal Review No. 170 of 1893. (7) I. L. R., 15 Bom., 11.

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Code of Criminal Procedure. No certificate was necessary to give the Court of Sessions jurisdiction if there is no such Political Agent. *Queen-Empress* v. *Daya Bhima and others* (1); *Queen-Empress* v. *Sheik Abdool Rahiman* (2). The instructions of the Government Pleader are that there is no such officer. This Court takes that view of this matter and holds therefore that it was unnecessary of the Sessions Judge to consider whether the certificate was a proper one. It has not been shown that the certificate even if requisite failed in regard to specification, as it mentions the offence in terms of the Indian Penal Code and the amount of money misappropriated. The Court of Sessions has power to amend charges under the Code: *Queen-Empress* v. *Khoda Uma* (3).

The Court now annuls the order made by the Sessions Judge declining to exercise jurisdiction and directs that a new trial be held by the Court of Sessions.

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8 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Pandu Khandu.*

Criminal Procedure Code (Act X of 1882). Secs. 123, 396—Security for Good behaviour—Person undergoing imprisonment—Magistrate—Term of the security to begin when.

If a person, undergoing a sentence of imprisonment, is ordered, under section 118, Criminal Procedure Code, to give security for good behaviour, it is premature and illegal to pass against him an order under section 123 of the Code whilst the imprisonment lasts. If, in the meantime, he is convicted of another offence and sentenced to a fresh term of imprisonment, the order should not be passed, until the expiry of both imprisonments. If, before such expiry, the prisoner gives the required security, the Magistrate cannot pass an order of imprisonment under section 123 of the Code.

The order of imprisonment under section 123, Criminal Procedure Code, is one to which the word "sentence," as used in section 396 of the Code, applies.

PER CURIAM:—The Sessions Judge cites no authority for the statement that under section 396 of the Code of Criminal Procedure, the original sentence of rigorous imprisonment commenced to run from the date of the re-arrest of the prisoner. It is difficult to understand how there could be any rigorous imprisonment until the prisoner reached again some jail where such a sentence could be carried into execution. But this is not the point referred and the Court has not the facts before it.

The sentence passed for the escape is under section 396 legal so far as the original sentence is concerned. It is also legal so far as the order sentencing to rigorous imprisonment under section 123 is concerned if that order is one to which the word sentence as used in section 396 may be applied, and there appears to be no authority or reason for excluding this order or not calling it a sentence. The contrary view of the Sessions

(1) I. L. R., 13 Bom., 149. (2) I. L. R., 14 Bom., 227. (3) I. L. R., 17 Bom., 369.

**Criminal Ruling* 38 of 1895. Criminal Reference No. 79 of 1895.

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Judge would occasion the inconvenience of our having to hold that the present is a *casus omissus* from the Code.

The error committed is not in Mr. Chitre's proceedings but in those of Mr. Scott. When the prisoner stated before him that he was then under sentence he ought in order to comply with section 120 to have ascertained if the statement was true. This has now been certified by the judgment convicting of the escape. The order of imprisonment made by Mr. Scott under section 123 is premature and illegal. The Court, therefore, sets it aside.

Mr. Scott must, therefore, pass a new order under section 118 fixing under section 120 a new date from which the period is to commence; and this date must be that of the expiry of the original sentence and the sentence for the escape. If before that date the prisoner gives the required security, the Magistrate cannot pass order of imprisonment under section 123. He ought to have the prisoner before him if this can be done without great inconvenience and explain the order of this Court: otherwise he must by means of the jail authorities convey to him a clear statement thereof.

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8 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Sakharam.*

Penal Code (Act XLV of 1860), Sec. 216A—Robbers—Harbouring.

To justify a conviction under section 216A, Indian Penal Code, both knowledge and intention are required.

THE accused was convicted by the First Class Magistrate of Nasik of the offence of harbouring robbers and dacoits under section 216A of the Indian Penal Code and sentenced to undergo one month's rigorous imprisonment.

ORDER.—There is no evidence of either knowledge or intention, and both are required to justify a conviction under section 216A of the Indian Penal Code. The Court sets aside the conviction and sentence.

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12 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Baji.†

Penal Code (Act XLV of 1860), Sec. 318—Secret disposal—Dead child—Mother.

Where a woman gives her new-born illegitimate dead child to another woman with instructions to dispose of it secretly and the latter carries out the instructions by throwing it in a river, the mother cannot be convicted of the substantive offence under section 318, Indian Penal Code, but her offence can more appropriately come under the definition of abetment.

IN this case the accused, a Hindu widow, gave birth to an illegitimate child. The child having died immediately, she wrapped it up in a cloth

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**Criminal Ruling 39 of 1895. Criminal Application for Revision No. 158 of 1895.*

† Criminal Ruling 40 of 1895. Criminal Appeal No. 172 of 1895.

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shortly after her delivery, kept it in her house the following day and at night fall sent for another widow Mainabai and directed her to dispose of the body, saying "take it away and throw it into the river." Mainabai threw the body of the child into the river according to the instructions of the accused.

PER CURIAM :—The facts are on all fours with those in *Regina* v. *Bird* (1) and *Regina* v. *Skelton* (2) so far as the act of the mother is concerned. They were held to amount to the offence of "secret burying or otherwise disposing of the dead body" within the meaning of those words in 9 Geo. IV c. 31 s. 14. But that section 14 strikes at the mother only which was doubtless before the minds of the Judges in those cases. Section 318 of the Indian Penal Code is not so limited: and moreover the facts come more appropriately under the definition of abetment. The Court, therefore, holds that the accused mother was not guilty of the substantive offence and dismisses the appeal. A separate head charging abetment ought to have been framed in the Court of Sessions: *Regina* v. *Chand Nur* (3).

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13 August 1895 JARDINE & RANADE, JJ.

Queen-Empress v. Ramchandra Sawairam.*

Evidence—Witnesses—Trial—Prisoner's Testimony Act, (*XV of* 1869)—*Evidence Act* (*I of* 1872), *Sec.* 118.

Two *sonars* A and B were convicted of theft and duly sentenced. R and G, who had given evidence as witnesses against them, were afterwards prosecuted under section 411, Indian Penal Code, in connection with the same property, and connected on the evidence of A and B:—

Held, (1) that the Prisoner's Testimony Act had no bearing on the point in decision and that the two convicts were competent and compellable witnesses, there being no exclusion of them, nor privilege given them by the law;

(2) that, in the absence of any pardon or suggestion by any judicial authority of pardon, R and G had no privilege against prosecution or against the evidence of any admissible witness being used against them. Even if, as witnesses against A and B, they made full confessions of crime as being dishonest receivers, they would have no privilege (which can only be conferred by special enactment of the Legislature as in the case of the confessing Mamlatdars by Act XIV of 1889).

PER CURIAM:—The Magistrate convicted the two *sonars* under section 411 of the Indian Penal Code. The Sessions Judge without, as is admitted, going into the facts acquitted them on appeal. Against this acquittal the Government of Bombay has made appeal here.

The reasons given by the learned Judge are as follows:—"After hearing the learned counsel for appellants and the Public Prosecutor in reply, and referring to the case of *Empress* v. *Ragho and Tukya*

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(1) 2 C. & K., 817. (2) 3 C. & K., 119. (3) 11 Bom. H. C., 240.

* *Criminal Ruling* 41 *of* 1895. Criminal Appeal No. 173 of 1895.

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and 3 *others*, No. 366 of 1894 on the file of the same Magistrate, I find that these convictions cannot be sustained.

Reference to that case shows that the Crown was made to rely, and did rely on the sworn statements of both these appellants, in order to obtain convictions against Ragho and Tukya, and that these convictions were accordingly obtained. It strikes me, therefore, as nothing less than *perfidy* to make the crown turn round now upon two of its own prime witnesses, and strive to obtain *their* convictions in connection with the self-same property by means of the sworn statements of the two convicts who apparenty under the Prisoners' Testimony Act, 1869, have been brought up here from Tanna Jail for this purpose. I believe this to be a great mis-use of the Act, and except in this District I have never seen recourse to such procedure, which seems to me quite opposed to public policy and the spirit of English law."

The Judge raised no issue on this important question as he was required by this Court: *In re Shivappa* (1); nor does he cite any authority. Before reversing a solemn decision he ought to have used the procedure which the law considers essential to solemn hearing in appeal.

The Prisoners' Testimony Act has no bearing on the point we have to decide. Mr. *Branson* has not argued that the two convicts examined as witnesses were not competent and compellable witnesses. This they certainly were, there being no exclusion of them nor privilege given them by the law. In *Queen-Empress* v. *Palanji* (2) this Court directed the evidence of a prisoner under sentence of death to be taken in the appeal of another prisoner so sentenced for the same murder.

The only question possibly arising is whether the *sonars*, whose acquittal we are now considering, had any privilege against prosecution or against the evidence of any admissible witness being used against them. Mr. *Branson* has faintly suggested that perhaps *Kudd's case* may apply in his favour. This is discussed in *Regina* v. *Hanmant* (4) and in *Queen-Empress* v. *Mona Puna* (5). But in the absence of any pardon, or suggestion by any judicial authority of pardon, neither that case nor any other such case affects the present, as it is not suggested that when these *sonars* gave evidence they deposed to dishonest conduct as such or affected to be accomplices or were treated as such. Even if they made full confessions of crime as being dishonest receivers, they would have no privilege before the law which is not a respecter of persons. This privilege can only be conferred by special enactment of the Legislature as in the case of the corrupt Mamlatdars or

(1) I. L. R., 15 Bom., 11. (2) I. L. R., 19 Bom., 195.
(4) I. L. R., 1 Bom., 619. (5) I. L. R., 16 Bom., 661.

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other persons who confessed for whose protection Act XIV of 1889 was passed, in consideration of the invalid promise set forth in the report of *Queen-Empress* v. *Chagan* (6). It is said in the case of *Ganesh Sathe* (7), that the object of Criminal Procedure is the punishment of offenders against the substantive criminal Law. That case and the other case of the same name show that the private prosecutor has substantially the same rights as the Crown. But the Crown has a duty and so have its Magistrates and officers to act with diligence against offenders. In such matters it is not the duty of the Courts to deal with matters lying entirely within the discretion of the Crown or its officers. The test to which all are subject, the accused as well as the prosecutor, is whether what is done is done according to the law of the land. We are bound to say that there is nothing to show or to lead us to suspect that the trying Magistrate has in taking the evidence of the convict witnesses or in prosecuting the *sonars* exceeded the powers he is in duty bound to use for the prosecution of criminals. The witnesses were bound to state what the justice of the country calls upon them to reveal. Gresley on Evidence p. 382. We may, however, point out that section 132 of the Indian Evidence Act gives a witness a certain amount of protection, which this Court has defined in *Queen-Empress* v. *Ganu Sonba* (8). As justice must always be administered according to law the Court now reverses the acquittal of the two *sonars* and directs the Sessions Judge to rehear their appeals.

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15 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Hari Gopal.*

Criminal Procedure Code (Act X of 1882), Secs, 260, 263, 264—Summary trial—Magistrate—Watandar Kulkarni—Record of summary trial—High Court—Revision.

Where a case is complicated and a conviction may entail further serious consequences, as for instance, where the charge is under section 202, Indian Penal Code, against a person who is a *Vatandar Kulkarni*, a summary trial is not the procedure which a Magistrate, in his discretion, should use.

The record of a summary trial should not be so meagre as to deprive the High Court of the power of judging whether the finding is correct, legal or proper, when the case comes before it in revision.

PER CURIAM:—We concur generally in the opinion stated by the Sessions Judge. Cases under section 202 of the Indian Penal Code are complicated. As to what is to be proved, see the *Queen* v. *Ahmed Ali and others* (1); *Empress of India* v. *Abdul Kadir* (2). That is one good reason to guide a Magistrate's discretion in not using the summary procedure. Another is that which is pointed out in *Subramanya Ayyar* v. *The Queen*

(6) I. L. R., 14 Bom., 348. (7) I. L. R., 13 Bom., 598. (8) I. L. R., 12 Bom., 440.

**Criminal Ruling 42 of 1895. Criminal Reference No. 104 of 1895.*

(1) 22 W. R., 42. (2) I. L. R., 3 All., 279.

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(3). The accused is a *Watandar Kulkarni*; and the conviction may entail further very serious consequences. For these reasons we think a summary trial was under the circumstances not the procedure which should have been used.

We also follow *Queen-Empress* v. *Shidgauda* (4) in considering that the finding should have shown something on which this Court could judge whether the accused had reason to believe that the death was violent. We make this remark with reference to *Empress* v. *Rango Timaji* (5). The record of a summary trial should not be so meagre as to deprive this Court of the power of judging whether the finding is correct, legal or proper, when the case comes before it under Chapter XXXII of the Code of Criminal Procedure. We are unable to say whether the trying Magistrate should have used the power given him by section 245 of questioning the accused under section 342 to enable him to explain the circumstances appearing against him. But if the statement in the Police Diary noted by the learned Judge is true, *viz.*, that the Police Officer to whom the report of the death ought to have been made under section 45 of the Code of Criminal Procedure was himself present at the death, and if this fact had come to the trying Magistrate's notice, it is doubtful whether he would have convicted the accused for not making the report. We draw the Magistrate's attention to the cases on the meaning of the law on this point, *viz.*, *Imperatrix* v. *Sada Nandbha* (6) which follows *The Empress* v. *Sashi Bhusan Chuckrabutty* (7), *The Queen Empress* v. *Gopal Singh* (8), and *In the matter of the petition of Pandya Nayak* (9).

The Court now sets aside the conviction and sentence. Whether a new trial should be held is a matter which we must leave to the discretion of the District Magistrate on consideration of the cases on which this judgment is based. As to the caution with which hereditary officers may, as a matter of expediency be dealt with, where only neglect of rules is charged, we may refer to the remarks of the Honourable Mounstauart Elphinstone in his Report on the Deccan, 2nd Edition, page 76.

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26 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Narayan Nathu.*

Accused—Evidence—Burden of Proof—Evidence Act (I of 1872).

An accused person is under no obligation whatever to produce any evidence; and, until a strong case has been made out against him, no inference can be drawn from non-production of such evidence.

(3) I. L. R., 6 Mad., 396. (4) I. L. R., 18 Bom., 97. (5) I. L. R., 6 Bom., 402.
(6) Cr. R., 40 of 1893. (7) I. L. R., 4 Cal, 623. (8) I. L. R., 20 Cal. 316.
(9) I. L. R., 7 Mad., 436. *Criminal Ruling 43 of 1895. Criminal Appeal No. 201 of 1895.

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In a criminal case, the burden of proof is on the prosecution under section 101 of the Indian Evidence Act, and a conviction must be based on evidence which excludes the theory of innocence; not on circumstances of suspicion, or on mere probabilities.

PER CURIAM :—Except that all the persons deposing to the execution of the second will, Ex. A., have been made prisoners and tried for forging it, the present case is much like the civil suit out of which it arose. The two widows of the testator Nathu relied on an earlier will and sued the donee, prisoner 1, the nephew and adopted son of Nathu. The defence of prisoner 1 was two-fold in the suit: he relied on his admitted *status* as adopted son and on the later will. Before examining the matters on which the litigants differ it is best to see what matters they are agreed upon.

The following facts are undisputed. On the 31st August, 1890, Nathu, a childless Gujerati trader, executed a will, of which Ex. B. is a copy, making prisoner 1 his heir, or rather residuary legatee, and making three devises. On the 8th September he adopted prisoner 1 by a deed of which Ex. C. is a copy, and two other deeds confirmed two of the three devises, *viz*, to the Arya Somaji and to Parshotam Barve. On the 8th September the Sub-Registrar came to Nathu's house and registered the will, Ex. B., the adoption deed, and the two deeds of gift. On the 13th September Nathu died; and for a while prisoner 1 lived with the two widows, when disputes arose about the rate of maintenance. The widow Bhagu swears that prisoner 1 did in these first weeks, after Nathu's death, refuse to pay at Rs. 10 a month and offered Rs. 4, which, he said, was in accordance with the second will made by Nathu. The other widow Walu, also an adult woman, tells a different story, and says she first learned that there was a document giving only Rs. 4 after the suit was begun by these two women. There are, however, two admitted documents. Ex. L. of June 1892 is a notice to prisoner 1 by these two women that they would sue him unless he acted up to the dispositions of the first will, which with many other things is recited. Ex. K. of the 29th September, 1892, is a long expostulatory reply thereto. Both Exs. L. and K. were published in a newspaper and show that the widows and the heir were on very strained terms. Ex K. distinctly alleges by date the second will of the 9th September, 1890, as superseding the first will. These bad relations having lasted till now, the widows being afterwards pitted against the heir in a civil suit and this criminal trial, it is difficult to believe Walu. The civil suit was not filed by the women till 1st June 1893, or about eight months after prisoner 1's written and public insistance on the second will, which Bhagu admits she had known about since the autumn of 1890. On the 8th July, 1893, prisoner 1 filed his written statement, which again distinctly relies on the second will. The suit was

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ultimately settled by arbitrators by amicable compromise on which the Subordinate Judge passed a decree. Ex. A. was produced before that Judge on the 6th June, 1894. The case which it is for the prosecution to prove, is that the signature of Nathu on Ex. A. is a forgery. There is no testimony to show this. No witness asserts that it is not Nathu's writing. What testimony there is bears in favour of the prisoners 1, Witness 13 thinks the signature is like one admitted signature on Ex. O. He is a donee of the gift to the Arya Samaj and has nothing to lose or gain, as he holds a confirmatory deed. Witness 16, the father of prisoner a man likely to be informed, says Nathu showed him Ex. A. which had been executed at his advice or remonstrance. Witness 21, Khemchand, who attested the first will and was one of the arbitrators in the suit, was also shown Ex. A. by Nathu and discussed it with him. Thus the testimony, such as it is, stands in favour of the prisoners; and it would be illegitimate to infer their guilt from the mere supposition that the witnesses have not told the truth or the whole truth. The two widows deny that Nathu executed a fifth document but for reasons mentioned above it will not do to place much reliance on them. The Courts are at liberty to compare a disputed signature with admitted signatures. The learned Judge thinks that Ex. A. is not as feebly written as a sick man would write, nor as feebly written as Ex. O. We have compared the former with those on Exs. O., D., and P. and find much resemblance in the fashion of the letters. As a difference may be made in fineness by using a different pen, it would be unsafe to assume that the asthma affected Nathu's handwriting. See the view taken by the PRIVY COUNCIL in *Bama Sundari* v. *Torasundari* (1) in a similar case. "There is nothing else on the record which can properly be called evidence of any weight being remote from the question who wrote the signature," and it follows, therefore, that the prisoners must be acquitted. What remains is material for conjecture, but not such as a Court can judge on, to use the expression approved by HOUSE OF LORDS and cited in *Queen-Emp* v. *Vajiram*, (2). The only reason given by the assessors for conviction is that the second will was not registered. But it is common experience that testators neglect many precautions, else disputed probate suits would be rare. Khemchand also deposed to it being known that a will need not be registered, and it may be conjectured that as prisoner 1 was heir under both wills and had been given in adoption he and his father may have refrained from putting the sick man to further trouble. The Sessions Judge assumes that there has been a shameful and iniquitous conspiracy to suppress the documents bearing Nathu's admitted signature. The Government

(1) I. L. R., 19 Cal., 65. (2) I. L. R., 16 Bom., 423.

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Pleader, however, admits that two of these documents are not in the possession or power of any of the prisoners. Nothing could, therefore, be assumed against them so far, however great may be the suspicion in either the suit or the criminal trial. As regards the others there is no proof that prisoner 1 got the earlier will or adoption deed. At the civil suit it was a matter in which if he had these papers he would be guided as to producing them by the various considerations that influence a litigant. We must point out to the Sessions Judge that the prisoners at the trial were under no obligation whatever to produce any evidence; and that until a strong case had been made out against them, no inference against them can be drawn from non-production of papers, even were it proved that they had them. It is also matter of mere conjecture whether a testator making a second will would demand the presence of particular persons, *e. g.*, those who wrote or attested an earlier will, to do the same again. It would be as wrong to treat the late production of Ex. A. in the Civil Court as evidence of forgery as it would be to assume from the widows not demanding its early production, when they knew of it, that *their* claim was a false one. This is matter of conjecture. The Government Pleader admits here that there is no interpolation in the prisoner 1's written statement: and it would be absurd to make any inference against him because he relies on the second will in his last para, seeing he had publicly asserted that will long before; and to anyone used to legal proceedings it is easy to surmise that prisoner 1 naturally wished to win on the undisputed defence, *i. e.*, his status of adopted son, without, however, giving up his point about the second will. Of course his pleading, which is reasonable enough, was most likely governed by his pleader's learning: and of course his pleading does not in any way touch the other prisoners. We are also of opinion that the Sessions Judge in dealing with the probability of a second will has failed to give due weight to the vast change which occurs when a childless Hindoo proceeds to adopt a son. He was moved to do this some days after he had by his first will made prisoner 1 his heir. There is usually a negociation before a man will consent either to give or take a son. The adoption was not made till the 8th September. Once made Nathu had a son by whom he would naturally expect his widows to be maintained and cherished. There is then nothing improbable in the natural father asking to have the rate of maintenance reduced. Nor in a reduction of bequest to them for charity, seeing that the son given is the proper person to do what religion requires in the family. Except as regards the matter of Ex. N. there is no such great change made by the second will as to justify any great suspicion. Ex. N. is fully explained by

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witness 13, and the evidence is that the second will carried out Nathu's wish in that matter, and, moreover, a fact of importance, that the second will was acted upon. It would not be difficult to construct an argument from probability out of the circumstances of the adoption and contents of the second will, the delay of the widows to bring suit or to demand production of the second will, an argument that these widows who compromised the suit are the real offenders. But as in the present trial that would be based on mere probabilities on which opinion would be mere conjecture, and besides the risk of a mistaken and unjust judgment there would be a terror added to civil litigation enough to deter many persons from resorting to the Court. In a criminal case the burden of proof is on the prosecution under section 101 of the Indian Evidence Act, and a conviction must be based on evidence which excludes the theory of innocence, not on circumstances of suspicion, however well founded. The Court now reverses the convictions and sentences and acquits the four prisoners and directs that they be discharged.

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29 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Mhatu Balaji.*

Penal Code (Act XLV of 1860), Sec. 202—Police Patil—Report about death—Magistrate.

Where, from the fact of the Police Patil ordering the Kulkarni to write a report regarding a suspicious death in his village, his good faith is apparent, and it does not seem that he had an intention to omit the report, it is not proper to convict him, under section 202, Indian Penal Code, of an intention to evade the law about the first report.

THE accused (who was the Police Patel) was convicted, by the First Class Magistrate of Satara, of intentionally omitting to give information about the death of one Jana, being legally bound to do so, an offence under section 202 of the Indian Penal Code.

PER CURIAM :—This case ought not to have been tried by summary trial. It appears that the Police Patel did order the Kulkarni to write the report, which shows that the Patel had no intention to omit to report. In construing the enactments about his duties the various sections of Bombay Act VIII of 1867 must be carefully considered. This Court has often noticed that when a murder has occurred the Patel has gone in pursuit of the offender or has recorded evidence or has held the inquest; and where his good faith is thus apparent it would not be proper to convict him under section 202 of the Indian Penal Code of an intention to evade the law about the first report. The Court now sets aside the conviction and sentence.

**Criminal Ruling 44 of 1895. Criminal Reference No. 123 of 1895.*

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29 August 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Waman Dhonddev.*

Criminal Procedure Code, (Act X of 1882), Secs. 45 (1), 260—Summary trial—Magistrate—Village Kulkarni—"Forthwith"—Interpretation—Penal Code (Act XLV of 1860), Sec. 176.

Where a Village Kulkarni is charged with an offence under section 176, Indian Penal Code, the Magistrate would use a right discretion in not trying the case by summary procedure.

The word "forthwith" in the first clause of section 45 must be construed with reference to the object of the enactment.

THE accused was convicted on the 15th July 1895, by the First Class Magistrate of Satara, of intentionally omitting to give information about the death of Jana to a public servant being legally bound to do so, an offence under section 176, Indian Penal Code. The accused, the substitute Kulkarni of Padegaon, was convicted after a summary trial, of an offence under section 176, Indian Penal Code, in that he being bound by amended section 45 (*d*) of Act X of 1882 to give forthwith information of the death under suspicious circumstances of one Jana either to the nearest Magistrate or the Chief Constable of Khandalla intentionally omitted to do and was sentenced to one month's simple imprisonment.

The Sessions Judge of Satara being of opinion the conviction and sentence were illegal, made this reference to the High Court, observing:—"I am of opinion that the conviction cannot be sustained. The facts found are that the accused was aware that the corpse was lying in the gutter of a road within the limits of his village by about 9 A.M., that the Patil at the time asked the accused to report the occurrence to the authorities but he declined to write a report. Meanwhile a Police Constable who was stationed at Lonaud heard a rumour that a corpse had been seen at the road side at Padegaon and started for Padegaon with the Kulkarni of Lonaud. On his way he received a report of the death from the village officers of Padegaon. Finally at 4 to 5 P.M., after the Constable reached Padegaon a report of the death signed by the village officers and the Constable was despatched to the Chief Constable. From the above it will be seen that on the Magistrate's own showing the accused did make a report to the Chief Constable within a few hours of the receipt of information and unless the word 'forthwith' in section 45 be construed to mean 'instantly' the accused cannot be reasonably convicted. A reference to Wharton's Law Lexicon shows that the word will not bear any other interpretation. It appears to me that the accused must be held to have sufficiently discharged the obligation imposed upon him by section 45 by communicating the information to the Chief Constable within 7 or 8 hours from the time that he received it."

**Criminal Ruling 45 of 1895. Criminal Reference No. 122 of 1895.*

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PER CURIAM.—We are of opinion that in a case like the present a Magistrate would use a right discretion in not trying the case by summary procedure: see *Subramanya* v. *The Queen* (1). But as the record states the facts found with sufficient fulness to enable the High Court to understand them we decline to interfere on the ground of wrong use of discretion.

On the interpretation of section 45 (*d*) of the Code of Criminal Procedure we concur with the majority of the Judges in *Matuki* v. *Queen-Empress* (2). The word *forthwith* in the first clause must be construed with reference to the object of the enactment: and we accept the findings of the Magistrate as findings that the accused did not report in reasonable time but intentionally refused to report when called upon by the Police Patel.

The case differs in the facts from *Imperatrix* v. *Sada Nandbha* (3) and *The Queen-Empress* v. *Gopal Singh* (4).

The Court sees no reason to interfere.

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5 September 1895 JARDINE & RANADE, JJ.

Queen-Empress v. Dhondi*.

Murder—Beating a wife—Wife possessed of a devil.

Where a man beats, in good faith, his wife under a mistaken idea that by so doing the devil of which she is possessed would go away, and the wife subsequently dies from the after effects of the beating, the man cannot be convicted of murder or of any minor offence since what he did was done in ignorance and in good faith.

THE wife of the accused was suffering from hysteria or an epileptic fit; and owing to this the neighbours to the accused oftentimes crowded in to see her. After a while, an ignorant and meddlesome old woman told accused that the proper thing to do was to beat his wife with a view to exorcise the evil spirit which possessed her. The accused did beat his wife with a stick and she died about one day afterwards. Upon these facts, he was charged under section 304; and upon being tried before a Sessions Judge with a jury, the latter returned a verdict of not guilty of the offence under section 307 or any minor offence. The Sessions Judge, differing from their view, made this reference to the High Court under section 307, Criminal Procedure Code, and observed.—"Accused admits that he beat his wife but had no intention of killing her. He believed in his ignorance that the only way to exorcise what he imagined to be the devil was to beat his unfortunate wife who was really suffering from hysteric or an epileptic fit. It does not appear that the injuries caused by the beating were severe or that the death of the woman

(1) I. L. R., 6 Bom., 395. (2) I. L. R., 11 Cal., 622. (3) C. R., 40 of 1893.
(4) I. L. R., 20 Cal., 316. *Criminal Reference No. 124 of 1895.

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which occurred about half a day after was caused or even accelerated by them...I think that accused has undoubtedly committed the offence of voluntarily causing hurt, and I do not think that he should get off scot-free for this might perhaps lead to a mistaken impression that killing or beating a woman supposed to be possessed by a devil is no offence."

PER CURIAM :—There can be no doubt that the prisoner caused hurt. But the Sessions Judge is of opinion that the hurt neither caused nor accelerated the death. The Magistrate who first convicted the prisoner found that he struck the woman with the intention of causing her recovery from illness by driving out an evil spirit. The Judge records that the prisoner believed in his ignorance that the only way to exorcise the devil was to beat the woman who was really suffering from hysterics or an epileptic fit and that the injuries caused were not severe. On these findings there arises a question whether the prisoner acted in good faith which implies due care. It was for him to plead and prove this if he intended to rely on sections 87 to 92 of the Indian Penal Code about consent. In such a matter an ignorant man acting with good intentions and not resorting to causing any grievous hurt or serious injury must be more leniently judged than a man of better education or experience. Consent was not pleaded nor inquired into. But the above considerations may have been those which influenced the Jury to find the prisoner not guilty. The case is in the opinion of this Court one in which the verdict may be upheld as reasonable. The Court, therefore, acquits the prisoner.

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12 September 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Ramchandra Sawairam.*

Judge—Duties—Administration of justice.

The duty of a Judge is to administer justice according to law; he is not entitled to put terms on the Crown or any suitor requiring conformity to his own extrajudicial views. He must not defeat any right given by law by interposing his private notions of morals or an extraneous or extra-judicial consideration. He may fairly meditate an accomodation, but not put terms on pronouncing sentence or giving judgment. In the exercise of his judicial office, he is restrained from the use of language which may prevent the approach of persons aggrieved or which may cause scandal, or may show that he is influenced by fear or favour.

What is legal is a matter competent to a Judge to ascertain; but the question whether the Crown is *morally* justified in calling a witness or prosecuting a criminal is not usually one for a Court of law, but is a matter within the discretion of the prosecution.

To the law of the land every Judge is strictly bound to conform: and the Judges of the inferior Courts are bound to act upon the interpretations of the High Court, which is the highest tribunal.

PER CURIAM :—The reversal of the acquittal of the prisoners by the Sessions Judge was directed by this Court on appeal of the Governor in

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*Criminal Ruling 48 of 1895. Criminal Application No. 245 of 1895.

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Council, and was based solely on an error in law. On the appeal being returned to the Sessions Judge for determination on the merits, the Judge has applied that the appeal be sent to some other Court. There is nothing special in the record of the case to prevent him or any unbiassed Judge from hearing it, and except the learned Judge's statement that the officers representing the Crown must be aware of the grounds why the Judge considers the prosecution illegal, the reasons which he gives for asking this Court to impose this appeal on some other Judge are not sufficient, except in so far as they disclose a strong inclination in the mind of the Judge to import into the adjudication tests of evidence derived not from the statutes or decisions but from his own views of what is the right carriage of a prosecution in the name of the Crown, from a moral point of view. In the letter of the 20th August, which may be regarded as explanatory of the reversed decision, he says he differs on the question of the moral, not the legal, admissibility of the testimony; he holds that there was a moral, not an illegal, use of the Prisoners' Testimony Act in regard to the testimony of some convicts, and he even adds that he does not care whether it is a legal use of them or not. Then as regards the prosecution of the acquitted convicts the Judge goes on to say:—"All this may be quite legal and possibly very clever too, but I take leave to think it *morally* low. And I have said here in open Court, and must continue to say the same upon every similar occasion, that I think the Crown *dishonoured* by such a prosecution." In volunteering these statements in his letter asking for a transfer the Judge must be taken as desirous to show the strong bias of his mind as the questions about the relevancy of the evidence had all been fully argued in this Court and settled by its decision, which pointed out that the production of any particular evidence admissible by the law, lay entirely within the discretion of the Crown as prosecutor, and the production was not a matter for the Sessions Court to deal with. The duty of a Judge is to administer justice according to law; he is not entitled to put terms on the Crown or any suitor, requiring conformity to the extra-judicial views of the Judge. To avoid the danger of improper bias in decision the Court must now, as asked by the Judge, transfer the appeal. The transfer of a case on the ground of the incapacity of the Judge from bias has always been regarded as a serious proceeding. Extra-judicial notions should never prevail in judgment; they tend to deprive the suitor of the redress to which he is entitled, as in *Queen* v. *Adamson* (1), see *Cockburn*, C. J's remarks, p. 205, on this point, and the remarks of the Full Bench of this Court in *Ganesh Sathe's case* (2). These cases and others, where Magistrates have been

(1) L. R., 1 Q. B. D., 201. (2) I. L. R., 13 Bom., 598.

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biassed by their notions on politics, show very clearly that the officers who administer justice must not act on what is extraneous and extra-judicial, as Lord *Cockburn* calls it. Judges are not doctors of morals by profession: the Court of Queen's Bench long ago abandoned that jurisdiction. What is legal is a matter competent to a Judge to ascertain. But the question whether the Crown is morally justified in calling a witness or prosecuting a criminal is not usually one for a Court of law. Morals depend much on motives, about which *Sargent*, C. J., says in *Ganesh Sathe's case*, "any attempt to determine them would open out a very wide and speculative field of enquiry." *Lex non cogit ad impossibilia.* A Judge must not defeat any right given by law by interposing his private notions of morals any more than those he entertains on politics. A Judge may fairly mediate an accommodation, but not put terms on pronouncing sentences or giving Judgments. Per Lord *Wright*, (Vern, 479, Viners, Abrid. Tit. Judges G). In matters outside of his special duty and office a Judge has no special reason to be treated as an arbitrator. Within his judicial duties a Judge has a special eminence for the reason given by Coke to the King of England in the case of Prohibitions del Roy, showing that the King's Judges and not the King himself may dispense justice, because His Majesty was not learned in the laws of his realm, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by the natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the meet wand and measure to try the causes of the subjects. The Sessions Judge being the Judge of a Court under our superintendence and control we think it behoves us, in order to prevent in the future the necessity of transfers of cases, even before the merits have been decided, to point out that in the exercise of his judicial office he is restrained from the use of language which may prevent the approach of persons aggrieved or which may cause scandal. The promise of the Sovereign implied in her Coronation Oath that justice shall not be denied nor delayed refers, as we have seen, to justice according to law, not to something according to an individual's notion. The law is the fortress to which the suitor resorts against wrong. A Judge may not use language which tends to stop this approach. He must not use language showing that he is influenced by either fear or favour; he must not interpose personal views on matters moral or political, and so forth, lest the suitor or the subjects generally should have reason to suppose that these rule his judgment, and lead to the passing of orders contrary to the law of the land and the

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delay of common right. The cases on informations against Magistrates show that the bias caused by extra-judicial considerations has often been followed by illegal or improper orders, and sometimes to the scandal of justice, requiring the interference of the tribunal with disciplinary powers, even when the Magistrate was not guilty of the gross misbehaviour caused by passion and opposition which was disclosed in *Rex* v. *Brooke*, (3). The jealousy with which the superior Courts regard any language tending to a denial of justice is shown in *Queen* v. *Marshall* (4), which affirms the right of the suitor to a patient hearing through his counsel. These principles are well consistent with those which prohibit the Courts of Justice from being made use of for purposes of scandal. The reasons are given in *re Clive Durant* (5), which has often been followed and must be familiar to all the Judges of inferior tribunals. In *Eknath* v. *Ramchandra* (6), the Governor in Council brought to the notice of this Court the language of a Judge who had used the term *fraud* as regards two officers of the Government. This Court pointed out the need of discretion on the part of the Judge below, who ought to have remembered that the public have a serious interest in the character of a public officer and the officer himself has a valuable property in his character. The Lords of Her Majesty's Privy Council have at times remonstrated about the use of language. In *Kali* v. *Bhusan* (7), their Lordships cast a protection over witnesses. In one passage they say:—"Hasty, uncalled for, and indiscreet expressions like these casting suspicions of grave crimes against unnamed absent persons without one tittle of evidence to support them are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge, and lower the confidence which might otherwise attach to his decision upon the questions really before him." The cases show that when a Judge goes out of his way into matters of speculation foreign to the case he is prone to commit this kind of injustice, and to let his impartial office be shadowed by controversy with the other authorities. In the *Queen* v. *Budri Roy* (8), the learned Judges at Fort William, in dealing with a Sessions Judge under their control, expressed an opinion that the comments made on Police officers should not exceed those on other witnesses. This High Court has not thought it necessary to lay down such a rule, but has often followed *Kendillon* v. *Maltby* in encouraging the Courts to pronounce their opinion about individuals of the Police force in cases coming before them in such a way as to lead to inquiry in cases of misconduct appearing before them. We are not aware of any instance in which this Court has gone further in principle, and the reports of that

(3) 2 T. R., 195. (4) 4 E & B., 475. (5) I. L. R., 15 Bom., 488. (6) P. J., 1894, 393.
(7) I. L. R., 18 Cal., 201. (8) 23 W. R., 65.

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case (1 C. & M., 402, and 2 M. and R., 438,) show that in Lord *Denman's* opinion not even the highest Judge in the land is justified in going out of his way to calumniate an individual by uttering charges not warranted by the occasion. How much less an inferior Judge after the highest tribunal has justified the action which has been denounced as morally wrong. Moreover, this Court has often declared that when an officer acts in doing his duty within the limits of the law the presumption is in his favour, and several times it has said that the public order is preserved by each of the authorities doing the work the law lays on it. On this principle the Court of Queen's Bench has refused to issue mandamus to the Attorney General; and in India the Courts while defining their position have refrained from directing the Public Prosecutors in their discretion. The rule of Magna Charta that justice must not be denied applies also to the executive Magistracy, and is enforced by another statute to be mentioned with reverence, which places on them in their various degrees the duty of maintaining justice by prosecuting offenders according to law, *i. e.*, the Petition of Right. This high prerogative of the Crown must never be forgotten. We do not doubt that the assertions made by the learned Judge are based on sincere intentions and on a fervent desire to administer justice and right. But as Lord *Coke*, the great lawyer and Judge, who drew the Petition of Right, insists (cited *Queen-Empress* v. *Chagan* (9)) the discretion of a Judge is not merely *scire quid sit justum*, but *scire per legem quid sit justum*. No authority is cited by the Sessions Judge empowering him to qualify acts of public officers already pronounced legal by this Court as perfidious or morally low: and the pretension to do so is, in our judgment, novel and unfounded and without warrant of the law, while the cases referred to above show that for centuries the law has placed restraints on Judges, confining their utterances to matters properly before them, and restraining them from acting upon rules which are not rules of the law. To the law of the land every Judge is strictly bound to conform, and the Judges of the inferior Courts are bound to act upon the interpretations of this the highest tribunal. It is urged by the pleader for the convicts that this Court should hear their appeal, as a transfer of it from Nasik to any other Court will cause them much expense, and the expense of retaining counsel will be less if the appeal be heard here. The Government take no objection. As the act of the law should injure no man, and as it is not the fault of the appellants that the appeal must be heard a second time and in another place, the Court assents and transfers the appeal to itself.

(9) I. L. R., 14 Bom., 352

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12 September 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Mohun Abhesing.*

Criminal Procedure Code (Act X of 1882), Sec. 369—"Other than a High Court"—Review of its own Judgment—Government, application to.

The words "other than a High Court" in section 369, Criminal Procedure Code, do not give to a Division Bench of the High Court power to review its judgment in a criminal appeal. The words are to be accounted for by the power of review given to the High Court by section 434 of the Code.

The remedy against any error in an order passed in an appeal by a Divisional Bench is afforded by petition to the Government, "the authority with whom rests the discretion either of executing the law or commuting the sentence."

PER CURIAM.—This an application to us on behalf of the convict to review a conviction for murder and sentence of transportation for life passed by us in an appeal to this Court from a judgment of acquittal. Mr. *Inverarity* was unable to show any instance of such an order to review in the records of this Court. He admitted that the power to a Divisional Bench to review its judgment pronounced on *revision* in a criminal case was denied by the Full Banch in *Queen-Empress* v. *Fox* (1). He rested the jurisdiction of a Divisional Bench to review its judgment in a criminal *appeal* on the words excepting a High Court in section 369 of the Code of Criminal Procedure. We agree with the Full Bench in treating those words as accounted for by the power of Review given to the High Court by section 434. The learned Judges make also the following remarks which are applicable to the present matter. "Under Act XXV of 1861 there was no review of any order passed in a criminal matter by the High Court. The decision and reasoning in the Calcutta Full Bench case, *Queen* v. *Godai Raout* (2), have always been regarded as conclusive on that point." Except section 369 it is not suggested that there is any alteration in the language of the Code to lead to a different result. Where, as in the present case, the applicant was fully heard in the appeal, this Court would have refused to review under the Code of 1861: *Reg.* v. *Mehtarji* (3). We are of opinion that the present Code does not impliedly give the power. The remedy against any error in an order passed in an appeal by a Divisional Bench is afforded by petition to the Government "the authority with whom rests the discretion either of executing the law or commuting the sentence": *Reg.* v. *Murphy* (4). The Court, therefore, refuses this application.

**Criminal Ruling 49 of 1895. Criminal Application in Appeal No. 127 of 1895.*

(1) I. L. R., 10 Bom., 176. (2) 5 W. R., 11, 61. (3) 7 Bom. H. C., 67. (4) L. R., 2 P C., 552.

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12 September 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Salu.*

Village Police—Corpse—Unnatural Death—Medical Inspection—Medical witness—Practice.

In cases of unnatural or sudden death and particularly where murder is suspected, it is the duty of the Village Police, under the ancient system recognized in Bombay Act VIII of 1867, to forward the corpse at once for medical examination.

The testimony of a medical witness, especially in a case of murder, ought, when he is present, to be taken fully, and not supplemented by reading over his testimony given elsewh ere and recording an answer that the earlier testimony is true.

PER CURIAM.—The evidence of the medical witness is adverse to the theory that the death of the child occurred by drowning. He accounts for it by fracture of the skull caused by the head striking with violence on a stone in the well. There do not appear to be sufficient reasons for disbelieving the prisoner's statements made on various occasions to the effect that the child was living when she threw her into the well. The Court, therefore, rejects the appeal.

The prisoner has been sentenced on conviction for murder to transportation for life. The Sessions Judge is of opinion that there are reasons for a recommendation to the Governor-in-Council to reduce the sentence. In this opinion we concur. We infer from the evidence that the prisoner had been deserted by her husband and left to maintain the child without any help from his family. The motive to murder appears to have originated in want and misery. The prisoner is very young. We will forward the record to the Governor-in-Council for consideration whether the mercy of the Crown may be shown to her. We will also draw the attention of the Governor-in-Council to a fact which ought to and possibly may, have been noticed by the Magistrate and the Sessions Judge with a view to prevent future breaches of the law—see the remarks in *Kendillon* v. *Maltby* (1) cited in *Queen-Empress* v. *Ganesh* (2). The Village Police allowed the dead body to remain many hours in the well. It was their duty under the ancient system recognized in Bombay Act VIII of 1867 to forward the corpse at once for medical examination. By leaving it in the well the risk of putrifaction made it more difficult to get the sort of evidence which is so important in cases of drowning. We have noticed on several occasions that the Courts below even the Courts of Sessions have not brought such behaviour to the notice of the District Magistrate; and as it seems expedient that the Village Officers should not be allowed to substitute a new practice tending to the prevention of evidence of crime, nor that which has so long prevailed especially where murder is suspected we may suggest the expediency of some orders being passed by the

*Criminal Ruling 50 of 1895. Criminal Appeal No. 248 of 1895.

(1) 2 M. & R., 438; 1 C. & M., 402. (2) I. L. R., 13 Bom. 506.

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Government on the general question. The Judgment in *Queen-Empress* v. *Raghu* (3) is merely declaratory of the law with which all the Courts and officers have been familiar since the year 1818.

We also point out to the Court below that the testimony of a medical witness especially in a case of murder ought, when he is present, to be taken fully, and not supplemented by reading over his testimony given elsewhere and recording an answer that the earlier testimony is true. To check what is a novelty in procedure and dangerous to the administration of justice we refer to the remarks of the Judicial Committee of Her Majesty's Privy Council in *Reg.* v. *Bertrand* (4).

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13 September 1895. JARDINE & RANADE, JJ.

Municipal Commissioner of Bombay v. Proprietor of Prince Albert Victor Bakery.*

City of Bombay Municipal Act (Bom. Act III of 1888), sec. 394—Domestic—Bakery—Firewood, stacking of.

The word "domestic" in section 394, City of Bombay Municipal Act, 1888, means "household," and cannotes "dwelling" as opposed to manufacture or bake-house.

THIS was a reference from the Fourth Presidency Magistrate of Bombay under section 432, Criminal Procedure Code. The material portion of the reference ran thus:—

"In a case now pending before me the Municipal Commissioner prosecutes the Proprietor of the Prince Albert Victor Bakery under section 394 (*d*) of the City of Bombay Municipal Act. It seems that this man has stored a large quantity of fire-wood in his compound for use in his bake-house, and it has been contended that because this wood is stacked for "other than domestic use" a license is necessary.

"On the other hand, it has been argued as section 394 applies only to certain trades not to be carried on without a license and as the wood in question is not *per se*, a commodity of the baker's trade, the latter need take out no license. The question therefore that I have to submit is what is meant by "other than domestic use" in section 394 (*d*). Obviously the word "domestic" means belonging to the house, and if strictly interpreted this section would apply to all other than household usage.

"It seems, however, from the marginal note to this section as well as from the headnote to sections 390 to 397 that the Legislature intended to apply those sections to the regulation of factories and certain trades, and it could not be seriously argued that section 394 applies to the baker, because he directly or indirectly trades in the fire-wood. Such a narrow construction of the words would, moreover, make all hotel-keepers,

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(3) I. L. R., 19 Bom., 612. (4) L. R., 1 P. C., 535.

* *Criminal Ruling* 51 *of* 1895. Criminal Reference No. 139 of 1895.

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boarding house keepers, sweetmeat sellers, smiths and many other trades men who use fuel of some kind in their business liable, a result, which I humbly think was never contemplated by the framers of the section."

PER CURIAM.—In section 394 of Bombay Act III of 1888 the word "domestic" means "household" and connotes "dwelling" as opposed to manufacture or bake-house. As a man by dwelling in a bake-house does not make it less a bake-house under section 392, so by creating a bake-house in his dwelling he does not acquire any right to store fire-wood for other than domestic use. Section 394 aims at punishing people who, without a license or contrary to its terms, use premises in a way likely to endanger life, health or property or to create what the Act defines as a nuisance. Where a baker having a bake-house in his dwelling stores so much firewood in excess of his domestic requirements as may lead to such danger or nuisance, he may be punished, as the intention of the law about licenses is to bring trades, factories and bake-houses under the eyes of the Commissioner in order that he may protect the public.

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23 September 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Nagesh Vaijnath.*

Criminal Procedure Code (Act X of 1882), Sec. 439—High Court—Revision—Question of fact.

Although the High Court is generally reluctant to interfere in revision on a matter of fact, it will interfere where a Court has taken a wrong view of the facts through an error in law *e-g.*, where it places the burden of proof on the accused contrary to the principle illustrated by section 101 of the Indian Evidence Act, 1872.

PER CURIAM.—The conviction is chiefly based on the opinion or theory of Mr. Lindsay founded chiefly on the appearance presented by one of the rails 24 hours after the accident. He supposes that when the mail train No. 38 went past Salpa station without stopping, the points must have been wrongly fixed for the siding, as in this way he accounts for the injury to the rail. But as the District Magistrate points out, there is no evidence that the driver or fire-men or guard on that train felt any jerk or noticed any thing wrong. The District Magistrate gives other good reasons for holding Mr. Lindsay's theory insufficient to explain the facts proved by the evidence.

The evidence shows by the testimony of the driver, fire-men, guard and station master that these witnesses were of opinion from what they saw and felt and what the pointsman told them that the pointsman moved the point at the time the up train No. 45 was passing it, in an endeavour to prevent it going to the siding to which the switch wrongly directed it

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**Criminal Ruling* 52 *of* 1895. Criminal Reference No. 143 of 1895.

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and to make it go to the platform as it ought. The testimony is corroborated by report and telegram made at the time.

There remains the question when and by whom was the switch which allowed the train No. 38 to pass in safely altered wrongly so as to cause the accident to the train No. 45 by diverting part of it the engine, tender and some carriages from the main rails on to the siding.

The answer appears to be that given by the pointsman to the station master at the time, *viz.*, that he, the pointsman, had done this by mistake.

This is the view taken by the District Magistrate and it appears to be the one most in accordance with the evidence. The High Court is reluctant to interfere in revision on a matter of fact, *Queen-Empress* v. *Chagan* (1). But the error in the trying Magistrate's judgment, pointed out by the District Magistrate is in our opinion one of law, being equivalent to placing the burden of proof on the accused by requiring him to show that the theory of Mr. Lindsay is wrong. This is contrary to the principle illustrated by section 101 of the Indian Evidence Act. The same error is sometimes committed in trials for forgery: see *Doe dem Devine* v. *Wilson* (2), where the difference between a civil and criminal trial of an issue about forgery is pointed out. A Court has to test every theory by the facts proved and on the evidence to form its own opinion.

We are of opinion that the accused was wrongly convicted of the charge on which he was tried and therefore set aside the conviction and sentence.

We would also point out that if it is expedient that an Assistant Station Master on duty should be placed under the same responsibilities as a Station Master this should be distinctly done by making a rule.

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3 October 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Irappa.*

Criminal Procedure Code (Act X of 1882), Sec. 54—Police Officer—Cognizable offence—Complaint—Arrest—Warrant—Respectable persons—Discretion.

A Police officer to whom a complaint of a cognizable offence is made ought, if there be circumstances in the case which lead him to suspect the information, to refrain from arresting persons of respectable position, and leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of warrants of arrest.

PER CURIAM :—We have less difficulty in reversing these convictions than usual in cases where the Sessions Judge has had the advantage of hearing all the witnesses which the Court has not. As regards every incident of importance the assessors have given full opinions, which

(1) I. L. R. 14 Bom., 331. (2) 10 Moore's. P. C., 531.

* *Criminal Ruling 53 of* 1895. Criminal Appeals Nos. 256 and 258 of 1895.

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appear to us to be in all respects reasonable. They held the three prisoners to be not guilty. The case against Nila a boy of 11 years of age, depends chiefly on his confessions made to the Magistrate, Mr. Sholapurkar, on the 14th June, the day after his arrest. The boy retracted it on the next opportunity, which was on the 25th of June before Mr. Anderson, although that Magistrate began the questioning of the boy by reminding him of his confession already made. Considering the boy's tender years we must look on this confession with much caution. We concur with the learned counsel in holding the boy's remarks about the rumour and the beating to be indications of tutoring. He mentions no inducement whatever as offered him by the prisoner Irapa for setting fire to the stack. As to the way he did this he is contradicted by the only eye-witness, Subava, who is a girl only 12 years old. The fire occurred on the 29th May. Her story was not recorded till the 17th June. She does not appear to have made it to any policeman before the 5th of June. She says, and her father confirms her, that when the stack was blazing, the boy Nila, who knew she had seen him set the fire to it, and who had just before run away, came back and went to the roof of her house to look at the blaze and was seen by her and pointed out to her father. Yet neither of them did anything to point him out as the criminal, although the girl's father is a tenant of the complainant's brother. This brother told the complainant something, which induced the latter to send for the girl on the 4th June, when they had an interview. He pretends that he did not understand her language. We are of opinion that he could have easily got somebody who did, and we concur with the assessors in their remarks about the great delay of the complainant to set the law in motion in the usual and easiest manner. It is reasonable, therefore, to suppose that he delayed in order to get evidence in his own way. We give weight also to Mr. Inverarity's argument that if Nila's story were true, he would, when made Queen's evidence by the Judge, have adhered to it in order to get a pardon. This is the theory on which such pardons are offered in a legal way; the law assumes this to be enough without resort to further declarations of indulgence; such as are discussed in *Queen-Empress* v. *Chagan* (1). The witnesses who say they saw the three prisoners together before the fire, and that the boy Nila had his matchbox ready for all to see, are not to be believed. Without the incident of the matchbox, there is nothing criminating in the three being together. Except these witnesses there is no evidence to connect the prisoner Rayappa with the firing of the stack. Nila, who is his nephew, says nothing against him. The same remark applies to the case against

(1) I. L. R., 14 Bom., 346.

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the prisoner Irappa. We do not believe that either Subava or her father had any great difficulty in expressing themselves, as it is admitted that they had been in the village for a year and the father knows Canarese; and the complainant never thought of sending for an interpreter. The other circumstances in the case, the alleged beating and the absconding are ambiguous circumstances. The Court acquits the three prisoners and directs their discharge and the return of the fine if levied. It appears proper also to remark that the conduct of the complainant, his waiting some days before he took any action, and even then only by sending a telegram to the Mamlatdar, the fact that neither the girl Subava nor her father acted at the time as if she had seen the fire applied by Nila, and the other circumstances of the case tend to show that the Chief Constable used a right discretion under section 54 of the Code of Criminal Procedure in not arresting the prisoners. The case is one where a prudent Police Officer would suspect the information and would refrain from arresting persons of most respectable position and would leave the dilatory complainant to go to a Magistrate and convince him that the information justified the serious step of the issue of warrants of arrest.

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7 October 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Bhavjya.*

Penal Code (Act XLV of 1860), Sec. 398—Dacoity—Deadly weapons.

To support a conviction under section 398, Indian Penal Code, as under section 397, it is necessary to prove that at the robbery the accused was armed with a deadly weapon, and not merely that one of the robbers who was with the accused at the time carried one.

PER CURIAM:—We find no evidence and the Government Pleader is unable to refer us to any showing that at the first of the two robberies the prisoner Bhavjya was armed with a deadly weapon. The persons robbed, Vedu and Putali, say that only one of the robbers carried a weapon. None was found on Bhavjya on his arrest. We think the ruling on section 397 in *Regina* v. *Deoji* of the 1st August 1872 applies in principle to section 398.

The Court, therefore, alters the conviction of Bhavjya on the first head of charge to section 392 for robbery; and reduces the sentence of seven years' to one year's rigorous imprisonment.

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7 October 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Gooki.†

Bombay District Municipal Act (Bom. Acts VI of 1873; and II of 1884), Sec. 70—Selling of meat—Market—Municipality—By-law.

*Criminal Ruling 54 of 1895. Criminal Appeal No. 245 of 1895.

†Criminal Ruling 55 of 1895. Criminal References Nos. 181 to 185 of 1895.

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The by-law prohibiting the sale of fish or meat outside the market, purporting to be made by District Municipality under the repealed section 70 of Bombay Act VI of 1873, is *ultra vires* of that section and also of section 33 of Bombay Act II of 1884. The bye-law cannot be treated as a direction under section 66 (1) directing that no place shall be used as a market, as it does not allude to any such use, there being no evidence that the road in question was used as a market.

FIVE persons were in this case convicted for selling fish in various places on the road or sides of the road in the bazaar in Karwar, their act being contrary to bye-law (*c*) passed under section 70 of Bombay Act VI of 1873. The bye-law ran as follows :—" (*c*). No person shall expose for sale within the bazar limits any meat or fish in any other place except the market built for the purpose. Any one infringing the above rules shall on conviction before a Magistrate be liable to a fine not exceeding Rs. 10." The District Magistrate of Kanara in referring these cases, for the orders of the High Court, under section 438 of the Code of Criminal Procedure, observed :— " The conviction is, therefore, perfectly correct if the bye-law is legal. It purports to be made under section 70, clause 1, of Bombay Act VI of 1873 and was provisionally sanctioned by the Commissioner, S. D. pending the preparation of a general set of bye-laws for all Municipalities—a proposal not yet brought into force. I, however, very much doubt if the Municipality had under section 70 of Bombay Act VI of 1873 or have now power under section 33 of Bombay Act II of 1884 which has succeeded it to make such a bye-law. In my opinion their powers are restricted to regulation of the arrangements in the markets, and that they have not power to prohibit carrying on trade outside the market. I hardly think that under clause (*c*) of section 33 of the latter Act, " the regulation of all matters relating to a Municipal administration" would empower the Municipality to stop all trade except in their own market for which fees are paid."

PER CURIAM :—The bye-law under which these convictions were passed purports to be made under the repealed section 70 of Bombay Act VI of 1873. We think it is *ultra vires* of the section and also of section 33 of the amending Act of 1884. Mr. Shamrao suggests for the Municipality that the bye-law should be treated as a direction under section 66, clause 1, directing that no place shall be used as a market. As, however, the bye-law does not allude to any such use we cannot so treat it. Moreover there is no evidence that the accused persons used the road as a market, and that was not the charge. A conviction under section 66 would thus be illegal: Criminal Ruling 24 of 12th May 1892. As to the scope of section 66 see *In re the petition of Raja Paba Khoji* (1) and *Queen-Empress* v. *Magan Harjivan* (2).

(1) I. L. R., 9 Bom., 272. (2) I. L. R., 12 Bom., 106.

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The Court sets aside the convictions and sentences and directs the return of the fines.

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8 October 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Limbya.*

Penal Code (Act XLV of 1860), Sec. 201—Principal offence—Accessary offence—Conviction.

A conviction of the assessory offence under section 201 of the Indian Penal Code is not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed, the principal offence.

Reg. v. *Kashinath* (1), considered.

PER CURIAM :—The assessors as well as the Sessions Judge held the prisoners to be guilty, and we think that there is not sufficient reason to disturb the convictions on the merits. But Mr. *Bhat* urges on behalf of the prisoners that they are wrongly convicted under section 201, they having been concerned as principals in the murder of Daribai, and he cites as authority *Torap* v. *Queen-Empress* (1). There the two prisoners were at the same trial both acquitted of a charge of murder and both convicted under section 201. The learned Judges held that such convictions cannot stand. They took note of the following circumstances: "The evidence for the prosecution pointed conclusively to one or the other of them being the actual murderer: but it was impossible upon the evidence to say which of them caused the death." In the case before us there is no admission nor evidence that either prisoner caused the death. The prisoner Limbya had pleaded not guilty to a charge of murder, but before any evidence was taken the Sesions Judge struck only out that charge, and the trial related only to the offence under section 201. The case of *Torap* v. *Queen-Empress* may, therefore, be distinguished. Whether that case should be followed is, we think, with all respect for the learned Judges who decided it, open to some doubt. In England, if a man be indicted as principal and acquitted, he may be indicted as accessory after the fact (1 Hale 626). Turning to the law of India, the accepted interpretation of section 201 is that set forth by Mr. Justice *Lloyd* in *Reg.* v. *Kassinath* (2). Section 201 and the two following sections commence with precisely the same words, thus :— "Whoever knowing or having reason to believe that an offence has been committed". Now, as there is no law which obliges a criminal to give information which could convict himself it is evident that sections 202 and 203 could not apply to the person who committed that offence, *i. e.*, the offence which he knew had been committed, and section 201 should, we think, be construed in a similar manner; and looking at the only illustra-

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**Criminal Ruling* 56 *of* 1895. Criminal Appeal No. 255 of 1895.

(1) I. L. R., 22 Cal., 688. (2) 8 Bom. H. C., 126. (3) I. L. R., 7 All., 749.

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tion which follows section 201, it would appear that the law was intended to apply exclusively to 'another', and we are, threfore, of opinion that the conviction of the accused, as accessories to an offence known or believed to have been committed by themselves, is illegal". The next case quoted by the learned Judges in *Queen-Empress* v. *Lalli* (3), where the only charges tried were under sections 201 and 202, but the prisoner had at one time asserted, like the prisoner Limbya, that he was present at the murder. The report does not show that any cases were cited. The learned Judges say "In our opinion on the construction of the section 201 the person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime". The next case cited is *Queen-Empress* v. *Dungar* (4) which resembles Torap's case, in regard to the charges tried, the results and the finding of the Sessions Judge that one or other of the prisoners had committed the murder, but he could not say which. Here Mr. Justice *Brodhurst* without expressing any other opinion on the facts, set aside the convictions under section 201, citing with approval the view of Mr. Justice *Lloyd* and referring to *Queen-Empreess* v. *Lalli* and other four cases. Three of these go no further than did that learned Judge. But in the *Queen-Empress* v. *Behala* (5) the learned Judges say: "We think that section 201 of the Penal Code was not intended to apply to such a case, that is, in which the person who is the possible or probable offender makes statements exculpating himself by inculpating another". It appears to us that in the cases of Torap and Dungar and Dalli and learned Judges have extended Mr. Justice *Lloyd's* views so as to acquit of the offences to which section 201 applies not only the person found by the judgment or the verdict to be the principal offender, but also the person not so found to be a principal offender, but even acquitted of being such, or about whom the judgment goes no further than to say that either he or somebody else is the principal offender. This appears to us not a right interpretation of the section, but to amount to legislation by creating a new exception to the Indian Penal Code, which would enable any person who denies that he is the principal offender, or who may have been acquitted of the principal offence, or never charged therewith to commit acts to screen the offender, and then gain impunity by suggesting or pleading a surmise, a suspicion, a possibility or a probability that he was after all a principal offender. The question arises how far is the declaration of a Court about probability to be a plea against conviction under section 201. Is a declaration that the prisoner was one out of three or ten or twenty by some one or more of whom, the Court being unable to say which, the principal

(4) I. L. R., 8 All., 252. (5) I. L. R., 6 Cal., 789.

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offence was committed to avail the prisoner, especially after his acquittal, so as to require the High Court to set aside his conviction for the accessory offence? We incline to say no. In the present case we think we ought not to act on a surmise or a conjecture that Limbya, who said he was present when Antu killed the woman and that he afterwards helped Antu to conceal the body, was concerned in a guilty manner in the killing. There is nothing to show that Yeshwant had anything to do with it.

The Court dismisses the appeals.

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10 October 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Pandu Mahadu.*

Criminal Procedure Code (Act X of 1882), Sec. 488—Maintenance, order of—Breaches of order—Imprisonment—Magistrate.

Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding, the Magistrate acting under section 488, Criminal Procedure Code, has no power to pass a heavier sentence in default than one month's imprisonment, as if the proceeding related to a single breach of the order.

Queen-Empress v. *Narain* (1) followed.

THE accused was convicted by the First Class Magistrate of Dharwar under section 488, Criminal Procedure Code, and sentenced to seven months' simple imprisonment. The sentence was passed for an accumulated arrears of maintenance for seven months arising under breaches of an order for maintenance.

The Sessions Judge of Satara referred the case to the High Court observing :—"It appears to me that the sentence is illegal. Although seven months' arrears of maintenance might be levied by one warrant, yet only *one month's* imprisonment can be awarded in default of realization. As held in *Queen-Empress* v. *Narain* (2), "the section contemplates that a separate warrant should issue for each separate monthly default, and when that is done, the maximum punishment can be one month's imprisonment. If a warrant is issued for an accumulation of arrears for several months, the Magistrate has no power to pass a greater sentence in such a case than it the warrant in that case only related to one particular breach." In the present case several breaches of orders have been dealt with in one proceeding but in my opinion it was not competent to the Magistrate to inflict one month's imprisonment for each separate monthly breach. The term of imprisonment in default must be limited to a term of one month."

ORDER.—Following *Queen-Empress* v. *Narayan* (3) the Court reduces the sentence to one month.

**Criminal Ruling* 57 *of* 1895. Criminal Reference No. 154 of 1895.

(1) I. L. R., 9 All., 240. (2) I. L. R., 9 All., 240. (3) I. L. R., 9 All., 240.

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16 October 1895. JARDINE & RANADE, JJ.

The Municipal Commissioner of Bombay v. Vinayek Ramchandra.*

City of Bombay Municipal Act (Bom. Act III of 1888). Secs. 3, (10), (d), 308—315—Repairs—Rat-holes, stopping of—Stones, re-setting of—Public Street.

The stopping up holes made by rats and setting right slabs of stones that had got out of position by the Health Department of the Municipality is no proof of repair within the intent of the definition of "public street" in section 3 (10) of the City of Bombay Municipality Act, 1888, but comes more appropriately under section 61 (*d*) of the Act, the Corporation having to make many sanitary provisions "and generally the abatement of all nuisances."

Section 308 to 315 of the Act apply to private and public streets, so that the use by the Corporation of the powers to remove the projections and obstructions is not evidence that the street is a public street.

PER CURIAM.—The point to be decided turns solely on the meaning of the word "rapaired" in the definition of public street in section 3 clause 10 of Bombay Act III of 1888. It is contended that the fact of the Health Department of the Municipality having from time to time stopped up holes made by rats, and set aright slabs of stone that had got out of position, is proof of repair within the intent of the definition. If we take the verb in its ordinary meaning, we do not think it applies to such doings. If we apply the rule of *ejusdem generis* we must take the same view: stopping rat holes and putting stones right where no builder or builder's labourer is employed, are not operations of the same *genus* as what the words "levelled, paved, metalled, channelled, sewered" mean. What the scavengers did comes more appropriately under section 61 (*d*): the Corporation has to make many sanitary "provisions and generally the abatement of all nuisances" The Magistrate may not have noticed that sections 308 to 315 apply to private and public streets so that the use of the power to remove projections and obstructions is not evidence that the street is a public street. We do not think the cases cited by Mr. *Wasudev G. Bhandarker*: *Guardians of Amesbury* v. *Justices of Wilts* (1) and *Leek Municipal Commissioners* v. *Justices of Stafford* (2), are in *pari materia*. In the first the question was as to who should pay for doing something which was bound to be done to enable the public in general to use a high-way. The second has no application in the absence of any evidence of what may be called repairs. We are of opinion for these reasons that the Magistrate has wrongly interpreted the Act; and that the thoroughfare in question is not a public street within the meaning. We set aside the order of dismissal and direct the Presidency Magistrate to dispose of the case according to law.

**Criminal Ruling 58 of 1895. Criminal Application for Revision No. 231 of 1895.*

(1) L. R., 10 Q. B. D. 480. (2) L. R., 20 Q. B. D. 794.

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16 October 1895. JARDINE & RANADE, JJ.

In re Lala Bahrumal.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction to prosecute—Date of grant—Period.

On an application by one of the parties to a suit for sanction to prosecute the other, the Judge, on 12th December, 1894, recorded a judgment according the sanction as applied for under section 209, Penal Code; the formal sanction was drawn up and issued on 25th January 1895:—

Held, that considering the protective intention of section 195, Criminal Procedure Code, the sanction was given on the 12th December 1894 in written words, and that the six months' term mentioned in that section began on that date.

THE District Judge of Dharwar granted a sanction on the 12th December, 1894, for the prosecution of the petitioner under section 209 of the Indian Penal Code for having made a false claim in a Court of law against the Southern Mahratta Railway Company. More than six months after the grant of the sanction as aforesaid the Railway Company, filed a complaint against the petitioner in Court of First Class Magistrate of Dharwar. The petitioner applied to the said Magistrate to dismiss the complaint as made more than six months after the sanction. The Magistrate declined to make the order prayed for on the ground that the six months should be counted not from the date when the sanction was given, but from the 25th of January 1895, the day when a copy of the formal order was delivered to the complainant. The petitioner, thereupon, applied to the High Court under its revisionary powers.

PER CURIAM:—On considering the cases cited by the learned counsel: *Darbai Mandar* v. *Jagoo Lal* (1), *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (2), and *Mungniram Marwari* v. *Gursabai Nand* (3) and the protective intention of section 195 of the Code of Criminal Procedure, we are of opinion that the sanction was given on the 12th December 1894 in written words, and that the six months' term began on that date. The sanction is no longer in force. The Court now sets aside the Magistrate's order and dismisses the complaint.

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31 October 1895 JARDINE & RANADE, JJ.

Queen-Empress v. Habla Sola.†

Criminal Procedure Code (Act X of 1882), Sec. 391—Imprisonment—Whipping.

Where a person is convicted at one trial of two offences and sentenced to a separate term of imprisonment for each, and also the whipping for the second, the two sentences being directed to be consecutive, the sentence of whipping ought not to be delayed until the expiry of the first sentence but must be carried into execution in accordance with the provisions of section 391 of

*Criminal Ruling 59 of 1895. Criminal Application for Revision No. 253 of 1895.

(1) I. L. R., 22 Cal., 573. (2) I. L. R., 22 Cal., 176. (3) I. L. R., 17 Cal., 356.

†Criminal Ruling 61 of 1895. Criminal Reference No. 159 of 1895.

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the Code of Criminal Procedure, as the word 'sentence' in the section means the total of punishment inflicted at one trial.

ONE Habla Kala was convicted by the First Class Magistrate of Kaira, of offences under sections 457 and 392, Indian Penal Code, and sentenced to suffer rigorous imprisonment for two years for the first offence and one year and twenty-five stripes for the second offence. These sentences were to run consecutively. The Superintendent of the Ahmedabad Central Prison questioned the propriety of the sentences passed by the Magistrate, alleging that the sentence of flogging was opposed to section 391, Criminal Procedure Code, and could not be carried out inasmuch as it formed part of the second sentence which was to run on the expiry of the first; and consequently, requested the Sessions Judge of Ahmedabad to make a reference to the High Court. The learned Judge, in making the proposed reference, stated:—"Mr. Mc Corkell in replying the above reference explained the phrase 'the sentences to be consecutive' and said that it appeared to him that the Superintendent would be perfectly justified in inflicting the sentence of whipping on the receipt of the result of appeal under the terms of section 391, Criminal Procedure Code. However, the Superintendent of the Central Prison again requested this Court to refer the matter to the High Court. With regard to the carrying out of the sentence of whipping, I concur in the opinion expressed by Mr. Mc Corkell."

PER CURIAM.—On comparing sections 35, 367, 376 and 415 with section 391 of the Code of Criminal Procedure, we are of opinion that in section 391 the word 'sentence' means the total of punishment inflicted at one trial. The view taken by the Sessions Judge is right, and the sentence of whipping should be carried into execution.

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14 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Sahadat Miran.*

Criminal Procedure Code (Act X of 1882), Secs. 367, 369—Sessions Judge—Date of sentence—Judgment—Changing the date.

On the 27th August 1895, a Sessions Judge convicted an accused under section 468, Indian Penal Code, and sentenced him to three years' rigorous imprisonment. On the 29th idem he directed that the sentence passed by him should run from the 25th June 1895, as the prisoner was on that day convicted and sentenced to three months' imprisonment by a Magistrate, and thereafter in appeal the conviction and sentence were set aside and a retrial directed which resulted in the accused being committed to the Sessions, where he was convicted and sentenced as above:—

Held, that as under section 367 of the Code of Criminal Procedure the sentence is part of the judgment, and the express words of section 369 forbid the Sessions Judge to alter it, the altering order dated the 29th August is a nullity.

**Criminal Ruling* 62 *of* 1895. Criminal Review No. 312 of 1895.

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THE accused was tried by the Sessions Judge of Nasik, who found the accused guilty of forgery for the purpose of cheating under Section 468, Indian Penal Code, and on the 27th August, 1895, sentenced him to rigorous imprisonment for three years. On the 29th August 1895, however, the learned Judge recorded the following order:—"Upon reading the appended letter from the Superintendent, Nasik Jail, I am reminded that the prisoner Sahadat was convicted in the first instance and sentenced to three months imprisonment by the Cantonement Magistrate, Deolali, under section 419, Penal Code, on the 25th June last, but the conviction was reversed on legal and technical grounds and the Magistrate was directed to retry the case according to law, with the result that the prisoner was committed for trial to this Court uuder section 468, Penal Code. In these circumstances I direct that the sentence of three years' rigorous imprisonment now passed upon him shall run from the 25th June, 1895."

The accused preferred an appeal, which was rejected; but the High Court being of opinion that section 369, Criminal Procedure Code, forbade the altering of judgment of which the sentence is a part, called for the case in revision.

PER CURIAM:—Under section 367 of the Code of Criminal Procedure, the sentence is part of the judgment. The express words of section 369 forbade the Sessions Judge to alter it: and we declare the altering order dated the 29th August 1895 to be a nullity. For the reason given by the Judge, the Court now reduces the part of the sentence passed on the 27th August 1895 which inflicts three years' rigorous imprisonment by substituting for that term a period of two years nine months and twenty-one days. A copy of this judgment will be sent to the Inspector General of Prisons with reference to Act V of 1871, section 18.

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19 November 1895. JARDINE & RANADE, JJ.

In re Framji Ardeshir.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction—Appeal—Lapse of time—District Magistrate.

It is not competent to a District Magistrate on appeal to revoke a sanction, duly granted on the ground of lapse of time.

THE petition was prosecuted by one Vithu Tukaram under section 403 of the Indian Penal Code. He was discharged and he obtained a sanction to prosecute Vithu under section 211 of the Penal Code from Second Class Magistrate of Ahmednagar District. Vithu appealed to the District Magistrate of Ahmednagar who without issuing a notice to the peti-

*Criminal Ruling 63 of 1895. Criminal Application for Revision No. 204 of 1895.

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tioner heard the appeal and revoked the sanction on the ground of lapse of time. The petitioner, thereupon, applied to the High Court under its revisionary powers.

PER CURIAM :—The only reason given by the District Magistrate for revoking the sanction, namely, the lapse of time, is contrary to the ruling of this Court in *Darubhai Bhaiii* v. *Raiji Ramdas* (1). The Court, therefore, sets aside the District Magistrate's order and restores the sanction.

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19 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Kallappa.*

Trial—Criminal Justice—Object.

The object of a trial is the administration of justice in a course, as free from doubt or chance of miscarriage as merely human administration of it can be, and not the interests of either party.

JARDINE, J :—Among other charges on which the jury had to deliver their verdict two of the appellants, Kalla and Ibrahim, were charged with murder under section 302 and with murder in dacoity under section 396 of the Indian Penal Code. The Sessions Judge charged that the evidence showed that the dacoity was completed before the murder, and that section 396 did not apply. The unanimous verdict about these prisoners was in the following words :—Guilty of dacoity and not guilty of the other charges. The Judge concurred and sentenced Kalla to seven and Ibrahim to 10 years' rigorous imprisonment. He omitted to notice the requirement of section 367 of the Code of Criminal Procedure that the section of the Indian Penal Code shall be stated in the judgment. We infer that the convictions were under section 395. Four witnesses, *viz.*, Hanmant and the three women of his family, say they saw the dacoity and murder of Venkatesh committed in his house at Halshi on the night of Monday, the 18th February 1895. No other person deposes to seeing any of the accused or any dacoit at or near the place that night, though the house is in a street of the town. They swear to the apparition of between twelve to eighteen men about midnight in the woman's sleeping room, the maj-ghar, having in their hands ten or twelve lighted candles and also clubs and swords. Hanmant swore to Kalla killing Venkatesh with a stick and to Ibrahim forcing open an inner door with an iron bar: and that after the property had been taken out of the house by others, these two men stayed, Kalla with a club and Ibrahim with a sword, which sword one Gando took and used in the murdering on Venkatesh's neck. Hanmant says he named his fellow-villager Kalla to the village-officers ; but intentionally was silent as to

(1) P. J., 1889, 123. *Criminal Appeals Nos. 271 and 272 of 1895.

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Ibrahim and his master Gando on the 19th February, though he afterwards named them to the Magistrate. Tulsawa, the widow, says Kalla and Ibrahim were at the taking of the property, but does not mention them as at the murder. She does not know Ibrahim's name, and does not say she ever saw him before. He belongs to Nangad. Kashi Bai's story is like Hanmant's. She did not know Ibrahim's name, but identifies him. She makes them both stand in front of Venkatesh during the murder and the preceding colloquy. Sita Bai's story is similar. In cross-examination she implicated Kalla, and she only knows them by sight. There is no evidence of any tangible motive for either murder or dacoity on the part of either prisoner: and no property was found on either. I think the Judge should have pointed out these two facts, and also that the three women might be mistaken about Ebrahim, as he was not arrested till the 5th July, and thus the only witness against him who knew enough of him to know his name is Hanmant. There are some other circumstances alleged against Kalla. One is the statement made to the Magistrate of the Second Class on the 21st and 22nd February, Mr. Shripad Joshi. The Second Class Magistrate thinks Kalla was speaking as a witness. It is clear he avoids confession of any guilt, he may have hoped to be made a witness, which could only be after a pardon or a discharge. There is evidence that Kalla was named early on the 19th February as a murderer. The patel says he found blood on his body when he went to his house and arrested him, but the Kulkarni and the witness Shridramapa do not confirm this statement. They say there was blood on his clothes; and the Second Class Magistrate elicited from Kalla a statement that the blood got there, because after the murder he stepped into the place where the corpse was lying. There appears to be nothing to show that at the time of the arrest or on the 22nd February he was treated as a dacoit. The jury acquitted Kalla of the murder; and the appeal of Kalla and Ibrahim relates only to the dacoity. They are based on misdirection: and I would, in interpreting sections 297 and 537 of the Procedure Code of 1882, follow the principles laid down by *Sargent*, J. in *Reg.* v. *Fattechand* (1), as to error and defect in a charge to a jury and as to the limits of interference by the High Court in appeal. After hearing Mr. *Daji Abaji Khare* I am satisfied that the mis-direction and omissions in this case were more important than in *Reg.* v. *Fattechand*. In the absence of any tangible motive to commit either the dacoity or murder the evidence of identity is most important. The Sessions Judge ought to have pointed out that—(1). Hanmant was uncorroborated as to his being an eye-witness, and that this is not asserted in the several written official

(1) 5 Bom., H. C., 93.

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documents made on the 19th February. (2) The women give no information about their previous knowledge of these two convicts. (3) In the first report by the village officers nobody is named. (4) In the inquest record F. F. made about seven hours after the time given by the inmates for the murder Kalla only is named: and it is stated that they refused to name any other, person. (5) In the inquest report on Sitabai's heir, C. C., made late in the afternoon of the Tuesday no names are given. (6) These reports are confirmatory of the evidence of the head constable Rudrappa. (7) The comment on Rudrappa is inadequate, the Judge omitting to point out that the presumption is that he recorded the statements of Hanmant and the three women correctly on the Tuesday, and that the scribe and other persons named had not been called to contradict him. (8) Also that he is absolutely confirmed by the Chief Constable, before whom the alleged eye-witnesses on the 20th February confirmed their statements made to Rudrappa. (9) The general comments discrediting District and Village Police and the written reports and depositions are misleading so far as they tend to induce the jury to believe that these officers act wrongly or foolishly, and so far as they withdraw from the jury the fact that a very different story was told by the eye-witnesses when the events were fresh. At this point cross-examination is effective. Section 145 of the Indian Evidence Act comes in, and the Judge should not overlook any result of use to the prisoner. (10) These fresh recorded and confirmed statements show that the four eye-witnesses then all said that the murderers covered the women's heads with blankets to prevent them recognising them; while at the trial all four denied this and account for recognition by the murderers, without doing them any real harm, making them sit up as if for the purpose of reconnaisance. Such express statements as those of Tulsa Bai and Kasi Bai, that they saw nothing of the murder, because their faces were covered with the blankets, conflict with the full and picturesque story told at the trial and the statement that during the murder Kalla and Ibrahim stood in front of Venkatesh. These four statements of the 19th February discredit the story of the trial, as we show in our Judgments acquitting other prisoners convicted of murder where the question of the blankets is fully discussed by Mr. Justice *Ranade*. (11) The Judge ought, therefore, to have directed the Jury that each of the four eye-witnesses was most seriously discredited; and in the absence of any stolen property being found with any prisoner and of any credible motive to crime that the Jury should be extremely cautious. (12) He ought to have pointed out that the murder was secret, namely, that no other person saw or heard any murderer or robber, present, going or coming. (13) Except these inmates there is no evidence as to the hour

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of the murder, and one inmate, prisoner No. 2, Narayen, son of Kasi Bai, was charged with complicity. (14) There is no evidence of any attempt to track the murderers or to recover the stolen property, or to do anything at the time which people would do if 4,000 Rs. of articles and 4,000 Rs. in cash had been carried off a few minutes before the alarm. (15) No evidence that Hanmant, the undivided brother, ever informed what documents had been stolen, or that any search was made for them. (19) The list of property is a memorandum not made till Wednesday. Hanmant's statements about the rupees 4,000 are extremely vague: and he made no attempt to recover them, nor did anybody else at the time. (20) The Judge ought to have told the Jury that if they found that the two claims made by the eye-witnesses to property, namely, the ornaments and the cloth, were false claims, they should treat the whole story with great caution, because these are the only articles claimed, and the cutting off of Sita Bai's lock to steal these ornaments is the keystone of the story, the highly dramatic incident on which the murder and the pathetic dialogue are hung, and with the exception of the claim to a cloth the only attempt to corroborate the eye-witnesses to the dacoity by production of stolen property. (21) Also that this incident of the hair-cutting is the chief difference between the earliest recorded story and the picturesque and pathetic tragedy told at the trial: and that it first appears in writing in the after-noon of the Tuesday, after the Official Report of the police, after the verdict of the inquest on the body, and after Rudrappa had recorded depositions. (22) Also that although a special inquest sat upon the lock of hair, it returned no verdict as to who cut it off. These matters are all-important when we remember how slight the evidence is about the identity of Kalla and Ibrahim as present at the dacoity. Most of these errors arose, in my opinion, from a more radical misdirection. The charge to the jury does not call on them to find whether the *corpus delicti*, the fact of the dacoity, was proved beyond reasonable doubt: and the Government Pleader has not averred in this Court that he did so call. The following passage appears to me to show that on the contrary he left the jury to assume this cardinal fact to exist, because the defence—he does not say which prisoner's defence—admitted the dacoity to be a reality. "Case for defence practically is that Venkatesh may have been murdered by dacoits, who were not recognized by inmates of house, and that these inmates have falsely charged accused, either because they suspect them, or because they think it is a favourable opportunity to ruin a number of enemies." This passage and the whole cross-examination shows that there was at the trial no admission of the fact of dacoity or robbery: there is none whatever on the record. Every part

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of the eye-witness' story was attacked, and when the pleaders were on the only tangible part, the ornament claimed as stolen out of Sitabai's lock of hair, the defence was successful, as the jury declared that the claim of the eye-witnesses was false, On such pleadings the Judge at the end of the trial ought, in so serious a case where this claim to the ornaments was pressed in order to secure several convictions of a capital crime, to have told the jury that this claim was the only real support of the story of Hanmant and the three women that the secret murder was a crime committed by outsiders for the sake of gain, and was the only real support of their attempt to throw suspicion off themselves, the close relations of the other inmate, who, they say, opened the door for the robbers. The Judge surely ought to have pointed out that the first record of the affair, the official report made by the Patel under section 10 of Bombay Act VIII of 1867, says Venkatesh was killed on the very spot where he lay asleep, and that this statement had not been explained, and that it was absolutely inconsistent with the wonderful narrative about him having been killed in the women's sleeping room by the men with lighted candles, some of them next-door neighbours, such as the two Brahmans whom this Court acquitted when the three sentences came before it. As to a supposed admisssion by a prisoner, the Lords of the PRIVY COUNCIL say in *Reg.* v. *Bertrand* (2). "The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party." This remark very much lessens the importance of a prisoner's consent, even when he is advised by counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession that a prisoner can consent to nothing". These observations apply to trials in India except so far as the Indian Codes allow statements to be made by prisoners and under certain circumstances solemn and precise admissions by their counsel. But if a counsel says "admitting for the sake of argument that there was a dacoity, the prisoner is not proved to have been present," that is no admission at all. Even where there have been admissions the Court ought to be scrupulous in fixing attention on the point of *corpus delicti* as is shown in the reported trials for witchraft, where many innocent persons suffered. The history of the law of treason is another illustration. In so awful a case as the present, where the claim to the ornaments was used to get men sentenced to death, although there was no evidence of any attempt, at the time of the alleged dacoity, to specify even or to recover by search any of the Rs. 8000 worth of property stolen or of any specification till now of the documents stolen,

(2) L. R. 1, P. C., 534

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the jury should have been asked to consider whether there had been a robbery at all. The general doctrine is stated in *Wills on Circumstantial Evidence*, 4th Edn., 199, in very clear terms as follows :— "Every allegation of the commission of legal crime involves the establishment of two distinct propositions, namely, that an act has been committed from which legal responsibility arises and that the guilt of such act attaches to a particular individual, though the evidence is not always separable into distinct parts or applicable to each of those propositions. Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions for alleged offences which have never existed, that it is a fundamental and inflexible rule of legal procedure of universal obligation, that no person shall be required to answer, or be involved in the consequences of guilt, without satisfactory proof of the *corpus delicti* either by direct evidence or by cogent and irresistible grounds of presumption": *Rex.* v. *Burdett* (3). I do not doubt that Kalla and Ibrahim have both been seriously prejudiced by the misdirections and omissions of the charge delivered to the Jury. The only evidence of their presence at the dacoity is that of the four-eye-witnesses, who are so immensely discredited each and all, and have been so from the beginning. Both of us have in our Judgment acquitting the three men sentenced after the unanimous verdict to die given our reasons for believing that Hanmant's uncorroborated story about his presence at the murder is untrue. So there are only three witnesses to identify Kalla and Ibrahim, these three women ; but it is not very strong even if believed to be given without guile ; and it would be contrary to principle to believe them, firstly, because of the enormous variations and expansions of their story; secondly, because they have made a false claim to other people's ornaments in a persistent endeavour to get their next-door neighbours hanged. Join this to the fact that no other person saw any dacoit, and that every-body acted as if Rs. 8,000 and documents had not been stolen. The murder can be accounted for without assuming a dacoity, especially as the dacoity theory requires the Court to stomach, on the evidence of Hanmant and three women only, a narrative as unsubstantial as the cases of witchcraft, and as wonderful as the capture of Sita in the Ramayana. The original story started at the time was murder only. The accretions began late on the Tuesday when the make-believe jury sat on the lock of hair and the false claim to the ornaments was concocted with deadly intention to kill the Brahman neighbours by judicial murder—a purpose frustrated only by the thorough examination of the evidence and all the Canarese

(3) 4 B. & Ald., 123.

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documents in the High Court. These ornaments may have been claimed to meet the argument "If the vast property you describe was stolen by outsiders, why was none found? Why did you take no trouble to get it back? Why did you not inform when you were asked and bound by law answer the patel and the District Police? Why did not they insist on answers when they had the lawful power, and their obvious duty required them to get hold of the property and the documents, if the charge of robbery by outsiders was true?" The Judge ought also to have pointed out that the story of dacoity was based on a prior conspiracy, of which, as also of the coming and going of the dacoits on the night of the murder, there was no evidence except the retracted confession of Narayen. I am clear that on the discredited evidence of the three women no Judge sitting with assessors would convict Kalla and Ibrahim. Therefore, following *Reg.* v. *Fattechand*, I would acquit them. The case of the school-boy Narayen, a lad of 17 years of age, is more perplexing. The fact that nobody saw any dacoit and that one inmate suggested a search of stolen property were doubtless noticed at the time by the police: and also that there was no house breaking and not the least hurt done to any of the women. Except the inmates there is no evidence as to when the murder occurred: how long the body had been dead; and it is quite clear that the inmates, whatever excuse they may allege, deferred all outcry until a time when every dacoit could get away unperceived, and the immense booty had become untraceable. The patel reported that the man had been killed on the very spot where he lay asleep. The wounds, all parallel about the shoulder, seem such as one man slashing with one weapon on the same place might inflict on a sleeping man. These facts and the absence of all outcry may have been the causes why suspicion fell on the inmates; and the Chief Constable says his fell upon the boy Narayen. Nothing effective was done; their clothes were not examined; and no shrewd policeman inquired whether the inmates had not spread out a few empty boxes as part of the later story about, 1st, the Rs. 8,000 and documents; 2nd, the false claim made to ornaments on Wednesday after. It may or may not be that the assasin was one of the inmates or hired by any of them; he may have been some outsider who somehow got into the house. But some explanation is required as to how he got in whether we take the patel's first story that Venkatesh was slain on the spot where he was sleeping or whether we believe the story started after the suspicion against the inmates had been raised that he was killed by his next-door neighbours and others, whom we have acquitted of the murder, after they had done their best to secure their own conviction, as the inmates say, by lighting up ten or twelve candles to illuminate the crime and forcing the women to sit up in

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the best positions for identifying the men's features. I am of opinion, especially with regard to the Privy Council's remark about the object of a trial, that the prisoner Narayen was entitled like the others to proper remarks from the Judge as to *corpus delicti*, and that the Judge should have pointed out that there was no testimony to corroborate his confession made on the 24th February about the plot at Belgaum. In that long story told to the Mamlatdar and Magistrate of the Second Class, Mr. Joshi he told much of Hanmant's later story about dacoits with candles and the pathetic incidents of the murder: and he is the author of the story of the Belgaum plot, evidently meant to bring to the gallows the different enemies of the family who have been acquitted by the jury and by this Court when the three sentences of death came before it. He also gets over the difficulty about the house not being broken, and about no sound being heard, nor any robber seen to arrive, by saying that in pursuance of the plot he let the murderers in, not knowing they meant to murder, but because he hated Venkatesh, because he would not come to partition of the house, and because the plotters promised the school-boy Rs. 1,000. Narayen heard the confession read at the trial and heard the evidence of Hanmant about Narayen confessing in the early morning, and the evidence of Kasi Bai, his own mother, and Subrao, his father, to the same effect. He also heard read his retractation before the Magistrate on the 17th June of his whole story. But after all this he made his own statement to the Judge in which he adheres to the story about robbers entering and muffling the women and killing Venkatesh, but denies all complicity of himself. His explanation was that when the District Police had come, they on the Tuesday and Wednesday asked Hanmant and the inmates who had killed Venkatesh and got a reply that they had not seen the murderers and did not know; whereon the Police said "The wall is not broken, so we will put you all in the jail, as the murder has taken place in your house." Under this pressure, and being told it would be a good thing for him and the other inmates, if he made a statement, he says he agreed to do so, and he blames the Chief Constable, the Kulkarni and Hanmant and his father Subrao for having got him to make up his long story to Mr. Joshi. Therefore the only thing Narayen wished the jury to believe was that the murderers got into the house without his help; not that there was no dacoity at all. I do not think the evidence of Hanmant, Subrao and the woman against the school-boy can be imputed to any desire to aid justice; their outrageous falsehoods noticed fully by us both on other points preclude any such intention. But Narayen had a pleader, and might have shown if such be the case by cross-examining them that he never confessed to them in the

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dawn after the murder. If there was no robbery at all, a fact within his knowledge, he might have so told the Court; the conviction by the jury of abetment of simple theft is more due to himself than to any omission of the Sessions Judge. The jury were his proper judges and as he had full opportunity to explain his conduct to them, and as Mr. Justice *Ranade* holds the dacoity proved, I do not think there is a case for interference by the High Court. My impression about him and Kalla is, however, that they wished to get made witnesses, that is to say, to get pardons: and in that secure position to say what they chose in conformity with some false theory of the case, implicating people in large numbers by such frail evidence as reports of mere conversations, using that means to contradict written documents, and as in the Popish plot and other old State trials, putting forth uncorroborated stories of conspiracies and plots in order to give a semblance of probability to the story. The case shows how earnestly the Magistrates having jurisdiction should, on receipt of the reports, Police are bound to send, consider what is reported: and compare it with the records made by the village officers under Bombay Act VIII of 1867. In dealing with stories told by suspected persons, ready to secure their own safety by accusing others right and left, much attention should be given by the Courts to the remarks of this Court on the Mamlatdar's Declaration of Indulgence in *Queen-Empress* v. *Chagan* (5). Such witnesses have often been used for judicial murders, and in the present case we have noticed already that Hanmant was allowed to take up the line of Titus Oates and allowed his own time to name one enemy after another, as in those days "when Dangerfield, Bedloe and Oates found a Tongue to declare half the natives deserved to be hung." In the present case these same eye witnesses tried also to get capital convictions of other persons whom the jury acquitted, and it is either by accident or by humanity on the part of the prosecution that the prisoners Kalla and Ibrahim have escaped capital sentences, for the evidence is that they were at the murder, and the original story was that the murder was committed in order to get more property, and this what Mr. Justice *Ranade* believes. It is true that convictions on which Courts of Session pass sentence of death are operative only on confirmation by the High Court as the decree of divorce under Act IV of 1869; the Legislature has not thought it safe to entrust the Court below with the power of pronouncing binding decisions followed by the highest penalty known by the law, *Hay* v. *Gordon* (6), and even when there has been verdict of a jury the confirmatory judgment of the High Court is practically the judgment in the suit. In no case ought men to be sentenced when there is reasonable doubt if

(5) I. L. R., 14 Bom., 350. (6) L. R., 4 P. C., 337.

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the crime was committed; and Courts ought always to remember that conversations can be invented at any moment, and the uncorroborated plot based on mere conversation is a favourite weapon of a false witness. I must add that whether there was a dacoity or not; that question should have gone to the jury. I differ on that point with Mr. Justice *Ranade*. We agree that Hanmant did not see it, and I refuse to believe the remaining witnesses, the three women, because as we both point out they have greatly changed their first story about their means of identifying the robbers, and because the jury rightly declare their claim to the ornaments to be false; and appalling though it be, the intention of both these wicked attempts was to get not only the neighbours but people of other villages sent to the gallows. I repeat that I do not believe that people committing such dreadful crime would light ten candles at the time, or that Venkatesh and his family would allow him to be killed without raising the slightest cry, but treating the murder as quietly as Socrates and his disciples treated the death of that philosopher. Nor do I believe that people would suffer a robbery of property valued at Rs. 8,000 with the indifference of the Cynics to worldly possession, withou trying to recover it and at the same time to bring the murderers to justice promptly. The Court now reverses the convictions and sentences passed on the prisoners Kalla and Ibrahim and acquits them, and dismisses the appeal of Narayen.

RANADE, J:—The appellants in these three appeals, being accused Nos. 1, 2, and 10 in the Belgaum Sessions Case No. 25 of 1895, were convicted by the Sessions Judge, concurring with the Jury, accused Nos. 1 and 10 being convicted on the charge of dacoity under section 396, and sentenced to rigorous imprisonment for 10 years, while No. 2 was convicted on the charge of abetment of theft and sentenced to one year's rigorous imprisonment. Accused Nos. 7, 8, and 9 in the same Sessions case were found by the same Judge and jury guilty on the charges of murder with dacoity and sentenced to death, while accused Nos. 3, 4, 5, 6 were acquitted. In confirmation case No. 22 of 1895, and in the appeals preferred by accused 7, 8, 9, the whole of the evidence in this case was reviewed in separate judgments given by Mr. Justice *Jardine* and myself, and it is not necessary to go over the same evidence again here, except so far as that evidence is concerned more immediately with the present appellants. In my Judgment in the confirmation case and the appeals tried with it, I have stated fully the reasons which led me to the conclusion that the evidence satisfactorily established both the fact of the dacoity and the murder of Venkatesh at Halshi on the night of the 18th February 1895, and that the only question in dispute was whether the identity of the

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accused was satisfactorily established. Both Mr. Justice *Jardine* and myself held that the charge of murder with dacoity was not brought home beyond all reasonable doubt to the accused Nos. 7, 8, 9, and we accordingly reversed their conviction on these charges. In the present two appeals the same question has again to be considered in reference to the appellants who were convicted, two of them under section 396, and the third with abetment of theft. The grounds of objection to the charge of the learned Sessions Judge in these two appeals are similar, and as they were argued as one appeal by the Hon. Mr. *Khare*, they can be best disposed of together. There appears to me to be considerable force in the objections taken to the charge, in that some of the positions laid down in it were of too general a character, and that the Sessions Judge did not take particular account of the special facts of this case. The Sessions Judge failed to bring to the notice of the jury the full contents of the Panchnama, and the evidence it afforded on the point of the inability or unwillingness of the principal witnesses for the prosecution to identify the prisoners on the night of the 18th February and up to after-noon on the next day, the names mentioned by them being more the result of suspicion than of personal knowledge. The Judge also did not dwell with sufficient emphasis on the fact that the prosecution studiously avoided calling the Jamadar Rudrappa, before whom the first statements of these witnesses were made, as a Crown witness. These were the principal points of omission in the charge to the jury. It is also obvious that the direction to take no account of the statements made to the Police or to the Magistrate was a direction, which, however it might be needful or permissible in other cases, was not applicable to the present case, because the statements of the witnesses taken down by Rudrappa were full enough, and were taken down in the form of questions and answers. The same observation holds good of the Panchnamas, which were not open to the remark that they did not name the suspected offenders. Partly from the time taken up by the defence before him, the Sessions Judge did not in his charge discuss the evidence about the dacoity with the same fulness as that of the murder, and as the present appellants were acquitted on the charge of murder and convicted on the charge of dacoity, their association with the accused Nos. 7, 8, 9, in the trial on the double charge of dacoity and murder, must have to some extent placed them at a disadvantage, when the jury had to weigh the evidence separately against each accused. The charge to the jury is thus to some extent open to the objections noticed above. Such omissions and vague over-statements constitute misdirection which this Court is bound to take notice if they have prejudiced the

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consideration of the defence. The test laid down in *Reg.* v. *Fattechand Vastachand*, (1) is to see whether, if the trial had been held before Judge and assessors, these defects were such as would have led the Appellate Court to set aside the decision of the Judge. In the case the misdirections would constitute a sufficient reason to set aside the verdict of a jury also. Taking up the case of Kalappa, accused No. 1, in the Court below it is true that he was arrested on the night of the murder by the village authorities. This arrest was, however, made on the suspicion of Hanmant and others that he might have been concerned in the murder. The charge of dacoity had not been made that night. Accused No. 1's house was not searched but his person was arrested, and he was taken to the *chowki*. So far as the charge of dacoity is concerned, the fact of his being named and arrested on the night on the suspicion of his being concerned in the murder is thus not of much moment. The mention of his name in the Panchnama is of no consequence for a similar reason. The strongest piece of evidence against him is his statement before this 2nd Class Magistrate. He was produced before this Magistrate on the 21st when he said nothing. On the 22nd he made halting admissions of his knowledge of the intended dacoity, and later on about his entrance into the house also after the murder. These admissions made in the vaguest possible manner do not appear to me to be very satisfactory, and he retracted them all and denied knowledge of this crime before the committing Magistrate and in the Sessions Court. No adequate motive is also alleged why he should have joined in the murder or the dacoity, and no part of the property was traced to his house or discovered with him. The exaggerated statements of Hanmant and the three women have been already held to be utterly unreliable, and Hanmant's statement made to Rudrappa is not of much value in this man's case, as the accused No. 1, had been already arrested on suspicion by the village people. Taking all circumstances into consideration the direct evidence against this accused does not bring home to him the charge of dacoity, and he must, therefore, be acquitted. The case of accused No. 2 is very differently circumstanced. There is no dispute about his being in the house in the night of the 18th. He was sleeping in the back part of the house. He made statements to both his father and mother that he was tempted by the dacoits to open the back door by a promise of Rs. 1,000, and he did open it. He made a long statement before the Magistrate which sets forth details which could not be possibly concocted by the Police. His own father and mother would not have given evidence against him in such a serious charge if they did not believe the admission made by accused to be true. Even Hanmant

(1) 5 Bom. H. C., 88.

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would not have falsely charged his own nephew with complicity in the offence if he could have saddled his servant with the charge, as indeed he appears once to have thought of doing. For all these reasons, holding as I do that dacoity and murder were committed by persons entering the house by the back door, I see no reason to disbelieve the confessional statement made by accused No. 2. The witnesses against him are his own father and mother and the other women of the family. His appeal must therefore be rejected. As regards accused No. 10 he is not a resident of Halshi but of Nandgad. He made no admission and no property was found in his house. His name is not mentioned by Hanmant and the women in their first statements made to Rudrappa. He was a stranger to the inmates of the family, and it was not likely that he could be identified by these witnesses. He had no motive of his own except to share in the loot, which is not traced to him. His flight and disappearance from his place for some time is not of itself sufficient to bring the charge home to him. In his case, therefore, as in the case of accused No. 1, the defects in the charge to the jury and his inclusion with the other accused in the more serious charges must have prejudiced the consideration of his case on the merits, and for the reasons which led me to acquit accused Nos. 7, 8, 9, his conviction must be set aside, as it is not proved beyond all reasonable doubt that he was in Halshi and took part in the dacoity. I would, therefore, reject the appeal of Narayen, and I would set aside the sentence passed against Ibrahim and Kalappa and order their discharge.

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19 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Irapa.*

Indian Penal Code (Act XLV of 1860), Sec. 84—Onus.

The *onus* of proving the defence afforded by section 84, Indian Penal Code, rests on the prisoner.

PER CURIAM:—The *onus* of proving the defence afforded by section 84 of the Indian Penal Code rests on the prisoner: *Reg.* v. *Stokes* (1) where Baron *Rolfe* also says—"It is dangerous ground to take to say that a man must be insane because men fail to discover the motive of his act." Great crimes often result from very inadequate motives, as *e.g.*, in *Queen Empress* v. *Lakshman Dagdu* (2), and *Queen-Empress* v. *Sakharam walad Ramji* (3), which are cases to which the Joint Sessions Judge ought to have referred. We agree with him that the prisoner killed his mother. But in his reasons for finding that he was of unsound mind at the time of the killing, the learned Judge omits to notice that this defence was

*Criminal Ruling 64 of 1895. Criminal Appeal No. 275 of 1895.

(1) 3 C. & K. 188. (2) I. L. R., 10 Bom., 512. (3) I. L. R., 14 Bom., 564.

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practically abandoned by the prisoner when questioned at the trial, when he informed the Court that he had raised the plea of insanity before the Magistrate because his relations had bullied him so to do in his own interest. The learned Judge also omitted to notice that in his first statement to the Magistrate the prisoner said he got angry at something his mother said. The act may be accounted for by sudden anger on an inadequate cause. There is no evidence of any previous or subsequent act of violence or any epilepsy or other plain indication of derangement of the mind. The very vague statements about the prisoner's habit of roaming in the wilds or of his twining cattle into the wrong pastures are not good ground for the Judge's conclusion that when he killed his mother his mind was unsound in any sense defined in section 84.

The Court, therefore, reverses the acquittal and the order passed and convicts the prisoner of murder under section 302 of the Indian Penal Code : but under all the circumstances refrains from passing sentence of death and sentences him to transportation for life.

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20 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Harkisondas Narotamdas.*

Bombay District Municipal Act (Bom. Act VI of 1873), Secs. 33 (2), 39 (2),—Privy—Municipality.

The accused gave a notice to the Bandora Municipality under section 33 of the Bombay District Municipal Act, 1873, of his intention to build a house, and submitted a plan of the proposed building. The Municipality stated in reply that the site for the privy shown in the plan was objectionable, and that the plan was, therefore returned with a view to an amended one being submitted. The accused built a privy on the proposed site after one month had expired :—

Held, (1) that the action of the accused in building the privy came within the words of the penal section 39 (2) of the Act, as there was a construction of a privy, which was, as regards its site, contrary to the direction of the Municipality ;

(2) that the action of the accused properly came within the mischief at which section 39 (2) strikes.

THE accused was charged at the instance of the Bandora Municipality with having made his house and privy in a manner contrary to the legal orders of the Municipality and committed an offence punishable under section 33, clause 3, and section 74 of the Bombay Act, 1873. The accused gave notice to the Bandora Municipality of his intention to build a house under section 33 of the Bombay Municipal Act and submitted a plan of the proposed building. The Municipality replied to this notice saying that the site for the privy shown on the plan was objectionable and the plans were therefore returned with a view that amended plans might be submitted. This amended plan was never submitted and the accused built

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**Criminal Ruling 65 of 1895. Criminal Appeal No. 282 of 1895.*

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his privy on the intended site. The Second Class Magistrate of Bandora who tried this case acquitted the accused under section 245, Criminal Procedure Code. Against this order of acquittal the Government of Bombay appealed.

PER CURIAM :—We do not think any valid objection has been taken to the form of the order, constituting the direction of the Municipality. We are of opinion that the action of the accused in building the privy comes within the words of the penal section 39, clause 2. There has been a construction of a privy, and that is as regards the site, contrary to the direction. There was no absolute need of the draftsman to repeat the words about *situation* used in section 33, clause 1, as that clause shows that the Municipality is to use a discretion about the sites of privies. We think the action of the accused comes also within the mischief at which section 39, clause 2 strikes : as may be gathered from the fact that no new privy can be constructed without consent of the Municipality. The Court reverses the acquittal and convicts the accused under section 39, and fines him Rs. 20 under section 74.

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25 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Bai Mahakor.*

Indian Penal Code (Act XLV of 1860), Secs. 361, 362, 366—Kidnapping—Abduction—Removing a minor Hindu girl by paternal guardian from the guardianship of a maternal relation for purposes of marriage—Good faith—Exception—Burden of proof—Practice and Procedure.

The right to dispose of a minor Hindu girl in marriage does not necessarily belong to the person, who has the right of guardianship. The paternal relative's right to select the husband and perform the marriage is not absolute either as against the minor or as against the guardian; and he is not, by Hindu law justified if he removes the minor by fraud or force for the purpose of getting the marriage performed, without any consideration for her own wishes and in spite of the objections of the guardian.

The burden of proving the exception of good faith is on the accused. A mistake of law does not make an exception under section 79, Indian Penal Code, even where the due care and attention of section 52 is proved.

As a rule where the act done comes within the words of the Penal Code, proof of a general or special exception is required to take it out.

Held, upon the facts, that, the acts of the accused amounted to a kidnapping as defined in section 361, and also to an abduction as defined in section 362 of the Indian Penal Code; and that the case did not come within the exception of section 361 as there was no evidence of good faith, and was not taken out of section 366 as the girl objected to the marriage, and the paternal cousin had no authority to insist at all events on her marriage with his own nominee.

THE facts in this case were that one Bai Mancha, mother of a minor girl Pashi, and her elder sister Reva, by a will made in her lifetime, assigned the guardianship of Pashi and the duty of marrying her

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*Criminal Ruling 66 of 1895. Criminal Appeal No. 276 of 1895.

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to Reva: the family being divided, Reva undertook this responsibility and brought up Pashi since the death of Mancha. On 2nd May 1895, Pashi then having reached the age of 12, she was formally betrothed to one Bakor and the marriage was to be celebrated on the 5th May following. This was resented by accused 3, Adit, an agnatic relative of Pashi, and he resolved, under color of his relationship, to prevent the occurrence of the marriage so as to carry out a scheme of his own whereby Pashi was to be married to the prosperous but elderly accused 4, Amrat, who in return for the young bride, would by means of his own money find a wife for the unmarried Adit. Adit, therefore, with the help of the other accused, his partisans, prepared to give effect to this plan, and, as no time was to be lost they acted at once on the 3rd May, that is, the day following Reva's betrothal of Pashi to Bakor. In the evening of that day a general caste feast was given in Dakore, and to it the girl Pashi went taking with her the infant child of Reva. She went first to the house of her aunt, when the accused Mahakor came there and asked Pashi to go with her and give her bathing water, as she had oiled her hair. Pashi suspecting nothing wrong, went away with accused Mahakor who took her to the house of accused 11, Rukshmini, then Pashi's eyes were opened to the situation by seeing the accused assembled and the usual accessories of a marriage ceremony present in the house. She refused to enter, whereupon the accused 1 and 2 seized hold of her and tried to drag her in and as she still resisted the accused 1 lifted her up and carried her into the house. There the accused by threats and promises attempted to compel her to marry accused Amrat, but Pashi resolutely refused and raised cries for help. Attracted by these cries, some persons entered the house and released Pashi from the grasp of accused 2.

The Sessions Judge of Ahmedabad, upon these facts, found Bai Mahakor guilty under section 366, Indian Penal Code, and accused Shomeswar and Aditram guilty under sections 109 and 366 of the Code.

The accused, thereupon, preferred an appeal to the High Court.

PER CURIAM.—We take the facts as found by the Court below with which the assessors concurred. Mr. *Branson* has argued for the accused Aditram that on the facts found by Mr. Batchelor, the Joint Sessions Judge, he as distant paternal cousin of the father of the maid Pashi, is the person designated by the Hindu Law, to give her away in marriage: and justified therefore in using a trick to get possession of her person for that purpose by withdrawing her from the house, protection and guardianship of her sister Rewa to whom by registered will, the deceased mother of Pashi had entrusted the guardianship and the duty of getting Pashi married.

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Therefore, said the learned counsel section 366 of the Indian Penal Code does not apply and the convictions are bad.

No case was, however, cited nor any *dictum* of Hindu Law to justify a removal by foul or fraud of a minor girl under guardianship from that guardianship by the paternal relative for the purpose of getting the marriage performed, at all events and without consultation with the guardian. Reva is separated in family from Aditram and she manages Pashi's property. It does not appear that the law approves of the paternal relative taking the law into his own hands and getting the marriage performed in spite of the objections of the guardian and without any consideration of the wishes of the minor. The right of the paternal relative to select the husband and perform the marriage is not absolute as against the guardian: see, *Modhoo Soodan* v. *Jadab* (1). This is clearly shown in *S. Namasevayam* v. *Annammai* (2), as regards the right of the mother as guardian. The right to dispose of the girl in marriage does not necessarily belong to the person who has the right of guardianship: *Maharanee Ram* v. *Maharanee Soobh* (3). So the latter right may, as often happens in regard to the persons and properties of female infants, belong at Hindu Law to a woman: see *Mayne's* Hindu Law, 5 Edition, sections 81, 192. The distinction was recognized in *Shridhar* v. *Hiralal* (4), where the District Court refused to remove the girl from the custody of the persons who had brought her up but postponed the change of custody to that of the paternal uncle until one month before a day to be fixed for her marriage to a bride-groom already selected by the paternal uncle and previously approved by the Court. The Judgment of the High Court shows that many circumstances must be considered before a Court will either change the custody or give its approval to a particular person as a husband. The validity of the claim of Aditram to the position of adviser may also require consideration: see Dr. Jolly's Tagore L. L. 1883 p. 12. The paternal relative has no right to hurry on the marriage in order to avoid any order that the Court might on application of the guardian make. Again the right of the paternal relative is not absolute as against the minor. The powers conferred on relatives by the Hindu Law are, like the *patria potestas* of Rome, to be used not atrociously but benignly. They are meant as concerns marriage for the good of the minor not the profit of the relation. This guardianship thus differs greatly from our old wardship in chivalry described in Coke on Littleton 2, c. 4, section 107, which Hargrave in his note 70 thereto stigmatises as repugnant to the voice of nature. But even there the minor heir was protected against disparagement, one form of which was

(1) 3 W. R., 194. (2) 4 Mad., H. C., 389. (3) 7 W. R., 323. (4) I. L. R. 12 Bom., 480.

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propter vitium corporis which Coke explains to include deformities, infirmities such as consumption and "impotency to have children in respect either of age past children, or so tender years as there is too great disparity or for natural disability or impediment, or such like." Among the Hindus marriage is a religious duty, a sacrament. As its great and primary object is the procuring of male issue, physical capacity is an essential requisite so long as mere selection of a bridegroom is concerned: *Mayne's* Hindu Law section 86, see also, *Jummoona* v. *Bamasoonderai* (5). There are many other kinds of disparagements which would be guarded against by a father or mother: and it is shown by *S. Namasevayam* v. *Annammai* that the duty placed on the remoter kinsman is to be performed in a paternal way "to ensure the making of a suitable provision for the betrothal of daughters before reaching the age of puberty" and that the express provision made by the law for the choice of a husband by a girl in case of neglect on the part of her relatives of their duty to betroth her for three years from the time she became marriageable (*Manu*, Ch. IX, Pl., 90, 91) shows that the duty does not amount to an enforceable legal obligation. The paternal relative must therefore have regard to equity and not act iniquitously. He may claim an injunction against a guardian of the person who is improperly hurrying on a marriage: *In re Kashi Chunder Sen* (6). But the same principles of equity would apply in restraint of himself. We hold therefore that he cannot by mere volition make a lawful guardianship of the person a nullity. On this view of the law the facts found amount to a kidnapping from lawful guardianship as defined in section 361: also to an abduction as defined in section 362. It is argued, however, that the acts done are not criminal being within the exception to section 361 of good faith and taken out of section 366 by the doctrine that Aditram is a person whose consent to the marriage is tantamount to that of Pashi herself at Hindu Law.

The few reported authorities show that the Penal Code was held to apply when a mother removed a minor girl from the father's custody and gave her in marriage: *In re Prankrishn* (7), that the object of the Code is to protect children as well as guardians, *Emp.* v. *Pemantle* (8) and that section 361 applies to a father who takes a Hindu wife aged fifteen from the husband's custody, *In the matter of the Petition of Dhuronidhur Ghose* (9).

Section 105 of the Indian Evidence Act throws on the accused the burden of proving the exception of good faith. A mistake of law does not make an exception under section 79 of the Indian Penal Code even

(5) L. R., 3 I. A., 78. (6) I. L. R., 8 Cal., 266. (7) I. L. R. 3 Cal., 269
(8) I. L. R., 8 Cal., 971. (9) I. L. R. 17 Cal., 298.

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when the due care and attention of section 52 is proved. We find no evidence of good faith at all. The accused were so eager to prevent the marriage with Reva's nominee and to perform it with Aditram's nominee that they did not stop to reflect on the rights of the guardians or the virgin, protective functions of the Courts. We, think, then that the accused did the act *at their peril*, if turned out to be the fact that the custody of Pashi was lawfully with Rewa. We take the expression from *Blackburn*, J.'s Judgment in *The Queen* v. *Prince* (10); see I Russell on Crimes,888.

It is unnecessary on this finding to consider whether if there had been good faith the exception would have been inapplicable on the ground of unlawful purpose. We need not therefore consider the word *unlawful* after the manner in which the word unlawfully was treated in *Prince's case*. As regards the doctrine of *mens rea* there also discussed we are of opinion that as a rule where the act done comes within the words of the Penal Code, proof of a general or special exception is required to take it out. These observations are made because the giving in marriage though it might be without legal cause or excuse or inequitable would not be criminal. We do not think it proved that Aditram intended thereby to gain an advantage to himself. So unless that giving became unlawful under the Penal Code because committed by means of a conspiracy, there was not the same quality of misdemeanour in it as in *Gondal* v. *Harris* (11) where one of the two surviving guardians removed the girl of less than ten years of age from a boarding school, and married her to his own son, a person of inferior degree.

As to the argument raised on section 366 the fact is that the girl objected to the marriage, we have already given our reasons for holding Aditaram had not authority to insist on her marrying his nominee at all events.

The general exceptions about consent do not touch the facts. The case of a guardian for marriage who in an unexpected emergency takes away the minor from the guardian of the person merely to prevent an improper marriage may when it arises be dealt with on all the circumstances.

The convictions are in our opinion legal for the reasons given above. As in the cases of criminal informations or attachments for contempt for the removing or marrying of young people the punishment ought to fit the circumstances: the fact that the effect of the Penal Code in such a case has hardly before been declared is a reason for leniency. There is also something harsh in the prosecution of all the persons who attended the alleged marriage. Acting on these considerations while confirming the three convictions we change the rigorous imprisonment to simple imprisonment and reduce the term of Mahakor to six weeks and that of

(10) L. R., 2 C. C., 172; s. c., 44 L. J., M. C., 122. (11) 2 P. Will., 560.

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Someshwar to three months. As regards Aditram we take note that a civil suit is pending about the alleged marriage: it may be that in the result he can show that his conduct has not resulted in harm to the girl or he may be able to get the matter terminated by inducing the alleged husband to admit in formal manner if such was the case on which we express no opinion that the marriage was not completed. These circumstances may possibly justify an application to the Governor in Council for reduction of the term.

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25 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Nuradin.*

Act II of 1864—Regulation II of 1891—Sheikh Othman—Aden.

For the purposes of Act II of 1864, the village of Sheikh Othman is made by Regulation II of 1891 part of the Settlement of Aden and placed under the jurisdiction of the Court of the Resident at Aden.

PER CURIAM:—The homicide occurred in what Regulation 2 of 1891 describes as the village of Shaikh Othman which that enactment expressly makes part of the settlement of Aden for the purpose of Act 2 of 1864 and thus places under the jurisdiction of the Court of the Resident at Aden, so removing the difficulties regarding jurisdiction discussed in the cases of *Queen-Empress* v. *Mangal Tekchand* (1).

We are of opinion that the Resident's view of the facts is fully supported by the evidence, that the prisoner killed his wife by strangling her with his hands, and that he is rightly convicted of murder.

But as there was no premeditation and the violence used may have been used in hot blood and without intention to kill, this Court is of opinion that a sentence of transportation for life would be a proper one and accordingly commutes the sentence passed.

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28 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Subhabhatta.†

Prevention of Gambling Act (Bom. Act IV of 1887), Secs. 6, 7—Burden of proof—Warrant—Police Officer—Chief Constable.

Prevention of Gambling Act, 1887, must be strictly interpreted as section 7 of it throws the burden of proof on the accused and is thus a departure from the usual rule.

A Police officer of lower rank than a Chief Constable held a warrant, issued under section 6 of the Act, and entered and searched the house:—

Held, that the entry under the warrant was unauthorized, as the authority could not be given under section 6 to the lower officer, and cannot be treated as valid for the purposes of section 7.

**Criminal Ruling 67 of 1895. Criminal Confirmation Case No. 25 of 1895.*

(1) I. L. R., 10 Bom., 258, 263, 274.

†Criminal Ruling 68 of 1895. Criminal Application for Revision No. 288 of 1895.

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THE accused were convicted of the offence of gambling in a common gaming house under section 5 of Bombay Act IV of 1887, by the First Class Magistrate of Sirsi.

The accused applied to the High Court under its revisionary powers to quash the conviction on the following grounds :—(1) That the place where the gaming charged is proved to have taken place having been entered by an officer of a less rank than a Chief Constable, and the prosecution having given no evidence that it was a common gaming house, the conviction is contrary to law. (2) That the Magistrate has erred in law in holding that the Police officer to whom the warrant was issued was a Chief Constable. The officer in question was the Jamadar, and the warrant could not legally be issued to him merely because the Chief Constable was absent on duty and the Jamadar was in charge of the station."

PER CURIAM :—Bombay Act IV of 1887 must be strictly interpreted, as section 7 throws the burden of proof on the accused where it applies and is thus a departure from the usual rule. The house was entered and searched by a Police Officer of lower rank who held a warrant issued under section 6 to a Chief Constable. As the authority could not be given under section 6 to the lower officer, the entry under the warrant was unauthorized: and cannot be treated as valid for the purposes of section 7. There is no direct evidence that the house was a common gaming house. The Court sets aside the convictions and sentences and directs the return of the fines.

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28 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Dagdu Gangaram.*

Criminal Procedure Code (Act X of 1882), Secs. 412, 424, 439—High Court—Revision—Appeal.

The High Court is cautious in the use of its jurisdiction to try questions of fact in revision, especially where the suitor has a right to this relief by appeal.

Except when it uses express language as in sections 412 and 418, the Code of Criminal Procedure does not provide for the admission of an appeal for the limited purpose of reviewing only a part of the sentence. If the appeal is admitted, the appellant has a right to have the whole merits dealt with by the Judge in solemn form, and, as the close of the hearing of the appeal is the time at which the Judge has to proceed to judgment, any opinion that he may have expressed before sitting to hear the appeal must not be allowed to prejudice the express right of the appellant to a decision on all the issues raised.

The High Court will direct the rehearing of an appeal where justice has not been administered according to law, such omission being prejudicial to the prisoners.

PER CURIAM :—The prisoners urge that the Sessions Judge after admitting their appeals dealt only with the part of the sentences which consists of whipping. They complain that the decision of the Magistrate

*Criminal Ruling 69 of 1895. Criminal Applications for Revision No. 284.

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was wrong on the facts and that they are unjustly suffering long terms of imprisonment. They call on the High Court to decide the matters of fact as in an appeal. But as explained in *Queen-Empress* v. *Chagan* (1), the High Court is cautious in the use of its jurisdiction to try questions of fact in revision, especially where the suitor has a right to this relief by appeal.

These prisoners had this right and it appears that the Sessions Judge did admit their appeals. But in his judgment he records that he confined the intimation in the notice (issued under section 422 of the Code of Criminal Procedure) to the question about the whipping, having seen no reason to interfere with the convictions or sentences of imprisonment. We have to determine whether or not this procedure is a denial of justice.

The Code of Criminal Procedure does not provide for the admission of an appeal for the limited purpose of reviewing only part of the case, except where it uses express language as in sections 412 and 418. The Sessions Judge might under section 421 have rejected these appeals summarily. But as he did not do this, sections 422, 423, and 424 make the *lex fori* which had to administer. It is clear from them that the prisoners had a right to have the sole merits dealt with by the Judge in solemn form: and as the close of the hearing of the admitted appeal was the time at which he had to proceed to judgment, any opinion that he might have expressed before sitting to hear the appeal was not binding upon him and must not be allowed to prejudice the express right of the prisoners to a decision on all the issues raised. The Judge was then bound by section 424 to record a judgment on the various points, giving his reasons therefor. This Court which continually insists that Justice shall be administered according to law has repeatedly held the omission of this safeguard to be prejudicial to prisoners, following *In re Shivappa* (2). The Court now while leaving as valid the directions of the Sessions Judge, about the whippings, directs a rehearing of the four appeals according to law: and as the Sessions Judge of Nasik appears to have expressed an opinion on the merits, the Court issues notices to the Governments and the appellants to show cause if any why the appeals should not be heard by the Sessions Judge of Thana.

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28 November 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Radha.*

Criminal Procedure Code (Act X of 1882), Sec. 541—Prisons Act (IX of 1894), Sec. 60 (t) —Prisoner's Act (V of 1871)—Imprisonment—Different Jails—Judge—Local Government.

(1) I. L. R., 14 Bom., 341. (2) I. L. R., 15 Bom., 11.

**Criminal Ruling 70 of 1895.* Criminal Review No. 344 of 1895

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There is no law empowering a criminal Court, passing a sentence of imprisonment, to divide the imprisonment between different jails. It would seem from section 541 Criminal Procedure Code, section 60 (t) of the Prisons Act, 1894, and Prisoner's Act, 1871, that this power belongs to the Local Government and the Inspector General of Prisons.

THE accused was convicted of exposing her illegitimate male infant with the intention of wholly abandoning it, section 317, Indian Penal Code. The Sessions Judge of Nasik who convicted her ordered as follows:—"The infant before the Court to be made over to the prisoner Radha, since the Koli woman Saku intimates that she is unwilling to take charge of it any longer. Under the circumstances I think it better that the first three months of prisoner Radha's imprisonment should be spent in the Nasik Jail, and the remainder in the Thana Jail."

PER CURIAM:—The Court is not aware of any law empowering the Sessions Judge to divide the imprisonment between different jails. It would seem from section 541 of the Criminal Procedure Code, section 60 of Act 9 of 1894 clause (*t*) and the Prisoner's Act 1871 that the power belongs to the local Government and the Inspector-General of Prisons. But as the officer in charge of the prison might act under section 18 of the last named Act, the Court returns the record and proceedings.

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2 December 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Ganesh Raghunath.*

Land Revenue Code (Bom. Act V of 1879), Sec. 214, Rule 111, clause 1—Government—Forest—Trees.

To justify a conviction under Rule 111, clause 1 (b) framed under section 214 of the Land Revenue Code, it must be proved that the trees cut down by the accused were the property of Government. In such a case the fact that Government has at various times asserted ownership over other trees in other parts of the village is, by itself, of small importance as proof against the accused, as the occupants of the lands may not have known of their rights or may have had their own reasons for submission.

***Re Antaji* (1), followed.**

PER CURIAM:—The conviction is under Rule 111, Clause 1 B, made under section 214 of the Land Revenue Code, as follows:—

"Whoever without due authority shall cut down or remove, or attempt to cut down or remove, any jungle or trees belonging to Government or the right to which has not been conceded by Government, shall be punished with imprisonment of either description which may extend to one month, or with fine which may extend to five hundred rupees".

The issue on which the case has been determined is whether the particular trees cut were trees "belonging to Government." The reasoning of *In Re Antaji* (2), applies. "The Court must be satisfied that the trees

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***Criminal Ruling 71 of 1895. Criminal Application for Revision No. 275 of 1895.**

(1) I. L. R., 18 Bom., 670. (2) I. L. R., 18 Bom., 670.

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cut down by the accused were the property of Government". We have been shown no evidence directly affirming this allegation. It is in evidence that Government has at various times asserted ownership over other trees in other parts of the village. But this fact by itself is of small importance as the occupants of the land may not have known of their rights, or may have had their own reasons for submissions. No ancient custom is proved or pleaded.

The judgment *In Re Antaji* shows the importance of a careful inquiry into the question of right: and is an example to all Courts below of the manner in which they should deal with such disputes.

The Court reverses the conviction and sentence: and as the appropriate tribunal for determining the civil rights is the Civil Court, no fresh trial is ordered.

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5 December 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Keshow Virupaksh.*

Railways Act (IX of 1890), Sec. 126—Rails—Stones, placing of.

A person charged with having placed a stone on the rails, under section 126, Indian Railways Act, 1890, cannot be allowed to plead that no train was due at the time.

THE accused in this case was charged under section 126 of the Railway Act with putting three stones on the rail of the Southern Maratha Railway near a level crossing with the intent or knowledge that he was likely to endanger the safety of a person travelling or being upon the Railway. He was tried by the Sessions Judge of Dharwar who sentenced him to rigorous imprisonment for one month. The accused applied to the High Court under its revisional jurisdiction, on the ground, among others that there was no evidence in the case to show that any train was due at the time the stones were alleged to have been put or for some time after.

PER CURIAM:—We think the principle of interpretation in *Queen-Empress* v. *Hormasji* (1), applies to Act IX of 1890, section 126. We are also of opinion that the Sessions Judge admitted some evidence of confessions contrary to the Indian Evidence Act as interpreted in *Reg.* v. *Jora* (2) and *Queen-Empress* v. *Nana* (3). But there is other evidence which, if believed, would justify the conviction. There are discrepancies but they have been considered by the Judge, on whom the serious responsibility of decision rested. We do not think the facts are such as require this Court to deal with the case like an appeal and we decline to intefere in revision.

**Criminal Ruling 72 of 1895. Criminal Application for Revision No. 326 of 1895.*

(1) I. L. R., 19 Bom., 715. (2) 11 Bom. H. C., 244. (3) I. L. R., 14 Bom., 260.

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12 December 1895. FARRAN C. J., & JARDINE & RANADE, JJ.

Queen-Empress v. Dayaram Ranchhod.*

Criminal Procedure Code (Act X of 1882), Secs. 123, 193—Magistrate—Reference under section 123—"Case committed for trial"—Joint Sessions Judge.

A reference by a Magistrate under section 123, Criminal Procedure Code, is not a "case committed for trial," and the Court of Session disposing of such reference does not "try a case" within the meaning of those words as used in section 193 of the Code. The jurisdiction conferred by section 123 is concerned rather with the exercise of a power for the prevention of an offence.

A Joint Sessions Judge, appointed to try "all cases which may be committed for trial by the Magistrates" of the District, has no jurisdiction to pass orders on a reference under section 123, Criminal Procedure Code.

THE accused was ordered, by the First Class Magistrate of Broach, under section 118 of Criminal Procedure Code, to execute a bond for Rs. 250 with two sureties for Rs. 250 each for maintaining good behaviour for a term of three years. The accused expressed his inability to furnish the security required of him. Thereupon the Magistrate under para 2 of section 123 of Criminal Procedure Code detained accused in prison under his warrant and laid the proceedings of the case before the Joint Sessions Judge of Surat at Broach for orders.

The Joint Sessions Judge directed that the accused be detained in prison for three years from the date of the Magistrate's order for requiring security and of detention of the accused in prison, or until within such period he furnishes the required security.

The Sessions Judge of Surat referred the case to the High Court observing:—"The point for consideration in this reference is whether the Magistrate's submission to the Joint Sessions Judge and the Joint Sessions Judge's order thereon under section 123 of Criminal Procedure Code are legal.

"Mr. Fawcett's (Joint Sessions Judge) appointment as Joint Sessions Judge is in the following words:—

'His Excellency in Council is also pleased under section 9 of the Code of Criminal Procedure, 1882, to appoint Mr. Fawcett to be a Joint Sessions Judge in the Surat Sessions Division and further to direct under section 193 of the Code that he shall try all cases which may be committed for trial by the Magistrates of the Broach Collectorate." *Vide* Notification No. 3875 published in the *Bombay Government Gazette* of 13th June 1895, Part I, page 672.'

"Under section 409 of Criminal Procedure Code the Joint Sessions Judge has power to hear appeals, and under section 193 of Criminal Procedure Code he can try such cases only as the Local Government by general or special order directs him to try or as the Sessions Judge makes

**Criminal Ruling 73 of 1895. Criminal Reference No. 157 of 1895.*

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over to him for trial. It has been ruled that a Joint Sessions Judge cannot exercise the revisional powers vested in a Sessions Court under Chapter 32 of Criminal Procedure Code. (Indian Law Reports 9 Bom. 164, 352). Mr. Fawcett's jurisdiction to pass an order under section 123 of Criminal Procedure Code must, therefore, depend upon the Local Government's direction in this behalf.

"In my humble opinion the notification above referred to cannot apply to cases submitted by the Magistrates under section 123. They are not cases "committed for trial", nor are they technically cases " for trial " by Sessions Court. I have, however, some doubts about the correctness of my opinion, for it is possible to argue that as under section 123 the Sessions Court has authority to require further evidence and to record it if necessary, the case is practically tried by such Court, and the submission of the Magistrate to the Sessions Court is in the nature of *quasi* committal."

PER CURIAM:—We agree with the view which the Court of Session has expressed upon this reference. Though section 9 of the Criminal Procedure Code would, if it stood alone, appear to indicate that Assistant Sessions Judges and Joint Sessions Judges were intended to exercise all the same jurisdictional powers as the Court of Session itself, yet the subsequent sections, which point out in what cases they are to exercise jurisdiction, curtail and limit the apparently wide scope of section 9. These Judges are not by section 17 made subordinate to the Sessions Court; but by section 193 their powers are expressly limited to trying such cases as the Local Government by general or special order directs them to try, or as the Sessions Judge of the Division makes over to them for trial—section 409 confers upon them jurisdiction to hear appeals.

The question then limits itself to this, whether the provisions of section 193 and the terms of the appointment of the Joint Sessions Judge by Government embrace the present case. The jurisdiction which he is entrusted with, is to try all cases which may be committed for trial by the Magistrate of the District. The present is clearly not an appeal, so we have not to deal with section 409. Is it then a case committed for trial by the Magistrate of the District? To us it does not appear to be so. The jurisdiction conferred by section 123 is rather the exercise of a power than the trial of a case committed for trial. It is a power to be exercised for the prevention of an offence and not the trial of a case for an offence already committed. The heading of Part IV Chapter VIII compared with the heading of Part VI Chapter XV emphasizes this distinction. The one is headed Prevention of Offences the other Proceedings in Prosecutions. See this distinction remarked in *In the matter of Umbica Proshad* (1).

(1) 1 Cal., L. R., 268.

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This view accords with the decision in *In re the petition of Musa Asmal* (2) and in *Reference by the Sessions Judge of Surat* (3).

The Division Bench will deal with the Reference.

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12 December 1895 JARDINE & RANADE, JJ.

Queen-Empress v. Kasima.*

Criminal Procedure Code (Act X of 1882), Secs. 341, 464, 466—Unsoundness of mind—Civil Surgeon—Magistrate.

If after inquiring into the fact of the unsoundness of mind of the accused, and examining the Civil Surgeon, the accused appears to be insane, and unable to understand questions and to return intelligible replies, the Magistrate should follow section 464 and not section 341 and should act on his opinion under section 466 of the Code of Criminal Procedure.

IN this case the First Class Magistrate of Sholapur committed on the 11th November 1895, to the Court of Sessions at Sholapur for trial the accused Kasima charged with the offence of exposing her female child under twelve years in a forest punishable under section 317 of the Indian Penal Code.

The Sessions Judge being of opinion that the commitment was illegal and should be quashed under section 215, Criminal Procedure Code, made this reference to the High Court, observing.—

"The Magistrate when the accused came before him had reason to believe that she was of unsound mind and incapable of making her defence. He examined the Civil Surgeon on the 21st October, who deposed that in his opinion she was not of sound mind, but the Magistrate recorded no finding on the question of such unsoundness of mind, and from the order of commitment it seems clear that he was dissatisfied with the civil Surgeon's opinion, which he says was based on a cursory examination. He says also that the Civil Surgeon declined to re-examine her, but what really happened in this connection does not appear in the proceedings. Mr. Kennedy says clearly 'she appears (not merely appeared at the outset) to me to be unable to understand questions and to return intelligible replies.'

"This being his opinion he was bound to postpone proceedings in the case, and to report it for the orders of the Local Government under section 466 of the Criminal Procedure Code. His procedure in recording the evidence, and committing the accused for trial upon such evidence so recorded was in my opinion *ultra vires* and illegal. Section 464 does not provide that any opinion expressed by a Civil Sugeon is to be regarded as final, or binding on the Magistrate; and in this case Mr. Kennedy evidently did not regard the Civil Surgeon's opinion as satisfactory.

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(2) I. L. R., 9 Bom., 164. (3) I. L. R., 9 Bom., 352.

**Criminal Ruling* 74 *of* 1895. Criminal Reference No. 169 of 1895.

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"I am of opinion that the order of commitment should be quashed, and that the Magistrate should be directed to commence the enquiry *de novo*, and to comply with the provisions of section 464 of the Criminal Procedure Code."

PER CURIAM.—The Magistrate who held the inquiry did examine the Civil Surgeon and other persons as to the fact of the unsoundness of mind of the accused: and recorded that "she appears to be insane" and "unable to understand questions and to return intelligible replies". These findings practically show that section 464 and not section 341 of the Code of Criminal Procedure should have been followed. The Magistrate should have acted on his opinion under section 466. To enable him so to do the Court quashes the commitment to the Court of Sessions and remands the case to that of the Magistrate.

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12 December 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Fula Dhana.*

Criminal Procedure Code (Act X of 1882), Sec. 423—Police investigation—Conviction.

A conviction, based on mere statements, made to the Police at the time of the Police investigation by witnesses who at the trial gave an entirely different story can not be upheld.

PER CURIAM:—We are of opinion that the statement made by the prisoner when he produced the tongs, is not admissible as evidence, *Queen-Empress* v. *Nana* (1) *Reg.* v. *Jora* (2). In the absence of any question or answer as to his presence at the time of the injury occurring to his wife, we do not think the Court can infer an admission of presence from what he said to the Magistrate Mr. Motilal.

Nor do we think it safe to uphold the conviction based on mere statements made at the time of the occurrence to the Police by witnesses who at the trial gave an entirely different story. The reasons given by the learned Judges in *Rej.* v. *Amanulla* (3) apply here. That was a case on the use of depositions under the enactment now found as section 288 of the Code of Criminal Procedure. A *fortiori* the reasoning applies to statements not made under equal sanctions and security for truth.

The Court reverses the conviction and sentence and directs that the prisoner be discharged.

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19 December 1895 JARDINE & RANADE, JJ.

Queen-Empress v. Dhurmya.*

Criminal Procedure Code (Act X of 1882) Sec. 367—Judgment—Appeal.

A judgment should state sufficient particulars to enable a Court of appeal to know what facts are found and how.

**Criminal Ruling 75 of 1895.* Criminal Appeal No. 343 of 1895.

(1) I. L. R. 14 Bom., 260. (2) 11 Bom. H. C. 244. (3) 12 Beng. L. R., 15; s. c. 21 W. R., 49.

**Crinimal Ruling 76 of 1895.* Criminal appeal No. 355 of 1895.

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THE accused in this case were placed for trial before the Sessions Judge of Thana, who recorded the following judgment:—"Accused (Dhurmya) No. 2 is charged with an offence under section 457, Indian Penal Code. It is proved from the evidence of Fakira that his house was broken into on the night of the *Nagapanchami*. Jethya who had pleaded guilty and been convicted of the offence says that the accused Dharmya went with him and was standing a few paces off when he cut the fastening of the door. This is admitted by the accused and there can be no doubt that he was present as an aider and abetter. This is the view taken by the assessors. I concur with the assessors in finding the accused Dharmia guilty of the offence charged and sentence him to suffer rigorous imprisonment for one year."

PER CURIAM.—As the conviction depended so much on the evidence of an accomplice, the Court is of opinion that the Assistant Sessions Judge should have given his reasons in his judgment for holding that the prisoner was present at the house-breaking with a guilty intention. A judgment should state sufficient particulars to enable a Court of appeal to know what facts are found and how. Having examined the evidence, the Court rejects this appeal.

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19 December 1895. JARDINE & RANADE, JJ.

Queen-Empress v. Yeshvanta.*

Bombay Abkari Act (V of 1878), Sec. 43 (c)—Manufacture—Eau-de-Cologne.

The word 'manufacture' in section 3 Clause 11, of the Bombay Abkari Act, 1878, includes the preparing of a spirituous liquor by admixing, and is not limited to the processes which result in the production of alcohol.

The making of Eau-de-cologne by adding to rectified spirit water and some essential oils which create fragrance, is a manufacture of liquor within the penal section 43 (*c*) of the Bombay Abkari Act, 1878.

PER CURIAM.—The facts to which we have to apply the law are these. Yeshwant took rectified spirit and added thereto some water, and some essential oils which create fragrance and thus made Eau-de-cologne. It is not disputed that this Eau-de cologne is spirituous liquor within the meaning of Bombay Act V of 1878. The question argued is whether what Yeshwant did is a manufacture of liquor within the penal section 43, clause (*c*). The Presidency Magistrate discharged him, holding that what he did was to perfume alcohol, not to make alcohol. He held that the meaning of "manufacture" in the Act is limitted to any process which results in the production of alcohol. This view has been adopted by Mr. Robertson as counsel for Yeshwant. The Advocate-General has contended that Yeshwant has "prepared" a spirituous liquor

*Criminal Ruling 77 of 1895. Criminal Revision No. 305 of 1895.

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by an "admixing" within the words and meaning of section 3, clause 11. The point is new and is purely one of construction. Clause 11 is as follows:—

"Manufacture includes every process, whether natural or artificial, by which any spirituous, fermented or intoxicating liquor or intoxicating drug is prepared and also every process for the rectification of liquor; admixing is a process within the meaning of this definition."

The word "prepare" is often used in common parlance to mean the process by which a material is made available for use or sale, *e. g.*, the refining of silver, the melting of glass, and many acts in the exposing for sale and cooking of food. In many arts and trades some substance is added in the process, an alkali, an oil, an alloy. Now *every* process is to be held a manufacture where the spirituous drug is prepared: and admixture is specially mentioned: and in clause 9 "every preparation and admixture of *ganja* and *bhang*" is included within the term "intoxicating drug." The words used are wide, and there is no need to strain them to include what Yeshwant has done. If in clause 11, the Legislature had intended that no process should be included which is only a treating of spirit already made it would have used appropriate words. It has, however, under the word "liquor" included all liquid consisting of or containing alcohol:" and there is no exception nor anything to suggest that liquor already distilled is excluded, or that a man in Yeshwant's position has a valid defence to the charge under section 43, clause (*c*) by proving that somebody else distilled the alcohol before he got it for the purpose of preparing a vendible liquor.

The Court is, therefore, of opinion that the construction placed on the words of the law by the Presidency Magistrate is too limited: and therefore incorrect. The Court sets aside the order of discharge of Yeshwant and directs the Magistrate to dispose of the case according to law.

1896.

8 January 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Ellahibax.*

Act XLVIII of 1860, *Sec.* 11—*Licensee.*

On proof that a person has or keeps any such eating-house as is described in section 11 of Act 48 of 1860, he is liable to fine as in that section provided; and the sole circumstance that the Commissioner has refused to grant him a license under section 12 does not justify his acquittal.

THE accused was charged with the offence of keeping an eating house without a license under section 12 of Act XLVIII of 1860. Mr. Hamilton.

**Criminal Ruling* 1 *of* 1896. Criminal appeal No. 337 of 1895.

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the Second Presidency Magistrate, acquitted him on the ground that he having applied for a license the Commissioner of Police had no right to refuse one. The Public Prosecutor moved the High Court for a reversal of the order of acquittal.

PER CURIAM.—We are of opinion that on proof that the accused has or keeps any such eating-house as is described in section 11 of Act 48 of 1860, he is liable to fine as in that section provided, and that the acquittal was not justified on the sole circumstance that the Commissioner of Police had refused to grant him a license under section 12. The Court therefore reverses the acquittal and directs the Presidency Magistrate to determine the case according to law.

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9 January 1896. JARDINE & RANADE JJ.

In re a Dumb Man.*

Criminal Procedure Code (Act X of 1882), Sec. 341—Reference—Dumb man—Conviction.

Section 341, Criminal Procedure Code, becomes applicable only after there is a conviction.

THE accused on the night of the 12th December, 1895, dishonestly and without permission took away nine sheaves of *jowari* grass valued at about Rs-0-7-0 from the grass heap belonging to the complainant. It was proved by the evidence of the complainant and other witnesses that the accused did steal the grass sheaves and sold them to a witness and that he was deaf and dumb. The Magistrate, at this stage, made a reference to the District Magistrate in the following terms:—"It is true that the accused is both deaf and dumb, and is unable to understand the proceedings of the case. However I am satisfied by his signs that he admits that he did commit the offence brought against him. He was previously convicted by Mr. J. W. S. Dracup, on 11th July 1890, for an offence under section 457, Indian Penal Code, for which he was directed to undergo rigorous imprisonment for one month...I therefore humbly beg to request you will be so good as to transmit the papers of the case to the Hon'ble High Court of Judicature Bombay for orders under section 341, Criminal Procedure Code."

ORDER.—If there is no conviction, section 341, Criminal Procedure Code, does not apply and the record must be returned to the trying Magistrate in order that he may pass a judgment of conviction, if, as appears to be the case, he finds the accused is guilty. The trying Magistrate should then return the record with a statement of his reasons for holding that the accused did not understand the proceedings. Again section 341 applies when the accused cannot be made to understand them. The Magistrate should also report what means he used to enable the

* Criminal Reference No. 175 of 1895.

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accused to understand them and the reason why this means was unsuccessful.

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9 January 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Kalu Sandu.*

Criminal Procedure Code (X of 1882), Secs. 209, 436, 437—District Magistrate—Sessions Judge—Concurrent jurisdiction.

Where the accused is discharged by a First Class Magistrate under section 209, Criminal Procedure Code, and the District Magistrate has him re-arrested, but on his showing cause why the commitment should not be made, orders his discharge, the Sessions Judge, if he is of opinion that the evidence warrants a commitment, has concurrent jurisdiction, which he can exercise under sections 436 and 437, Criminal Procedure Code.

THE accused was charged with murder under section 302, Indian Penal Code, but was discharged under section 209, Criminal Procedure Code, by the First Class Magistrate of Dhulia.

The District Magistrate of Khandesh on examining the record of the case got the accused re-arrested and called on him to show cause why he should not be committed to the Court of Sessions. On the accused's pleader showing cause the District Magistrate discharged him and directed that he be set at liberty.

The Sessions Judge of Khandesh referred the case to the High Court as he was of opinion that the accused should be committed to the Court of Sessions for trial partly because the Hospital Assistant was not examined by the trying Magistrate as to the *post-mortem* examination and partly because witnesses were not examined to show whether the accused had arsenic with him or whether the deceased was poisoned by some one else.

ORDER.—The Court of Sessions has concurrent jurisdiction, and as that can be exercised under sections 346 and 347 of the Code of Criminal Procedure, there is not sufficient reason for the High Court to be called on to consider questions of fact. The circumstance that the District Magistrate has, after inquiry, refrained from reopening the case is a matter which, along with the other circumstances, may be considered by the Sessions Judge. Following the principle of *Queen-Empress* v. *Chagan* (1) the record is returned to the Sessions Judge for disposal according to law.

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30 January 1896 JARDINE & RANADE, JJ.

Queen-Empress v. Raghappa.†

Murder Cases—Confessions, record of.

In cases of gravity such as murder, and especially as regards records of confessions, the records should be in plain and legible writing.

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*Criminal Ruling 2 of 1896. Criminal Reference No. 173 of 1895.

†*Criminal Ruling* 5 *of* 1896. Criminal Appeal No. 381 of 1895. (1) I. L. R. 14 Bom., 342.

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PER CURIAM.—The Court after consideration of the whole evidence and the full and able judgment and the opinions of the Assessors who concurred with the learned Joint Sessions Judge rejects the appeal of the prisoners. The Court having found difficulty in reading the confessions as recorded by the committing Magistrate, had to read the Canarese record and found the same difficulty. It is, therefore, to be remarked that in a case of such gravity and especially as regards records of confessions, the records should be in plain and legible writing.

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30 January 1896. JARDINE & RANADE JJ.

Queen-Empress v. Khandu Ganu.*

Criminal Procedure Code (Act X of 1882), Secs. 110, 192, 530 (d)—Magistrate—Jurisdiction.

A Magistrate of the First Class having jurisdiction throughout a District, but not specially empowered under section 110 of the Code of Criminal Procedure, cannot exercise jurisdiction in a case arising under that section upon a transfer thereof to him by the District Magistrate under section 192 of the Code.

PER CURIAM.—The question for decision is whether a Magistrate of the First Class having jurisdiction throughout the District of Satara but not specially empowered under section 110 of the Code of Criminal Procedure can exercise jurisdiction in a case arising that under section upon a transfer thereof to him by the District Magistrate under section 192. The answer is to be found in the language of section 110 and section 530 (1). Section 110 gives the jurisdiction to "a Magistrate of the first class specially empowered in this behalf by the Local Government." Section 530 declares that "if any Magistrate, not being empowered by law, in this behalf, demands security for good behaviour, his proceedings shall be void." The power is special; it is derived from the Local Government; it cannot be conferred by the District Magistrate. In a somewhat analogous case under Chapter XII, the High Court at Fort William speak of the power of transfer under section 192 as authorising the transfer of a case to a Magistrate *duly* empowered to deal with it, *Satish* v. *Rajendra* (1). We hold, therefore, that until Mr. Rand has been specially empowered under section 110 the Magistrate of the District cannot transfer the case to him under section 192.

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30 January 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Sheikh Ibraham.†

Criminal Procedure Code (Act X of 1882), Sec. 432—Reference—Question of law.

A reference to the High Court under section 432, Criminal Procedure Code, must be on a question of law, as distinguished from one of fact.

**Criminal Ruling 6 of 1896* .Criminal; Reference No. 4 of 1896. (1) I. L. R., 22 Cal., 901.

†*Criminal Ruling 7 of 1896.* Criminal Reference No. 6 of 1896.

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THIS was a case stated for the opinion of the High Court by the Third Presidency Magistrate, Bombay, who stated, "I have the honor to refer under section 432, Criminal Procedure Code, the accompanying case for the opinion of their Lordships on the question raised therein—whether a charge can be sustained against the accused under section 336 of the Indian Penal Code."

ORDER.—Following Criminal Ruling No. 10 of 23rd February 1891 the reference under section 432 of the Code of Criminal Procedure must in the opinion of the Court be on a question of law, as distinguished from one of fact. The Presidency Magistrate should state a question in that form and not on the whole issue.

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30 January 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Muktabai.*

Criminal Procedure Code (Act X of 1882), Sec. 100—Minor—Custody—Magistrate—Jurisdiction.

The accused were charged with kidnapping a minor boy, under section 363, Indian Penal Code, from the guardianship of a lawfully appointed guardian. The Magistrate discharged the accused under section 253, Criminal Procedure Code, and refused to pass any order under section 100 of the Code regarding the custody of the minor boy. On a reference by the District Magistrate:

Held, that the Magistrate was not bound to issue a search-warrant and pass order under section 100 of the Criminal Procedure Code in the absence of any reason to believe that the minor was wrongly confined. The jurisdiction under section 100 is not as wide as that conferred by section 491 of the Code.

THE accused were charged with kidnapping under section 363 of the Indian Penal Code, a minor from the lawful of guardianship of the complainant, who was appointed a guardian under Act VIII of 1890 by the District Court of Sholapur Bijapar. The First Class Magistrate of Sholapur discharged both the accused under section 253 of the Criminal Procedure Code, but passed no orders regarding the disposal of the minor as he was not produced before the Court in the case. The District Magistrate of Sholapur, being of opinion that a trying Magistrate had powers under section 100, Criminal Procedure Code, to pass orders regarding the proper custody of a minor referred the case to the High Court.

PER CURIAM.—The Magistrate was not bound to issue a search warrant and pass order under section 100 of the Code of Criminal Procedure in the absence of reason to believe that the minor was wrongly confined. The jurisdiction is not as wide as that conferred by section 491. No interference appears necessary.

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*Criminal Ruling 8 of 1896. Criminal Reference No. 5 of 1900.

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6 February 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Magan Kala.*

Bombay Act VI of 1887, Sec. 3—Common gaming house—Evidence.

In the absence of evidence that a house is used for profit or gain, it cannot be held to be a common gaming house as defined in Bombay Act IV of 1887, section 3.

PER CURIAM.—In the absence of evidence that the house was used for profit or gain, the Magistrate ought not to have held that it was a common gaming house as defined in Bombay Act IV of 1887 section 3.

The Court sets aside the conviction and sentence.

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13 February 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Dhondi bin Raoji.†

Accomplice witness—Confirmation—Evidence.

The confirmation usually required of an accomplice witness must be not merely as to the circumstances of the crime but as to the identity of each person accused of taking a part.

ORDER.—None of the grounds urged would move the Court to admit this appeal. But the Court notices that in his charge to the jury the Sessions Judge did not point out that the confirmation usually required of an accomplice witness must be not merely as to the circumstances of the crime but as to the identity of each person accused of taking apart. The Court admits the appeal.

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24 February 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Genu Gopal.††

Criminal Procedure Code (Act X of 1882), Sec., 296—Evidence Act (I of 1872), sec. 114—Accomplice witnesses—Corroboration—Practice.

In a trial by Jury, the Judge ought, in his charge, to direct them that the corroboration of an accomplice or accomplices ought to be that which is derived from unimpeachable or independent evidence, as distinguished from that derived from the earlier statements of the same accomplice or the statements of other accomplices; and to point out the danger of convicting any one of several prisoners charged at the trial, about whose *identity*, as one of the persons committing the crime, the accomplice testimony is not corroborated. The accomplice often knows all the circumstances, and may speak truly about them, and yet may put some innocent man in his own place or that of some other guilty person.

PER CURIAM.—The appeals of the prisoners 9 to 12 and 14 were admitted in order to see whether the Sessions Judge had given sufficient directions to the Jury to guide them in their estimation of the testimony of the two dacoits who were examined as witnesses after they had accepted a tender of pardon made under the Code of Criminal Procedure. The cases against these appellants differ from those against the other prisoners

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**Criminal Ruling* 9 *of* 1896. Criminal application for Revision No. 374 of 1895.

†Criminal Appeal No. 39 of 1896.

††*Criminal Ruling* 10 *of* 1896. Criminal Appeals Nos. 388, 389, 390 of 1895.

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jointly tried. These appellants have never confessed; and no stolen property was found with them. We think the Judge ought to have been clearer in directing the Jury that the corroboration of the accomplice or accomplices ought to be that which is derived from unimpeachable or independent evidence, as distinguished from that derived from the earlier statements of the same accomplice or the statements of another accomplice witness: *Regina* v. *Mallappa* (1), *Regina* v. *Budhu* (2), otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons.

Again the learned Judge was not explicit in pointing out the danger of convicting every one of the prisoners about whose identity as one of the persons committing the crime the accomplice testimony was not corroborated: *Regina* v. *Budhu* (2). This danger is much discussed by Sir *Barnes Peacock* C. J. in *Queen* v. *Elahai Bux* (3) where *Regina* v. *Stubbs* (4) is followed: as nothing is more easy than for an accomplice to accuse an innocent person in order to get off his real companion in guilt and to attribute to the person falsely accused acts which were really convicted by the guilty companion. *Regina* v. *Stubbs* was also followed here by *Couch*, C. J. in *Regina* v. *Imam* (5) where the learned Judge says "This may now be taken to be the established practice in England and it would certainly be unsafe to depart from it in India." It has very often been pointed out that the accomplice knows all the circumstances: he may tell the truth about them and be amply corroborated; but at the same time he may have his own nefarious reasons for naming an innocent person as one of the criminals present. The reason may be malice or a desire to save some guilty relation.

The next question is whether if the directions in the charge had been fuller the jury would have acquitted any of these appellants. It is difficult to say this would have been the result. For the jury were fully aware from the charge that accomplices ought not to be believed unless corroborated by better evidence than themselves. It was pointed out that one witness on the spot had sworn to the identity of prisoner 9. The small corroborations as regards each of the other appellants were also pointed out. The jury thus knowing well that they had to be cautious in weighing the evidence brought in a unanimous verdict of guilty. These appellants were defended by pleaders who had full opportunity and right to urge upon the Jury all such arguments for caution as are found in the well known cases in which Sir *Barnes Peacock* and Sir *Richard Couch* have set the reasons forth. There is thus no sufficient reason for this Court to interfere. It therefore dismisses all these appeals.

(1) 11 Bom., H. C. R., 196. (2) I. L. R., 1 Bom., 475. (3) B. L. R., Sup., Vol. 465 s. c. 5, W. R., 80. (4) Dears C. C., 555; s. c., 25 L. J. M. C., 16. (5) 3 Bom., H. C., 57.

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27 February 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Mahadu Vithoba.*

Criminal Procedure Code (Act X of 1882), Sec. 208—Committing Magistrate—Confession—Evidence record of.

As *all* the evidence, and not merely a part, should be ready at the trial, it is the duty of a committing Magistrate to make full and careful inquiry into the alleged offence, and to record the testimony of witnesses. He ought to do this even when the confession of the accused has been recorded, as there are many cases to show that confessions are often retracted at the trial.

PER CURIAM.—The reference made by the Sessions Judge suggests that some evidence was produced by the prosecution which the Magistrate in contravention of section 208 of the Code of Criminal Procedure declined to take. But there is nothing in the reference or the record making it clear that there was any such tender and refusal. Thus section 215 does not empower to quash the committal.

It was, however, plainly the duty of the Magistrate to make full and careful enquiry into the alleged rape and murder. It has never yet been held that a Magistrate may decline to make such an enquiry merely because the accused has confessed and the confession has been recorded. There are many cases which show that confessions are often retracted: and it is obvious that *all* the evidence available should be ready at the trial, not merely a part. We, therefore, direct the Magistrate to act under section 219 of the Code of Criminal Procedure: by taking full examinations of persons acquainted with the facts. The accused should be present.

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27 February 1896. JARDINE & RANADE JJ.

Queen-Empress v. Ganu bin Mathaji.†

Criminal Procedure Code (Act X of 1882), Section 298—Evidence Act (I of 1872), Section 24—Confessions—Sessions Judge—Jury.

In trial by jury, it is the duty of the Sessions Judge to determine whether confessions retracted at the trial are admissible. If he finds them to be irrelevant under Section 24 of the Indian Evidence Act, he should so direct the Jury. If there is no evidence on the record showing that they are invalid by reason of any improper inducement or threat, they should go to the jury with a direction that in the absence of evidence it is not to be presumed that they are inadmissible.

PER CURIAM.—It was the duty of the Sessions Judge to determine whether the retracted confessions were admissible: *Imperatrix* v. *Ballapa* (1). If he found them to be irrelevant under section 24 of the Indian Evidence Act he should have so directed the Jury: *see Moore's case* (2). There appears to be no evidence on the record showing that the confessions made to the European Magistrate on the 28th August and 16th September

*Criminal Ruling 11 of 1896. Criminal Reference No. 24 of 1896.
†Criminal Ruling 12 of 1896. Criminal Appeal No. 402 of 1895.
(1) Cr. R., 58 of 1894. (2) Denison's C. C., 526.

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were invalid by reason of any improper inducement. We think, therefore, they should have gone to the Jury with a direction that in the absence of evidence it is not to be presumed that they are inadmissible: *Regina* v. *Balvant* (3) approved of in *Queen Empress* v. *Gharya* (4).

The Sessions Judge among other observations said—"The mere fact of the withdrawal suggests that it (the confession) was obtained in an improper manner:" We do not think this remark was made as a direction of law, as it is contrary to the above rulings. We take it to be an expression of the learned Judge's opinion on the value of a retracted confession as a matter of prudence and although we do not concur in so broad a statement about retracted confessions and will lay down no binding rule, we cannot say that a Judge has not a right to state to the Jury his views on such a matter provided he states them as such matter of fact and not as direction of law. The Judge went on to leave the confessions to the Jury to be treated from the point of view of prudence by them under the light of their own experience as the Judges of the facts. On examining the whole charge we cannot hold that there was misdirection. We, therefore, dismiss the appeal.

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27 February 1896. JARDINE & RANADE JJ.

Queen-Empress v. Bayaji Laxman.*

Criminal Procedure Code (Act X of 1882). Secs. 174, 435—Inquest proceedings—Revision—High Court.

It is not open to the High Court to revise under section 435, Criminal Procedure Code, the inquest proceedings held by a Magistrate under section 174 of the Code. *In re Troylokyanath Biswas* (1), followed.

PER CURIAM.—The Jury were made aware of the fact that the Chambhar boys Kondia and Krishna had materially altered their statements. The Jury must also have noticed the demeanour of the two eye-witnesses the Kunbi children Ganpat and Balya as also of the witnesses Laxman and Yesu. The fact that the name of the murderer was not in the Patel's report was also before the Jury. The reason why the Patel held no inquest on the day of the murder the 6th November appears to have been that he was engaged on enquiries and in finding out where the prisoner was as Laxman had informed against the prisoner it is not explained why after the Patel had arrested him the Head Constable should have at once released him, nor why he should have been at large until the arrest made on the 9th November. As to the report of the Chief Constable's investigation under section 174 of the Code of Criminal Procedure, it does not appear that the law requires a statement to be

(3) 11 Bom., H. C., 137. (4) I. L. R., 19 Bom., 728.

(1) I. L. R., 3 Cal., 742. *Confirmation case No. 1 of 1896.

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entered as to who killed the person killed. If Government or the superior officer has not required *such* a statement to be entered, there is no reason why the Court should comment. We do not know whether a Magistrate was informed under section 174: but his inquest is not a matter open to the revision of the High Court under section 435: *In re Troylokyanath Biswas* (2). The whole evidence has been clearly laid before the Jury.

The Court confirms the conviction and sentence.

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5 March 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Shidlingappa.*

Penal Code (Act XLV of 1860), Sec. 114,—Abetment—Oath—Accomplice, deposition of—Magistrate.

Mere presence at the commission of an offence is not abetment of it, if the person present has no authority to interfere.

When a Police Constable makes an arrest in a village, the Code of Criminal Procedure applies to it, and the responsibility is of the Constable and not of the Police Patel who has no power to interfere.

A Magistrate should not put persons on oath unless he is satisfied of his authority so to do, for it may be an oppression.

A conviction based on the totally uncorroborated story of an accomplice is bad in law.

Where a person makes one statement when questioned on oath before a process to compel, his appearance is issued, and makes a different statement in his defence when put at the trial he cannot on this fact alone be convicted under sections 114 and 161 of the Indian Penal Code. The burden of proof in such a case lies on the prosecution and the proper material for judgment is the testimony as to what specific acts the accused did and what particular words he used.

THIS was a reference made by the Sessions Judge of Dharwar under the provisions of section 438, Criminal Procedure Code. The accused Shidlingappa, a Police Patel of the village of Kummur, was convicted by the First Class Magistrate of Dharwar of abetment of offences under section 342 and 161, Penal Code, wrongful confinement and bribery, and was sentenced to pay a fine of Rs. 25 on each charge. The principal in this case was a Police Naik by name Balaji who was sentenced to imprisonment for three months for each offence, but the sentences were reversed on appeal by the Sessions Judge of Dharwar. The Sessions Judge was of opinion that both the Naik and the Police Patel were wrongly convicted, and he summarized the reasons as follows: (1) The charge of wrongful confinement was held proved against both Patel and Naik not on the evidence tendered for the prosecution, but on a statement of the Police Patel which was not only inadmissible as against the Naik, but in itself was a complete denial of the truth of that charge; (2) The charge of bribery was held proved against the Naik on the uncorroborated statement of an accomplice. (3) The evidence for the pro-

(2) I. L. R., 3 Cal., 742. **Criminal Ruling* 13 *of* 1896. Criminal Reference No. 10 of 1896.

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secution, which the Magistrate hardly considered at all, is full of improbabilities, contradictions and inconsistencies. (4) The evidence for the defence was entirely ignored by the Magistrate on the ground that it did not agree with the Patel's statement above alluded to. (6) The Magistrate's proceedings in the initiation of the prosecution were *ultra vires* and irregular.

Upon these considerations, the Sessions Judge was led to believe in the innocence of the accused and consequently he made this reference, observing.—"To a Police Patel a conviction of abetment of offences punishable under sections 342 and 161 means of course ruin for life, as proceedings are certain to be taken for his dismissal from office and on this ground chiefly I would ask their Lordships, in the event of their agreeing with my view of the case to set aside the convictions and order a refund of the fine paid by the Patel."

JARDINE, J.—This Court has in Criminal Rulings 42, 44 and 45 of 1895 pointed out the need of careful enquiry into complaints against village officers. They are exposed to the danger of false charges being made against them; and it is of great importance that Magistrates use the Procedure intended to secure fair trial. The Magistrate's finding is defective on matters of fact because he did not comply with section 367 of the Code, which required him to state the points for decision, as was pointed out in *Re Shivappa* (1). There is no finding as to what the abetment of wrongful confinement for which the Patel has been convicted consisted in. The Magistrate has not found that any complaint was made to the Patel. One complainant accuses the Head Constable only of putting him in arrest. The other first said that this Constable and the Patel both did it; but in cross-examination he exonerated the Patel. He is contradicted by Ninga who called him to the Chowki. There is no evidence that the Patel joined in the arrest; and in fact all the evidence for the prosecution which the Magistrate believed shows that the enquiry, arrest and confinement were acts of the Constable. The Magistrate was therefore bound to frame an issue to be determined on such well-known laws as the Code of Criminal Procedure, the Village Police Act, and the District Police Act, whether the Patel had any power to terminate the confinement. The Magistrate has not alluded to these laws. He seems to have held that the Patel had some such power to interfere with the Head Constable and that his presence without interference was an illegal omission. This is not the law. After the Constable had made an arrest the Code of Criminal Procedure applied and the responsibility was his. There is nothing to show that the Patel advised that the complainants should be kept in custody, and that the constable

(1) I. L. R., 15 Bom., 11.

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should not report the arrest. The Magistrate also failed to frame an issue whether there was any reasonable cause for the arrest. The reasons which we have given require us to set aside the conviction under sections 342 and 114 of the Indian Penal Code. The Magistrate has also convicted the Patel of abetment of the Constable in accepting Rs. 6 as a bribe to release the complainants. The learned Judge is right in objecting to the Patel being convicted on the uncorroborated testimony of the accomplice who says he volunteered and paid this bribe. The accomplice only incriminate the Patel by putting words into his mouth, a kind of evidence that can be falsely given at any time. On this point also the accomplice is discrepant. He is contradicted by the two complainants on the important question whether as was natural he informed them next day of this bribe on their account. They say he did not. The Magistrate has thus convicted not merely on a totally uncorroborated story of an accomplice but on one which is contradicted by the two complainants. The official has thus been deprived of a protection of the highest importance to officials, viz., of the rule about accomplices. We draw attention to the Courts rulings in *Queen-Empress* v. *Maganlal* (2) *Queen-Empress* v. *Chagan* (3) and *Queen-Empress* v. *Karigawda* (4). The delay of eight days in making any complaint and then sending the complaint in a letter through the Post were circumstances which made the Magistrate distrust the story. He ought therefore to have done what section 202 requires, to have examined the complainants if he thought it was right to take any notice and to have postponed any process against the Constable and Patel. Instead of doing this he sent for and examined the Constable and Patel. He even put them on oath. Whether they were then accused persons who must not at all be examined on oath as is said in section 342 of the Code of Criminal Procedure, and in section 6 of Act X of 1873, is a matter we need not decide without argument: see *Queen-Empress* v. *Mona Puna* (5). But the procedure used is contrary to the spirit of the law. A Magistrate should not put persons on oath unless he is satisfied of his authority so to do, for it may be an oppression: *Oath ex-officio case* (6); *In re Ganesh Sathe* (7). As the learned Judge points out and the Magistrate's judgment shews, the conviction is based chiefly on the fact that what the Patel said when thus questioned on oath was different to the defence made at the trial, where as the burden of proof lay on the prosecution and the proper materials for judgment was the testimony as to what specific acts the Patel did and what particular words he said. For these reasons the conviction under sections 114 and 161 of the Indian Penal Code must be set aside.

(2) I. L. R., 14 Bom., 115. (3) I. L. R., 14 Bom., 331. (4) I. L. R., 19 Bom., 51.
(5) I. L. R., 16 Bom., 668. (6) 6 Coke R., 227. (7) I. L. R., 13 Bom., 621.

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RANADE, J.—I agree in thinking that the conviction of the Patel on the double charges must be set aside. It is not clear whether sanction had been asked for before he was placed on trial. The charge under section 161 rests solely on the evidence of the person who profess to have paid the bribe. None of the independent witnesses know anything about it and the complainant and his cousin also deny all knowledge. Even Timangawda who offered the bribe says he gave it to the Naik out side the chowki, while the Patel sat in the chawdi. Tamangawda himself by his own accord is the principal offender and his evidence is worthless, and should not have been believed. The Magistrate's view that he would have disbelieved the evidence if it had been corroborated is plainly not in accordance with the rulings of this Court. As regards the other charge also the complainant's story is that he and his cousin were detained 24 hours. They made no complaint for nine days and even then sent the complaint by post. They were not formally examined on oath till many days after the Patel had been examined on oath, and this deposition on oath was used and relied upon as the principal evidence against the Patel to discredit his denial of the charge. The whole of this proceeding was very irregular. The evidence such as it is on this charge also assigns to the Patel a very subordinate position. He was either silent or did not resist. The complainant admittedly went to their homes for meal. The evidence shows that there has been much exaggeration throughout. The Police evidence for the defence should not have been so summarily disposed of. For the reasons stated by the Sessions Judge, I would set aside the conviction on both charges.

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15 March 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Mhatarji Darku.*

Criminal Procedure Code (Act X of 1882), Sec. 259—Magistrate—Charge—Discharge.

Where in a warrant case, the Magistrate believes the evidence, it is his duty, on arrival at the stage to which section 254 of the Criminal Procedure Code applies, to frame a charge, it is not competent to him to discharge the accused under section 259 merely on the ground that the complainant did not appear on the day fixed.

THE complainant preferred a complaint under section 504, Indian Penal Code, to the Third Class Magistrate of Kopargaon. The Magistrate fixed the 19th November 1895 for the hearing of the case. The evidence for the prosecution was all taken on that day including that of the complainant. The Magistrate wished to examine some witnesses on behalf of Government before framing a charge and 30th November 1895 was appointed for the next hearing. The summons not having been served on the

*Criminal Ruling 14 of 1896.

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persons, fresh summons were issued for the attendance of the witnesses on the 9th December 1895. On that date the accused, who were on bail did not appear before the Court in time and warrants were therefore prepared against them. In the meanwhile, they appeared at 2 P.M., on the same day and the proceedings were adjourned to the 14th idem, of which date the parties were informed by the Court. The complainant failed to appear before the Court on the 14th and the Magistrate discharged the accused under section 259, Criminal Procedure Code.

The District Magistrate of Ahmednagar referred the case to the High Court observing:—"In my opinion the discharge was improper as the complainant had given all his evidence and there was no necessity of his being present at a later stage of the case unless specially ordered. Though the case is one which can lawfully be compounded and no charge was framed against the accused, I do not think the Magistrate acted rightly in discharging the accused. It appears to me that the words "any day fixed for the hearing of the case" in Criminal Procedure Code, section 259, can only apply to the day fixed for the proceedings to begin, so that complainant's evidence may be taken. There would apparently be no meaning in forcing a complainant to keep on attending Court day after day, through all the stages of the case, though he had given his evidence and was no longer required for any purpose."

PER CURIAM.—The case differs from Criminal Ruling No. 54 of 1890, because there a charge had been and here none had been framed. We think that, if the Magistrate believed the evidence, it was his duty on arrival at the stage to which section 254 of the Code of Criminal Procedure applies to have framed a charge and not to have discharged under section 259. There is nothing to show whether he believed it or not. Even if he used his discretion wrongly we do not think it desirable to revive the prosecution on the trivial charge at this distance of time.

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12 March 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Dhondi bin Raoji.*

Criminal Procedure Code (Act X of 1882), Sec. 297—Evidence Act (I of 1872), Sec. 114, Ill. (b)—Evidence—Accomplice—Corroboration—Jury—Sessions Judge.

In a trial by Jury, the Sessions Judge should in his direction add to what section 114, Illustration B, of the Indian Evidence Act says of an accomplice, the direction about corroboration, as to each prisoner, as laid down long ago in *Reg.* v. *Imam* (1).

PER CURIAM:—We are of opinion that in the case of this prisoner the Sessions Judge should have added, to what section 114, Illustration B, of the Indian Evidence Act says of an accomplice the direction about

(1) 3 Bom., H. C., 57. *Criminal Ruling 15 of 1896. Criminal Appeal No. 39 of 1896.

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corroboration as to each prisoner, for this was laid down as long ago as *Regina* v. *Imam* (2). We think that the witness Krishna's uncorroborated story about the receipt of the Kargota from the prisoner required further observations from the Sessions Judge; and the Jury should have been asked to notice that a person who keeps property proved to be stolen is under a temptation to charge some one else as an earlier guilty receiver.

We think also that the general remarks on the accused at the end of the charge might influence the Jury to mistake the facts and suppose that this prisoner had claimed some of the stolen property and had held possession of golden ornaments stolen, which was not the case. Being of opinion that the prisoner has been prejudiced by the omissions in the charge, the Court reverses the conviction and sentence and acquits the prisoner and on consideration of the evidence refrains from directing a new trial.

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12 March 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Ramji Bapuji.*

Criminal Procedure Code (Act X of 1882), Sec. 185—District Magistrate—Transfer of Case—Cantonement Magistrate—Jurisdiction.

Where a District Magistrate made a reference to the High Court for the transfer of a case before a Cantonement Magistrate in which the accused were alleged to have committed an offence under section 498, Indian Penal Code, to another District in which the offence was alleged to have occurred, the High Court declined to pass any order holding that if the facts relevant to section 498 occurred in the other District and if the Cantonement Magistrate was empowered under section 186, Criminal Procedure Code, he could deal with the matter under that section; and if he was not so empowered and he found that he was without jurisdiction under Chapter XV, he could decline to exercise jurisdiction; and also that the District Magistrate could himself make the enquiry requisite under section 528 and could transfer the case to his Court under section 528, the Cantonement Magistrate being expressly made subordinate to him by Act XIII of 1889, section 7.

PER CURIAM.—If the facts relevant to section 498 of the Indian Penal Code occurred in the District of Poona and if the Cantonement Magistrate is empowered under section 186 of the Code of Criminal Procedure he can deal with the matter under that section. If he is not so empowered and he finds that he is without jurisdiction under Chapter XV he can decline to exercise jurisdiction. We are also of opinion that the District Magistrate can himself make the enquiry requisite under section 186 and may transfer the case to his Court under section 528 as the Cantonement Magistrate is expressly made subordinate to him by Act XIII of 1889, section 7, and the reasons of the decision in *Queen-Empress* v. *Porya Gopal* (1) apply. The Court, therefore, returns the record to the District Magistrate.

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(2) 3 Bom. H. C., 57. **Criminal Ruling* 16 *of* 1896. Criminal Reference No. 29 of 1896.

(1) I. L. R., 9 Bom., 100.

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16 March 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Fakira bin Venkappa.*

Sessions Judge—Jury—Important testimonies to be read over to the Jury—Practice.

Where a trial by Jury is a long one the Sessions Judge ought in his charge read over to the Jury the important testimonies in the trial.

PER CURIAM.—The convictions followed the verdicts of an unanimous Jury and section 418 of the Code of Criminal Procedure applies. The appeals averred misdirections and omissions: and the remarks made by the Sessions Judge in his charge as to certain important witnesses are not fully recorded. He made comments, but we do not know what these comments were; whether or not he told the Jury that witnesses 17 and 18 deposed merely to statements put into the mouths of prisoners, each witness being uncorroborated whether he pointed out that witness 14 was not seen by the other witnesses relied on by the prosecution or that the evidence did not shew what has become of the pistol or gun. All this ought to have been pointed out and the heads of charge should have shewn that it had been: *Queen* v. *Kassim* (1). The trial was a long one and the record should have shewn that the more important testimonies were read over *in extenso*: *Regina* v. *Fattechand* (2). As we could not be certain whether the case had been laid before the Jury in the charge as the law requires, we have heard the appeal as if from a Judge with assessors. We are now of opinion that the Jury must have had the facts properly before them. Various pleaders appeared for the different prisoners. The charge deals specifically with the evidence of each important witness and as regards each prisoner.

The Court now dismisses the appeals.

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26 March 1896 JARDINE & RANADE, JJ.

Queen-Empress v. Purshotam Vanamali.†

Penal Code (Act XLV of 1860), Secs. 186, 189, 506—Custody, rescue from—Criminal Intimidation.

A Constable was sent to fetch to a Police Inspector some persons from whom the latter wished to make inquiries regarding an offence. The order to attend was evidently not in writing. While the Constable was, accordingly, taking two persons with him, the accused came up and threatened them both and the Constable with the Head Constable's vengeance, and as a consequence, the two persons refused to accompany the Constable who had to go without them. The Magistrate, on these facts, convicted the accused of offences under sections 186 and 189, Indian Penal Code:—

Held, that as an order under Section 160, Criminal Procedure Code, must be in writing, and a person summoned under such order cannot be forcibly compelled by the person serving the order to attend, the presence of the Constable with the two persons (who were not under

*Criminal Appeal Nos. 28 and 30 of 1896. (1) 23 W. R., 32. (2) 5 B H. C. R, 93.

†*Criminal Ruling* 18 *of* 1896. Criminal Applications for Revision No. 32 of 1896.

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duress) was an ordinary circumstance and not a discharge of duty, and that, therefore, the accused was not guilty of an offence under section 186:

(2) that the act of the accused properly fell within the terms of section 506, Indian Penal Code.

PER CURIAM.—The prisoner Purshotam has been convicted under sections 186 and 189 of the Indian Penal Code. A question may be raised whether in section 186 the word 'obstructs' applies to mere words used in a threatening manner: see *Regina* v. *Posten* (1), *Regina* v. *Bhagtidas* (2), *Regina* v. *Connon* (3), *Queen-Empress* v. *Thimmachi* (4), and *Queen-Empress* v. *Sommanna* (5). Mr. Inverarity, however, urged that the condition in section 186 that the public servant obstructed "in the discharge of his public functions" is not found here. The facts found are that the Constable had been sent to fetch to the Police Inspector, some persons from whom the latter wished to make inquiries. There is no evidence that the order to attend was in writing. The Courts below think the Constable was bound to fetch them under section 51 of the Bombay Police Act, 1890. We point out that the Constable is thereby bound to obey *lawful* orders only. If the Police Inspector were engaged in an investigation under Chapter XIV of the Code of Criminal Procedure, he could require the attendence of persons within certain limits who are acquainted with the matter. But under section 160 this must be done by written order; and it is left to the person summoned to obey, and neither the Inspector nor his subordinate may compel that person by force, any more than a bailiff can compel a man summoned on a Jury. This has long been settled law: *Queen* v. *Beharising* (6). If then by the word "fetch" or "take" is meant "compel to go" to the Police Inspector, the Court below should have pointed out that the fetching or taking was irregular and might be an oppression. But it is not found that the witnesses were under duress; and therefore we need not consider whether section 186 would apply to a rescue from illegal custody. It does not appear either that the Constable was acting as a pedagogue to show them the road; and we therefore treat his presence as an ordinary circumstance and not a discharge of duty; and hold that the proper section of the Penal Code is section 506 which punishes criminal intimidation. This Court, therefore, changes the conviction under section 186 to section 506. There appears to be no reason for interfering with the conviction under section 189. The Court sees no reason to interfere with the sentences. The defence being *alibi* and simple denial, the prisoner made no attempt to extenuate the quality of his acts. On the facts found we must hold him to be a volunteer in the cause of injustice and oppression who menaced the Constable and the witnesses with

(1) 2 Bom. H. C., 184. (2) 5 Bom. H. C., 51. (3) 6 Bom. H. C., 27. (4) I. L. R., 15 Mad., 93 (5) I. L. R., 15 Mad., 221. (6) 7 W. R., 5.

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future ruin, which he threatened would be accomplished by future corrupt and oppressive behaviour of the Chief Constable under whose jurisdiction they were.

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9 April 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Bali Kom Nagappa.*

Penal Code (Act XLV of 1860), Sec. 71—Two deaths—One Act—Offence.

Where a person causes the death of two children by a rash and negligent act committed at the same time and place, he can be convicted for the offence as one act, under section 71, Indian Penal Code.

IN this case, the accused caused the death of her two children by a rash or negligent act committed at the same time and place. She was, thereupon, tried by a Sessions Judge, who convicted and sentenced her under section 304 A of the Indian Penal Code to eighteen months' rigorous imprisonment in respect of the death of each child. The accused preferred an appeal to the High Court.

ORDER.—The Court thinks that section 71 of the Indian Penal Code applies (*Reg.* v. *Dod Basaya* and another (1), *Reg.* v. *Dina Sheikh* (2), *Reg.* v. *Trueman* (3) and *Reg.* v. *Dairs* (4)) and therefore reduces the term of sentence to two years and also changes it to simple imprisonment.

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9 April 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Abdurrahman Said.†

Murder—Conviction—Sentence.

The sentence consequent upon a conviction for murder must be death. If there exist any grounds for mercy, that circumstance will have to be considered by the Crown or its executive minister: and all that a Court of justice can do is to submit a recommendation after passing the sentence of the law.

PER CURIAM:—The prisoner was charged with culpable homicide amounting to murder, and to this charge he pleaded guilty. The Consular Court for the District of Uganda convicted him for that he did wilfully kill, and sentenced him to be imprisoned and kept to the usual local prison labour for fourteen years. The assessors signed the proceedings and did not dissent. The Consular Court took evidence and gave the prisoner opportunity of explaining his conduct. From the minutes of evidence and the judgment recorded by Mr. Berkeley, Her Majesty's Commissioner and Consul General, it appears that the prisoner was a private in the Soudanese troops; and he was on duty at the time preserving order in the Market place at Port Victoria. The deceased man expressed his discontent at the small price given him by a purchaser of some grass he brought to sell.

**Criminal Ruling* 96 *of* 1896. Criminal Appeal No. 19 of 1896. (1) 11 Bom. H. C., B. (2) 3 Beng. L. R., 15. (3) 8 C. & P., 727. (4) 3 F. & F., 19. †Criminal Reference No. 36 of 1896.

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Whereupon the prisoner pushed him, and he hit the prisoner once with his hand and then once with a stick. Then as an eyewitness deposes and as the prisoner confesses, the prisoner loaded his rifle with a cartridge and shot the man dead. The African Order in Council of 1889 makes provision of punishment as follows:—"Art 65. Every Court and authority in imposing and inflicting punishments shall have regard, so far as circumstances admit and subject to the other provisions of this order, to the punishments imposed by the law of England in like cases, and to the mode in which the same are inflicted in England." Among the crimes punishable under Art, 45 are "any acts or omissisons which are for the time being punishable in England, on indictment, with death, penal servitude or imprisonment as treasons, felonies, or misdemeanours." There is no law or order or Regulation known to us which takes the present matter out of judicial disposal according to the law of England so far as circumstances permit. It would appear therefore that on a conviction for murder the sentence must be death; and that any grounds for mercy would have to be considered by the Crown or its executive Minister, and not by the Court of justice, except by submitting a recommendation after passing the sentence of the law. The Court found an extenuating circumstance in the former lawlessness of the country. It also notices the facts of the provocation. The presumption being that the act of the Court was right and proper, we have to determine whether by using the words "wilfully kill" in the order of conviction, it meant to find the offence of murder, or only that form of manslaughter which in India is punishable under section 304 of the Indian Penal Code as culpable homicide not amounting to murder, but with an intent to kill, and to pass a sentence similar to what may be passed in England under 24 & 25 Vict, c. 100, s. 5, which allows penal servitude for life or for any term not less than three years, a minimum extended to five years by the 27 & 28 Vict; c., 47—see 1 Russell on Crimes. The Judgment does not call the crime murder, but records that it is "very serious;" it treats it as a very serious wilful killing; but allows for the provocation and lawless bringing up of the prisoner. These are all matters which would go to a jury in dealing with the question whether the crime was manslaughter or murder. By the law of England an assault and battery of such a nature as to inflict actual bodily harm or great insult is a provocation to the person assaulted; and the fact that the killing occurred at once would be pleaded as some evidence that the slayer had lost his power of self-control through the provocation. It may be that the Consular Judge and the assessors took a somewhat lenient view of the case influenced by such considerations, and meant to convict of manslaughter; and this

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would account for the sentence not being the sentence of death. The sentence being a proper one, if the extenuating circumstances are treated as proved, the Court under Art. 75 of the Order returns the minutes with these observations to H. M's. Commissioner and Counsul General.

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16 April 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Chanbasapa Madiapa.*

Criminal Procedure Code (Act X of 1882), Sec. 258—Magistrate—Warrant Case—Charge framing of—Sessions Court, Magistrate must treat with respect—Inspection of the place of offence.

Although a Magistrate has, in a warrant case, thought fit to frame a charge, he is not required to convict the accused person merely because the latter does not produce any rebutting evidence. He is bound to acquit if, at the time of giving judgment, he has reasonable doubt of the guilt of the accused.

The Magistrate, being subordinate to the Court of Session, must treat its judgments with respect, and be guided by them, on such matters of procedure as arise on section 257 of the Code of Criminal Procedure, or as relate to the acts of the Magistrate himself.

There is no objection to a Judge or Magistrate inspecting the place of an offence; but it is usually desirable that both the parties or their pleaders should have opportunity to be present, to draw his attention to facts if they choose, and thus prevent him drawing wrong inferences.

PER CURIAM :—We are of opinion that although a Magistrate has in a warrant case thought fit to frame a charge he is not required to convict the accused person merely because the latter does not produce any rebutting evidence. He is bound to acquit if at the time of giving judgment he has reasonable doubt of the guilt of the accused. Mr. Anderson gives several weighty reasons for his doubt, and it would be wrong to revive the charge of theft by an order in revision, especially as the Governor in Council has not appealed from the acquittal.

The Magistrate being subordinate to the Court of Session must treat its judgments with respect and be guided by them, on such matters of procedure as arise on section 257 of the Code of Criminal Procedure or as relate to the acts of the Magistrate himself. There is no objection to a Judge or Magistrate inspecting the place of an offence; but it is usually desirable that the parties or their pleaders should have opportunity to be present, to draw his attention to facts if they choose and thus prevent him drawing wrong inferences. It is unnecessary to define the limits of this judicial action : there are cases in the reports, some of which are collected under section 121 in Field's Law of Evidence. As regards dispensing with the services of the Police, this Court has several times said that the public order is best preserved by each public officer doing such things as pertain to his duty, not by doing such things as pertain to somebody else's duty. *Queen* v. *Ragho* (1), is an instance where this

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Criminal Ruling 20 of 1896. Criminal Reference No. 39 of 1896. (1) I. L. R., 19 Bom., 612.

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Court insisted that police officers must do those things in aid of the public order which the law requires that class of public servants to do. See also *Queen* v. *Ganesh* (2).

We avoid all but general remarks as the appeal is pending before the Sessions Judge and it is his duty to apply the law to the facts he finds. The record must be returned to him for disposal of the appeal.

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28 May 1896. STRACHEY & FULTON, JJ.

Queen-Empress v. Lakshmya bin Bhima.*

Confession—Custody of Police—Evidence Act (I of 1872), Sec. 26—Police Officer and Magistrate.

When a prisoner in Police custody is brought before a Magistrate, for the purpose of having his confession recorded, he does not cease to be in the custody of the Police, even though no Police Officer is in the room while the confession is being recorded.

The words "Police officer and Magistrate" in section 26, Evidence Act, 1872, include also Police officers and Magistrates in Native States.

PER CURIAM:—IN this case 15 persons were originally tried for a dacoity committed at Kalakop in the Belgaum District on the 21 August 1895. Eleven were convicted and appealed to the Court; but their appeals were rejected by a Division Bench (*Jardine* and *Ranade*, JJ.), which recorded the following judgment:—

"We reject the appeals of the prisoners, which raise no question to which section 418 of the Code of Criminal Procedure applies. The trial was by jury. Some of the evidence admitted consisted of confessional statements made by the prisoners to an officer of the independent State of Sangli (*Ramchandra* v. *Dada Mahado* (1)). The question arises whether such an officer is what is meant by the word "Magistrate" in section 26 of the Indian Evidence Act. If not, and if the prisoners were then in the custody of a police officer, the further question arises whether the statements were admissible as evidence. The Court therefore calls for the case in revision and gives notice to the District Magistrate."

Under these circumstances the case has now come before us for revision, and we have had the advantage of hearing Mr. *Branson* and Mr. *Bhatwadekar* for some of the prisoners and the Government Pleader for the Crown. The confessions of prisoners Nos 1-2-3 and 11 were made in the presence of a Magistrate of the Sangli State at Shahpur. The confession of No. 8 was made in the presence of a Magistrate of the Kurundwad State at Yellur. The question now to be determined is whether these confessions should have been received in evidence. The objections taken to them are—(1) That the accused, when they were made, were in the custody of the police. (2) That the

*Criminal Ruling 22 of 1896. Criminal Review No. 55 of 1896. (2) I. L. R., 14 Bom., 511.

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officials in whose presence they were made were not Magistrates within meaning of Section 26 of the Evidence Act. (3) That the fact of the accused persons making the confessions as recorded was not proved, for the Magistrates who were examined as witnesses to prove the confessions do not know Canarese, in which language the statements were made and the interpreters were not called as witnesses. In regard to objections (1) and (2) it is unnecessary in this case to say more than that we think the words "Police Officer and Magistrate" in section 26 of the Evidence Act include Police Officers and Magistrates in Native States. The question is fully discussed in our judgment in *Imp.* v. *Nagla Kalu* (2), a copy of which will be sent to the Sessions Judge for information. From the remarks made by the Sessions Judge in the summing up to the jury we notice that he admitted these confessions, because he held that owing to the absence of the Police Officers at the time they were made the accused were not in the custody of the Police. The evidence, however, shows that the accused had been in the custody of the Police who remained outside the room while the confessions were being recorded; and under these circumstances we think the Police custody continued. The mere temporary absence of a policeman from the room does not terminate his custody of the accused if he has taken effective steps to prevent his escape whether by locking the door of the room or by waiting outside, as in the present case, ready to capture him if he attempt to run away: see *Empress* v. *Lester* (3). The third objection is more serious. The Sangli and Kurundwad Magistrates, who took down in Marathi the confessions which were made in Canarese, both say that they do not know Canarese. The Sangli Magistrate employed a peon as interpreter: the Kurundwad Magistrate a vakil. The confessions were not proved by putting in the record taken down by the Magistrate as in the case of *Queen-Empress* v. *Sundar Singh*, (4) but the Magistrates were called as witnesses and refreshing their memories with the records deposed to what the accused persons had said. Under these circumstances it is clear that the evidence of the Magistrates was mere hearsay. They stated not what they themselves had heard, but what the interpreters had communicated to them as the statements of the accused. They doubtless heard the interpreters translate to the accused persons the statements taken down and saw the accused assent thereto and affix their signatures but neither of them can say of his own knowledge either that the statements of the accused were correctly translated in the first instance, or that the records when re-translated and assented to by accused was correctly interpreted. The only persons who

(1) 1 Bom., H. C., 84. (2) I. L. R., 22 Bom., 235. (3) I. L. R., 20 Bom., 165.
(4) I. L. R., 12 All., 595.

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could give evidence on this point were the interpreters themselves. No doubt this is a technical objection which does not appear to have been pressed in the Sessions Court. But it cannot be said that it was not taken, for several of the accused said they did not know what was written down. Accused No. 1 said in the Seasions Court "I said in Canarese that they had taken the clothes out of my house in enmity. What they wrote in Marathi I do not know." Accused No. 11 said: "The Foujdar said he would translate my Canarese into Marathi, and I was simply to say 'Ha.' They made me stand there and asked what I knew. I said I knew nothing. Then the Foujdar and Jemadar were present. Then I showed them the *dhotur, sari, rumal* and *kada* as belonging to me, but what they wrote down I don't know."

Excepting No. 2 none of the accused admitted the confessions made before the Sangli and Kurundwad Magistrates. Had it been attempted to prove these confessions by the records themselves, as in the Allahabad case, a similar objection would have prevailed. The Government Pleader urged that precise regularity of procedure could not be required in the Courts of Native States to which it was only the spirit and not the letter of the Codes that had been applied; but whatever laxity of procedure may be sanctioned in those States it is obvious that British Courts must be satisfied that it is not of such a kind as to prejudice the accused; and a confession taken down through the intervention of a person who is neither sworn nor is shown to be the official interpreter of the Court in a language not understood by the prisoner by a Magistrate who does not understand what prisoner is saying cannot be received without calling evidence to prove that the translation was correctly made. As the record stands at present there is no guarantee that the confessions have been fully and accurately presented to the Court. Under these circumstances we think we have no option but to hold that these confessions ought not to have been admitted. The Government Pleader urged that this was not a point on which the Division Bench called for the record on review. But as it was not dealt with when the appeals were rejected and only became apparent when the evidence was examined, we do not think that we can decline to deal with it. Rejecting then the confessions of accused Nos. 1, 2, 3, and 11 before the Sangli Magistrate, and of accused No. 8, before the Kurundwad Magistrate, it becomes necessary for us to consider the remaining evidence under section 167 of the Evidence Act, and determine whether it is sufficient to support the convictions. Mr. *Branson* argued that it was impossible to say what view the jury might have taken if these confessions had been excluded, but for the reasons given in the judgment

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in *Imperatrix* v. *Ramchandra* (5), to which we adhere, we think that it is open to us to dispose of the cases on the remaining evidence, and it seems to us that in the present case it is desirable to do so. Considering the length of time that has elapsed since the dacoity, it would be difficult, if not impossible, to collect together all the evidence requisite for a new trial, which would probably not be very fair either to the prosecution or the accused, and we think our proper course is to deal with the case ourselves after excluding the inadmissible evidence. * * * * * * *

The Sessions Judge was doubtful about the identification, but apparently the jury believed it, as the Judge distinctly told them that unless they believed that the accused was identified they could not convict. We agree with the Judge about witnesses 2. 3. and 11. Turning to the evidence of No. 6, his evidence about No. 13 is as follows:—" While in the idol room (in Chanbasappa's house) one man came and beat me saying 'Show the things in the house" and another said 'Don't beat him, he has been showing.' The man who said 'Don't beat him,' was this man (pointing out No. 13, Narayen Subrao). The man who beat me then is not here. Then we all came into the road. One man had given a chimney-lamp into my hand in the idol room and some one took it from me when we came into the road. No. 13, whom I first showed, took the chimney . . . I saw accused No. 13 for the first time in the idol room of Chanbasappa's house. I did not tell the Magistrate that No. 13 took the lamp in Chanbasappa's idol room. I did not see No. 13 from that time till I saw him before the committing Magistrate. Before the committing Magistrate he said " They took me into the *Deo's* room or cubicle (in Chanbasappa's house) and broke open a box there. I saw one of the dacoits take a *sari* from the box. The man who had a gun went up to the gods and told the others to take the ornaments which were on them, as they were silver. The bells and other silver ornaments shown me are the things they took. They threatened to beat us again. One of them intervened on our behalf. The man who intervened is accused No. 15 (Narayen *bin* Sabrao—No. 13 in Sessions Court.)" . . . . " One of the dacoits took the lamp from me which they had given me to go into the loft with," &c. Now we must say that the evidence of this witness impresses us favourably. It is true that he confused accused Nos. 3 and 4 and made a mistake as to the parts respectively played by Nos. 6 and 8 when breaking into the Kulkarni's house, but such mistakes—natural enough under the circumstances—are no reason for discrediting the rest of his evidence. In regard to No. 13 he has not wavered in either Court in saying that it

(5) I. L. R., 19 Bom., 749.

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was he who intervened to prevent his being beaten in the idol room in Chanbasappa's house, and there is no reason why he should be mistaken. If the evidence stood by itself it might be insufficient, but corroborated as it is by the statements of Nos. 12 and 14 we see no reason to distrust it. These two accused persons give discrepant accounts as to the action of No. 13 at the dacoity, but both agree that he was there, and both describe the distribution of property that ensued in a field outside Kolikop. The discrepancy is probably due to their being more taken up with their own part in the transaction than with each other. According to Lakshmya (No. 12) neither Narayen (13) nor Atmaram (14) was present at the Basapur dacoity, but both were at the Kalikop dacoity. Atmaram corroborates the statement that he was not at the Basapur dacoity, and says that Narayen and he were both at the Kalikop dacoity. Under the circumstances we feel no doubt as to the truth of these statements: and think No. 13 has been rightly convicted No. 14 (Atmaram *bin* Govind.)—(1) Confession before British Magistrate. (2) Implicated by No. 12 before another Magistrate. (3) Identified by No. 4. (4) Property discovered on 13th September. The evidence seems ample to support the conviction. We do not think we should reduce the sentences. The Division Bench refused to admit the appeal on this ground, and even if we have now jurisdiction to interfere we do not consider that we ought to do so. The offence of dacoity is most serious and causes great terror and misery wherever it is prevalent. We, therefore, set aside the conviction of No. 4 (Basawanta *bin* Madyapa) and decline to interfere in the other cases.

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11 June 1896. PARSONS & RANADE, JJ.

Bhimangauda v. Mallangauda.*

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction—Subordinate Judge—Sessions Judge.

Where a Sessions Judge set aside an order, passed by a Subordinate Judge granting sanction to prosecute certain persons for perjury, on the ground that after an interval of three-and-a-half months, no formal and legal sanction had been recorded by the Subordinate Judge, the High Court set aside the order of the Sessions Judge as illegal, because the time allowed by the Code of Criminal Procedure, within which a sanction could remain in force was six months.

THE facts in this case were that the Subordinate Judge of Hubli passed on 10th April 1895 an order granting to the petitioner under section 195, Criminal Procedure Code, sanction to prosecute one Mallangauda for forging a receipt and to prosecute three others for giving false evidence. On appeal, however, the Sessions Judge of Dharwar, set aside the order, stating, "From the Sub-Judge's reply to applicant's petition

*Criminal Ruling 23 of 1896. Criminal Application for Revision No. 12 of 1896.

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for copy, it appears that no sanction has yet been given for the prosecution. It so, no proceedings to set the sanction aside can be entertained, but it is wrong to let prosecution or fear of prosecution hang over a man's head indefinitely. The Sub Judge's order " " granting sanction " is dated 10th April 1895 the Court sets it aside on the ground that after an interval of 3½ months no formal and legal sanction has been recorded." The petitioner, thereupon applied to the High Court.

ORDER.—The order of the Sessions Judge setting aside the sanction is illegal. The time allowed by the Code within which a sanction shall remain in force is six months. As however the application for sanction ought to have been made to the Court which tried the case, the Court does not interfere.

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11 June 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Datter bin Bala.*

Opium Act (I of 1878) sec. 9—Breach of condition of license—offence.

An infraction of a condition of a license cannot be considered an infraction of the rules made under the Opium Act, and punishable under section 9 of the Act,

PER CURIAM:—Following Criminal Ruling 23 of 14th July 1887, we must hold that an infraction of a condition of a license cannot be considered an infraction of the rules and punishable under section 9 of the Opium Act, especially as in the present case. There is nothing in the rules or in the license which emposes on the license any—obligation to sell opium at the rate notified on his sign board and it is not shown that he has sold contrary to clause 16 of his license. We reverse the conviction and sentence.

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17 June 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Ramchandra Ganesh.†

Penal Code (Act XLV of 1860), Sec. 409—Criminal Breach of Trust—Onus.

To a charge of criminal breach of trust the accused pleaded that he had rendered accounts as the agent of Sitabai to her and has paid the sums in question to her by the direction of her trustee. Neither Sitabai nor the trustee were called to prove that these sums were not so paid, and the accused was required by the lower Courts to prove the payments:—

Held, that it was illegal of the Lower Courts to place the *onus* on the accused and convict him because he failed to discharge it.

PER CURIAM:—The applicant was convicted by the First Class Magistrate of criminal breach of trust as an agent in respect of two sums of money and the conviction was upheld on appeal by the Sessions Judge of Poona. His defence was that he had rendered accounts as the agent of Sitabai to her and had paid the sums in question to her by the direction of her trustee admitedly accounts were rendered and they show how the sums

*Criminal Ruling 24 of 1896. Criminal Application for Revision No. 54 of 1896.
†Criminal Ruling 27 of 1896. Criminal Application for Revision No. 90 of 1896.

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were paid. Neither the trustee nor Sitabai were called on behalf of the prosecution to prove that the sums were not paid as entered and alleged. There is therefore no evidence of any breach of trust and it was illegal of the lower Courts to place the *onus* on the accused and convict him because he failed to prove that he had paid the money to Sitabai. We reverse the conviction and sentence.

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18 June 1896. PARSONS & RANADE, JJ.

In re James Fitzgerald.*

Magistrate—Pleader—Contempt of Court—Magistrate's powers.

A criminal Court has no right to tell the pleader to sit down in the middle of his cross-examination because he is asking irrelevant questions. It can only rule a particular question irrelevant, and refuse to allow it to be put, and order the pleader to proceed with another question. It has no right to refuse to allow the pleader to cross-examine some witnesses because he has not purged himself of the contempt shown towards it or to allow him to cross-examine witnesses thereafter called, only if he apologized for his previous contumacious behaviour. The Court has no power to tell the accused, who has a right to be defended by a pleader of his choice, to engage another pleader, as the pleader already engaged by him did not know how to behave in Court.

THE facts of this case may be gleaned from the report of the Presidency Magistrate to the High Court.

"The case in question was one of ordinary assault and was being tried summarily under section 370, Criminal Procedure Code. The first hearing took place on the 30th April last and lasted about one hour, the second hearing which occupied nearly two hours came off on 15th May, and the greater portion of these hearings was taken up by Mr. Hemming's (accused's attorney) persistence in introducing irrelevant matters...On the present occasion he not only persisted in asking irrelevant questions and taking up the Court's time in needless discussions but refused to take the Court's ruling that in a summary case of this kind the Court was bound to record only such evidence as it considered necessary and went on dictating to the Court what notes should be taken down, and very frequently asked me to take notes of matters which in no way concerned the case. I had thereupon to tell him not to dictate to me and that I would record only such facts as I considered necessary. There was, however, not a single admission, important or otherwise which I refused to take down, in fact none was obtained in cross examination.

"Mrs. Flanagan seemed to me to be a witness answering Mr. Hemming's questions fairly and straight forwardly. Mr. Hemming continued asking her irrelevant questions, would not take her full answers and went on confusing her. The professional gentleman on the other side often appealed to me on her behalf, and I felt bound to interfere and ruled

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**Criminal Ruling* 25 *of* 1896. Criminal Application for Revision No. 102 of 1896.

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certain questions as irrelevant. Even after this ruling, Mr. Hemming persisted in pursuing the same line of cross-examination.

"Seeing that the hearing was being unnecessarily protracted and that the case had already gone into a third hearing and very little progress made I again asked Mr. Hemming to address himself to relevant matters, remarking, in passing, that nearly one hour had been wasted in irrelevant questions and the parties put to needless costs. Mr. Hemming thereupon again commenced to argue and said in his usual offensive manner that it was incorrect to say that nearly one hour had been wasted and that the Court had sat some minutes after the time. I asked him to go on with the cross-examination and not to argue, but he would not obey this direction and after one or two ineffectual attempts to make him proceed with the case, I had to ask him to sit down as I felt he was being deliberately disrespectful to me. Moreover, when I gave his client an opportunity to further question the same witness, Mr. Hemming needlessly interfered and whispered something to him with the result that he too declined to cross-examine.

"It is true that when Mr. Hemming asked permission to cross-examine two other witnesses I refused to allow him to do so as he had not then purged himself of the contempt shown towards the Court. When a third witness however gave evidence and Mr. Hemming again asked my permission to cross-examine him I agreed to allow him to do so, if he apologised for his previous contumacious behaviour. He declined to do so.

"I remember having said to the accused that as Mr. Hemming did not know how to behave in Court the accused must engage another Counsel, and this I did because a charge had already been framed and I did not wish the accused to be prejudiced in his defence."

PER CURIAM:—We take the facts from the report of the Magistrate, and after so doing, it is impossible to come to any other conclusion than that the Magistrate's procedure has been some what erroneous. Naturally enough, the pleader, eager and anxious in his client's causes, wishes to put all the questions to a witness that he considers to be likely to assist that cause. Naturally enough, when accused of wasting the time of the Court, he would endeavour to show that he had not done so. On the other hand, the Magistrate would be intent to finish his cases without undue delay, and would not be disposed to allow what he considered an irrelevant and too lengthy cross-examination or argument. The law has given the Magistrate full power in this matter, and he ought to be firm and skilful enough to rule and keep order in his Court. In the present case, the Magistrate has been indiscreet, and while he has omitted to use the lawful means at his command to keep the pleader in check,

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he has done what he had no possible right to do. To take the instances in question. The Magistrate had no right to tell the pleader to sit down in the middle of his cross-examination, because he was asking irrelevant questions. He could only rule a particular question irrelevant, and refuse to allow it to be put, and order the pleader to proceed with another question. The Magistrate had no right to refuse to allow the pleader to cross-examine two witnesses, because he had not purged himself of the contempt shown towards the Court, or to allow him to cross-examine the third only if he apologised for his previous contumacious behaviour. The Magistrate had no right to tell the accused that he must engage another counsel, as Mr. Hemming did not know how to behave in Court. An accused person has a right to be defended by the pleader of his choice. In all these things the Magistrate has been acting illegally, and he must be so informed, and his orders be reversed. As to the Magistrate's complaints about the pleader, we do not see how we can interfere. If, as the Magistrate now complains, the pleader persists in asking irrelevant questions, dictates to him, wastes the Court's time, tries the Court's patience, is deliberately disrespectful to him, all we can say is that the Magistrate himself must be to blame if he allows this to go on. His decision on any matter, whether it be the relevancy of a question or the admissibility of a document, is final so far as his Court is concerned and must be obeyed. To ensure this, the law has placed at his command the powerful remedy of being able to commit for contempt of Court; and he should not hesitate to use it in case of necessity. We reverse the order of the Magistrate refusing to allow the pleader of the accused to cross-examine the witness, and all after-proceedings. The case should be resumed from that stage.

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18 June 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Yelli Kom Yella.*

Penal Code (Act XLV of 1860), Sec. 400—Dacoits—Wives or mistresses of dacoits—Offenders.

The mere fact that women lived as wives or mistresses with men, who are dacoits, is not sufficient for a Court to hold that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of section 400, Indian Penal Code, unless it be proved that the women themselves were associated with their husbands or protectors for the purpose of themselves habitually committing dacoities.

PER CURIAM:—There is no proof that the women in question were in the habit of committing dacoity themselves. That being so we are unable to hold that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of section

*Criminal Ruling 26 of 1896. Criminal Appeal No. 126 of 1896.

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400 of the Penal Code merely because they lived as wives or mistresses with men who were dacoits.

We reverse the convictions and sentences passed on the appellants.

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18 June 1896. PARSONS and RANADE, JJ.

Queen-Empress v. Ulwapgavda.*

Indian Penal Code (Act XLV of 1860) Sec. 188.

Section 188, Indian Penal Code, refers to orders made for public purposes and does not apply to an order made in a possessory suit between party and party.

THE accused was convicted of an offence punishable under Section 188 Penal Code by the First Class Magistrate of Dharwar and sentenced to pay a fine of Rs. 20, or in default to undergo 20 days' simple imprisonment. The District Magistrate of Dharwar referred the case to the High Court, observing:—

"3. The order which he (accused) is said to have disobeyed was one passed by a Mamlatdar in a possessory suit, and that therefore under the Ruling in I. L. R., 6 Cal., 445, section 188, Penal Code, does not apply, and no offence was committed by him.

"4. I would further note that there is no evidence whatever on the record to show that the opposite party was in actual possession of the field, or that the act of the accused in sowing a crop therein was likely to cause any disturbance."

ORDER.—For the reasons given in paras 3 and 4 of the reference by the Sessions Judge, the Court reverses the conviction and sentence. Fine, if paid, to be refunded.

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2 July 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Tukaram Keshav Sonar.†

Criminal Procedure Code (Act X 1882), Sec. 399—Reformatory Schools Act (X of 1876.)

Section 399, Criminal Procedure Code, was repealed at the introduction of the Reformatory Schools Act, 1876, into the Presidency of Bombay in 1889.

PER CURIAM:—The 2nd Class Magistrate should have known that by the introduction of the Reformatory Schools Act 1876 into this Presidency in 1889, section 399 of the Code of Criminal Procedure was repealed. Under the Act of 1876 he had no jurisdiction to pass the order in question. We now reverse it.

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*Criminal Ruling 27 of 1896. Criminal Reference No. 44 of 1896.

†Criminal Ruling 28 of 1896. Criminal Reference No. 63 Of 1896.

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16 July 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Mulan Kalamia.*

District Police Act (Bom. Act IV of 1890), Sec. 61 (m)—Fishing—Public tank—Defilement—Offence.

The mere act of fishing in a public tank, without proof that something that would defile the water was used as bait, cannot sustain a conviction under section 61 (m), Bombay District Police Act.

IN this case the accused Mulan was convicted by the Third Class Magistrate of Dohad under section 61 (*m*) of Act IV of 1890 (Bombay) of defiling the water of a public tank so as to render it less fit for the purpose of drinking and bathing, by throwing a fishing hook and line and trying to catch fish, and was sentenced to pay a fine of Rs. 2.

The District Magistrate of Kaira, however, being of opinion that the conviction was illegal referred the case for the orders of the High Court, stating :—"All that the accused did was to throw in a fishing hook and line and try to catch fish in the water of a public tank set apart for drinking and bathing. It is not shown that anything offensive was attached to the fishing hook and it is difficult to see how the mere stirring up of the water by the insertion of the fishing rod and line could defile the water."

PER CURIAM :—In the absence of a finding that the accused was using as bait something that would defile the water of the tank, we do not think that the conviction can be sustained. The mere act of fishing would not defile the water. We reverse the conviction and sentence.

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16 July 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Gopala bin Rama.†

Indian Penal Code (Act XLV of 1860), Secs. 376, 511—Rape—Attempt—Impotent person—Presumption.

A person physically incapable of committing the offence of rape cannot be found guilty of an attempt to commit that offence.

In India the potency of a person charged with that offence has to be proved by evidence in each case, as, unlike the English law, there is no limit of age laid down under which the law presumes a person to be physically incapable of committing rape.

A person proved to have the power of erection must be presumed to be physically capable of committing rape.

PER CURIAM :—In our opinion a person physically incapable of committing the offence of rape cannot be found guilty of an attempt to commit that offence. He may do some lewd and filthy acts but they would not be acts "towards the commission of the offence of rape" which are the words used in section 511 of the Penal Code. Unlike the English

*Criminal Ruling 30 of 1896. Criminal Reference No. 66 of 1896.

†Criminal Ruling 31 of 1896. Criminal Appeal No. 170 of 1896.

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law the Indian law has laid down no limit of age under which it presumes a person physically unable to commit rape. In each case therefore it has to be proved by evidence whether or not the accused is potent. In he present case the accused is said to be between 13 and 15 years of age and the medical evidence proves that he certainly has the power of erection and probably that of emission. As penetration is sufficient to complete the offence of rape, a person with the power of erection would be physically competent to commit the offence of rape and therefore could be found guilty of an attempt. There is, therefore, no illegality in the conviction in the present case. The sentence, however, of detention in the Reformatory is illegal being contrary to the provisions of section 7 of the Reformatory School, Act of 1876. While therefore we confirm the conviction and sentence under sections 376 and 511 of the Penal Code, we reverse the order passed under the Reformatory Schools Act, 1876, leaving it to the Sessions Judge, if he considers it necessary, to call up the accused and pass a legal direction under section 7 of that Act.

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30 July 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Sheikh Hussain.*

Mamlatdar—Possessory suit—Parties—Order, binding effect of—Theft.

The order of a Mamlatdar in a possessory suit is operative only on the parties to the suit. Hence, where in execution of such an order passed against F. alone, symbolical possession of a field with crops standing thereon was given to A, and F's brothers S and G by whom the crops had been raised, and their two servants afterwards cut and removed the crops, they could not be convicted of theft or any other offence.

THE complainant took in mortgage half of survey number 230 at Chiplun from certain female relatives of the first three accused. The first accused passed him a rent-note for the cultivation of the same for one year, terminating on 27th March, 1895. On 27th July 1895, the complainant lodged a suit in the Mamlatdar's Court for possession of the same from accused No. 1; the latter pleaded that he had never obtained possession from complainant and that it was with his brothers, and asked that they should he made co-defendants. The Mamlatdar refused to join the brothers and passed a decree against accused No. 1 on 10th August 1895. On 27th October the complainant attempted to cut part of the crops but he was resisted by the brother of the accused. On 28th October, the brothers of the accused No. 1 and the other two accused cut the crops and removed them. It was for this Act they had been prosecuted and convicted by a third class Magistrate. The first accused pleaded that he was in Bombay at the time of the alleged offence and had nothing to do with the crops, and he was

* Criminal Ruling 35 of 1896. Criminal Reference No. 73 of 1896.

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acquitted. The District Magistrate of Ratnagiri, on appeal, only reduced the sentence passed on the accused.

The Sessions Judge of Ratnagiri referred the case to the High Court observing that the complainant had obtained only symbolical possession and at most such symbolical delivery could bind only the party to the suit.

ORDER.—The order of the Mamlatdar is operative only on the parties to the suit. It cannot affect the accused or give complainant possession as against them. The Court, therefore, reverses the convictions and sentences passed upon them.

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30 July 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Ramzan Shakebhai*

Cattle Trespass Act (I of 1871), Sec. 26 Trespass—Owner.

Before any person can be convicted under section 26, Cattle Trespass Act, 1871, the prosecution must establish that the owner has, through neglect or otherwise, damaged or caused or permitted to be damaged land &c. by allowing his cattle to trespass thereon. A personal neglect on the part of the owner, and his allowing his cattle to trespass must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to exist.

PER CURIAM:—The Magistrate only finds that the cow was trespassing. This however is not sufficient to justify a conviction under section 26 of the Cattle Trespass Act, 1871, as added to by section 8 of Act 1 of 1871. Before any person can be convicted under that section the prosecution must establish that the owner has through neglect or otherwise damaged or caused or permitted to be damaged land &c by allowing his cattle to trespass thereon. Thus a personal neglect on the part of the owner and his allowing his cattle to trespass must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to have existed. Proof of this is wanting in the present case. The accused stated that the cow was in the charge of persons employed by him to look after it. The Magistrate does not find that this is untrue. We, therefore, reverse the conviction and sentence.

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30 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Janu bin Dhondi†

Confession—Admissibility—Truth.

Where a confession appears to be made voluntarily, and where it agrees with all the circumstantial evidence in the case and the account contained in it is not an improbable or unlikely one, the confession can be accepted as true.

PER CURIAM:—We think that the confessions to the Inamdar were made voluntarily and as they agree with all the circumstantial evidence

*Criminal Ruling 36 of 1896. Criminal Application for Revision No. 108 of 1896.
†Criminal appeal No. 189 of 1896.

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in the case and the account contained in them is not an improbable or unlikely one, we accept them as true. Besides them there is no evidence of any kind against the accused in the case, so that without the confessions they would have to be acquitted. It only therefore remains to see what offence if any the confessions disclose. The confessions of the accused were never reduced to writing. We have to trust to oral evidence to find out what they were, and much difficulty has been caused by the vague way in which the witnesses speak to them, (but we gather the following to be the facts as admitted by the accused) not telling the exact words that each of the accused separately said but often only saying that accused 1 corroborated the statement of accused 2. We have however gathered the following to be the facts of the case as admitted by them.

The 2nd accused was intimate with the deceased, but on the evening in question when he accosted her and wanted her to come with him into the jungle, she refused to go as her husband (accused 1) was just behind, the deceased would not listen and tried to force her, on which they had a struggle, and as she seized him by the testicles, both fell down. Her husband came up at that time and hit deceased on the head with a stone killing him. They then making sure that he was dead returned home and the next morning buried the body.

Taking these to be the true facts, we do not see that the accused have committed the offence of murder. Accused 2 did not kill the deceased. Besides, if she had, she was protecting her own person from the offence of rape, which she had a right to do, adulteress though she was, even from her paramour. Accused 1 did kill the deceased, but he was protecting his wife against the same offence. Under section 100 of the Penal Code the right of private defence of the body extends to the causing of death in such a case.

The only other act done by the accused, was the concealment of the dead body. But under section 201 that is an offence only when an offence has been committed, so that the section does not apply. We reverse the convictions and sentences.

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13 August 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Raja valad Husen.*

Rule—"Payable in advance"—Construction—Meaning of the words.

The words "payable in advance," in a rule relating to house-tax, do not mean that the taxes are payable on the first day of the year, but would mean only that they would be payable in advance on demand at any time within that year.

*Criminal Reference No. 79 of 1896.

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THE facts in this case were that the Magistrate convicted the accused of having failed to pay house-tax payable by him to the Dharwar Municipality for the years 1892 to 1896 and sentenced him to pay a fine of Rs. 1-8-0 in addition to the arrears of tax Rs. 12 under section 84 of the Bombay District Municipal Act VI of 1873, as amended by Act II of 1884.

The District Magistrate of Dharwar, however, being of opinion, that the conviction and sentence were illegal, referred the case to the High Court, observing :—"Complaints of such offences must be made within three months next after the date when the taxes were due and not paid (*vide*, Bom. H. C. Ruling No. 86 of 1888). The Dharwar Municipality having as yet made no rules under section 32 of the amending Act, the rules framed under section 14 of the principal Act are still in force. Rule 1 in section 5 of Appendix B to these rules makes the house-tax payable in advance in one instalment. It follows therefore that the amounts for 1892-93, fell due on 1st April 1892, those for 1893-94 on 1st April 1893 and so on. The complaint in this case was filed on 29th June 1896 and was clearly time-barred under section 82 of the Act."

ORDER.—Return the case. The point of limitation ought to have been taken by way of defence to the action. Moreover, the words "payable in advance" do not mean that the taxes are payable on the first day of the year. They would be payable in advance on demand at any time within that year.

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18 August 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Hari Narayan.*

Criminal Procedure Code (Act X of 1882), Sec. 422—Appeal—Notice, service of.

Where it is impracticable to give to an appellant notice of the hearing of an appeal, as he cannot be found at the address given by him, the notice or a copy of it should be left at the address given. It is not competent to an Appellate Court to hear and decide an appeal in appellant's absence, simply because he cannot be found at the address given by him.

PER CURIAM :—The District Magistrate admits that the notice of the hearing of the appeal was not given to the appellant, but he appears to think that this was unnecessary as the appellant could not be found at the address he gave. This might have been the case had the notice or a copy of it been left at that address; but this does not appear to have been done and there is nothing to show that the appellant could, by any diligence of his, have got knowledge of the notice. We reverse the order and direct the appeal to be reheard after giving notice to the appellant.

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*Criminal Ruling 40 of 1896. *Criminal Application for Revision No. 141 of 1896.

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20 August 1896. PARSONS & RANADE, JJ.

In re Tricumlal Kalidas.*

Criminal Procedure Code (Act X of 1882), Sec. 488— Maintenance order—Living separate by mutual consent.

A wife is not entitled to receive an allowance under section 488, Criminal Procedure Code, if she and her husband have entered in to an agreement which provides for their living separately, and they are so living separately by mutual consent.

PER CURIAM:—It is clear in this case that the parties are living separately by mutual consent, the wife therefore is not entitled to receive an allowance under section 488 of the Criminal Procedure Code. We reverse the order of the Magistrate.

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20 August 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Juze bin Francis Souza.†

Criminal Procedure Code (Act X of 1882), Secs. 181, 188—Magistrate—Offence in a Native State—Penal Code (Act XLV of 1860), Secs. 4,224—Escape—Custody—Jurisdiction—British Courts.

The accused was arrested in the Mysore State by the State Police on suspicion of having committed a theft in British India. While in the State lock-up, he effected his escape, for which a Magistrate in British India tried him, and, in the absence of a certificate by the Political Agent for the Mysore State that, in his opinion the charge should be enquired into in British India, convicted him under section 224, Penal Code:—

Held, that as the offence of escape from lawful custody was committed out of British India, the Magistrate had no jurisdiction to try the accused for it.

IN consequence of information that the accused had committed theft in Sirsi, the Mysore Police arrested him at a place in the Mysore State and took him before a Magistrate there. The Magistrate ordered the accused's detention in order to enable the Police to trace the stolen property. While in the lock-up he effected his escape by removing some tiles in the roof. For this offence, the accused was convicted under section 224, Indian Penal Code and sentenced to six months' rigorous imprisonment by the First Class Magistrate of Karwar. The Sessions Judge of Kanara referred the case to the High Court, observing:—"I submit that the trial was illegal because the alleged offence of escaping from lawful custody was committed beyond the limits of British India, and there was no certificate by the Political Agent for the Mysore State that in his opinion the charge should be inquired into in British India (section 188, Criminal Procedure Code.) It is true that section 181 enacts that the offence of having escaped from custody may be enquired into or tried by a Court within the local limits of whose jurisdiction the person charged is but I do not think that the section was intended to make such offences committed beyond the limits of British India punishable by British Indian Courts of Justice."

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*Criminal Ruling 41 of 1896. Criminal Application for Revision No. 105 of 1896.
†Criminal Ruling 42 of 1896. Criminal Reference No. 74 of 1896.

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ORDER:—The offence, with which the accused was charged, having been committed out of British India, the Magistrate had no jurisdiction to try and convict him for it. The Court reverses the conviction recorded against and sentence passed upon Juze *bin* Francis Souza *alias* Balu.

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27 August 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Vaidyalingam.*

Indian Railways Acts (IX of 1890), Sec. 113—General Clauses Act (of 1868), Sec. 5—Excess Fare—Fine, recovery of—Imprisonment.

As section 5 of the General Clauses Act, 1868, declares the provisions of sections 63 to 70 of the Indian Penal Code applicable to all fines imposed under the authority of any Act thereafter to be passed unless such Act shall contain an express provision to the contrary, a Magistrate, ordering, under section 113 of the Indian Railways Act, 1890, payment of excess charge and fare, which under that section is to be recovered as if it were a fine imposed by him, can award imprisonment in default of payment under section 64, Indian Penal Code.

THE accused alighted at Hubli Station from a train coming from Bangalore side but did not deliver up a pass or ticket to the ticket-collector of that station saying he had none as he had lost his ticket. The Second Class Magistrate of Hubli convicted him under section 113 of Act IX of 1890, and sentenced the accused to pay the fare Rs. 1-15-6 and one Rupee on account of excess charge and in default to undergo simple imprisonment for three days.

The District Magistrate of Dharwar referred the case to the High Court observing:—"In this case the Magistrate has simply to issue a warrant of the levy of the sums by distress in case of non-payment of the penalty. Award of imprisonment in default was illegal. The form of the order by conviction and sentence was of course also wrong."

PER CURIAM:—Section 113 of the Indian Railways Act, 1890, provides for the recovery of the excess charge and fare as if it were a fine imposed by the Magistrate. Section 5 of the General Clauses Act, 1868, declares the provisions of sections 63 to 70 both inclusive of the Indian Penal Code applicable to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary. The Indian Railways Act, 1890, contains no provision to the contrary. Section 64 of the Penal Code, therefore, applies to the case and the order of the Magistrate is legal.

We return the Record and Proceedings.

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*Criminal Ruling 43 of 1896. Criminal Reference No. 81 of 1896.

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24 September 1896. PARSONS & RANADE, JJ.

In re Lahanu.†

Criminal Procedure Code (Act X of 1882), Secs. 133,139—Forge—Sparks—Magistrate—Order.

Where a Sub-Divisional Magistrate purporting to act under section 133, Criminal Procedure Code, ordered a forge set up by the applicant to be removed on the ground that the sparks from it might set fire to cotton stored in an adjoining building belonging to a third person, the High Court, holding that the Magistrate was not justified in ordering the summary removal of the forge, directed that the applicant should not be required to remove the forge, but only to alter its construction so that sparks shall not issue out of it into the open air when it is worked.

ORDER.—The Court thinks that the Magistrate was not justified in ordering the summary removal of the forge in question and it varies his order by directing that Lahanu shall not be bound to remove the forge but only ordered to alter its construction so that sparks shall not issue out of it into the open air when it is worked. This can easily be done by putting an iron roof and sides to it.

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24 September 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Hari Dagdu.*

Penal Code (Act XLV of 1860), Sec. 406—Evidence Act (I of 1872), Sec. 106—Criminal Breach of Trust—Criminal misappropriation—Burden of proof—Presumption.

Where at the trial for an offence under section 406, Indian Penal Code, the accused admits having received the money alleged to have been misappropriated by him, but defends himself by saying that he made it over to the proper person, the *onus* does not lie on him to prove payment, but on the prosecution to prove non-payment; for, it is only when the latter is proved that a presumption will arise of misappropriation or breach of trust.

PER CURIAM :—The Magistrate First Class says "Hari No. 2 himself admits having received the money but defends himself by saying that he made it over to Jeyram Dusruth, the burden of proof therefore lay on him to show that he paid the money to Jeyram as alleged" and again "as accused No. 2 Hari Dugroo has failed to prove the payment of money to Jeyram Dusruth, a very respectable Sahookar, and not a word is said against his character by any of the accused's witnesses, the Magistrate has no alternative but to convict the accused." The Sessions Judge says "this being so the burden of proof clearly lay upon appellant to satisfy the Court that he really paid the money to Jeyram as alleged (under section 106, Evidence Act) and he has entirely failed to discharge this onus". This placing of the onus on the accused is quite wrong. The onus is on the prosecution to prove non-payment, for it is only when that is proved that a presumption will arise of misappropriation or breach of trust.

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†*Criminal Ruling* 46 *of* 1896. Criminal Reference No. 75 of 1896.

* *Criminal Ruling* 47 *of* 1896. Criminal Application for Revision No. 166 of 1896.

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As it is impossible to say what effect this error has had on the minds of the convicting authorities, we have no alternative but to reverse the conviction and sentence and order the accused to be retried, and this we hereby now do.

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6 October 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Vithu valad Ramji.*

Criminal Procedure Code (Act X of 1882), Sec. 545—Conviction.—Reward—Indian Penal Code, (Act XLV of 1860), Sec. 379—Indian Forest Act (VII of 1878).

Where a conviction and sentence proceeds under the provisions of the Indian Forest Act, it is not competent to a Magistrate to pass an order of reward to the complainant for detecting the offence.

THE accused were convicted of theft under section 379, Indian Penal Code, for having dishonestly and without permission cut off 20 rafters worth Rs. 12 from the teak trees in their field, survey No. 88, knowing that the right over these teak trees was reserved by Government, and were sentenced each to pay a fine of Rs. 10 or in default to undergo rigorous imprisonment for seven days.

The District Magistrate of Ahmednagar referred the case to the High Court observing:—"In passing the above sentence the trying Magistrate has awarded a reward of Rs. 5 out of the fine inflicted by him, to the complainant, a forest servant, for detecting the offence. This order appears to be illegal as section 545 of the Criminal Procedure Code quoted by him contains no authority to give such rewards."

ORDER.—As the conviction was for an offence under the Indian Penal Code and not under the Forest Act, the order of reward is illegal. The Court, therefore, reverses it.

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6 October 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Koya Mavji.†

Criminal Procedure Code (Act X of 1882), Sec. 545—Reward, giving of—Theft—Penal Code (Act XLV of 1860), sec. 179—Indian Forest Act (VII of 1878) sec. 5—Trees, cutting of from waste number.

Where a person cuts a teak tree from a waste number, he cannot be convicted an sentenced under the Indian Forest Act, 1878.

The accused was convicted by the Second Class Magistrate of Godhra, under Rule 2 of the Rules under section 75 of the Indian Forest Act, VII of 1878, for cutting teak from a waste number.

The District Magistrate of Panchmahals referred the case to the High Court observing:—"Teak growing in waste numbers is under the control and at the disposal of the Revenue Department under Rule 93 para

*Criminal Ruling 48 of 1896. Criminal Reference No. 100 of 1896.

†Criminal Ruling 49 of 1896. Criminal Reference No. 98 of 1896.

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2 and Rule 94 under section 215 of the Land Revenue Code and it should have rested with the Revenue Department to say whether the case should be dealt with under section 43 of the Land Revenue Code or a prosecution instituted under Rule 111 (*b*) of the Rules under the Land Revenue Code. In any case Rule 2 under section 75 of the Forest Act does not cover the case of teak growing in waste numbers and I would, therefore, recommend that the illegal conviction be quashed and the fine ordered to be refunded the Collector being then at liberty to take such further steps under the Land Revenue Code as to him would seem proper."

PER CURIAM :—The District Magistrate is right. The tree cut down did not stand in a forest, and therefore the prosecution and conviction for an offence under the Indian Forest Act, 1878, is illegal. The Act applies only to trees in forests. We reverse the conviction and sentence.

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8 October 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Govind valad Lakshman.*

Workman's Breach of Contract Act (XIII of 1859), Sec. 2—Claim barred in a civil court—Bond—Prosecution.

Where a bond containing an agreement to work for 13 months as weavers or in default to pay back Rs. 100 borrowed, cannot be enforced in civil Court being time-barred, it cannot be made the basis of a prosecution under Act XIII of 1859.

PER CURIAM :—The bond in this case, dated 18th December 1887, contained an agreement to work for 13 months from that date or in default to pay back the Rs. 100 borrowed. Default was made in the first month. The bond, therefore, could not now be enforced by civil process. We follow ruling of this Court in *Queen-Empress* v. *Rajab* (1) opposed though it is to the ruling of the MADRAS HIGH COURT in *In the matter of Kittu and others* (2) and hold that the bond could not be made the basis of a prosecution under Act XIII of 1859.

We reverse the order of the Magistrate.

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8 October 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Shidlingappa.†

Statements made by witnesses to the Police—Copies of the statements—Discretion.

The practice of granting to the accused statements made by witnesses to the Police discussed.

PER CURIAM :—On the evidence we agree with the decision and therefore dismiss the appeal.

The Sessions Judge has taken objection to the grant of copies to the accused of the statements made by the witnesses to the Police. We notice however that these were granted by the committing Magistrate and we

*Criminal Ruling 50 of 1896. Criminal Reference No. 84 of 1896. (1) I. L. R., 16 Bom., 366.
†Criminal Ruling 51 of 1896. Criminal Appeal No. 266 of 1896. (2) I. L. R., 11 Mad., 332.

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think that at the least the grant was a matter within his discretion. It would not be possible, even if it was desirable, to keep these statements secret. The accused has a right to cross-examine witnesses on their former statements to the Police and by calling the Police Officers they could obtain the same information that they have obtained from the grant of the copies. The question, therefore, seems to resolve itself into one of procedure only. There has been, however, no argument addressed to us on the point and therefore we have expressed our opinion only.

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29 October 1896. FULTON & HOSKING, JJ.

Queen-Empress v. Govind Bapuji.*

Cantonement Act (III of 1876), Sec. 9—Rules framed under sec. 9—Rule 59—Chabutra building of—Cantonement Magistrate.

According to Chapter III of the Rules and Regulations made by the Governor in Council under section 9 of the Bombay Act III of 1867, and maintained, on the repeal of that Act, by section 2 of the repealing Act XIII of 1889, any temporary construction is an offence only if it shall be declared by the Cantonement Magistrate, *with the sanction of the Cantonement Committe* to be objectionable on sanitary grounds, or on account of causing encroachment.

IN this case the accused presented a petition asking for leave to build a *chabutra* within the limits of a Cantonement. The Cantonement Magistrate visited the place and orally refused the permission. The overseer made a pencil note of this refusal in the margin of the petition, which did not, however, state what the grounds of the Magistrate's objection were. The *chabutra* having afterwards been built, the Cantonement Magistrate convicted the person under Rule 1 of Chapter III of the rules framed by Government under section 9 of Bombay Act III of 1879, of breach of rule 59 of the same Chapter which forbids the erecting of any building "in any situation in which such building or other construction shall be declared by the Cantonement Magistrate with the sanction of the Cantonement committee to be objectionable on sanitary grounds or on account of causing encroachment or obstruction to a public thoroughfare". The Sessions Judge made this reference to the High Court on the grounds that the conviction was bad for want of (1) the declaration by the Cantonement Magistrate, and (2) the sanction of the Cantonement Committee.

ORDER.—For the reasons given by the Sessions Judge the Court sets aside the conviction and sentence, and acquits the accused.

**Criminal Ruling* 54 of 1896. Criminal Reference No. 110 of 186.

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12 November 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Godi.*

Indian Penal Code (Act XLV of 1860), Secs. 83, 495—Bigamy—Child of ten years—Moturity of understanding.

Where a child of ten years marries again during the life-time of her husband, the marriages being negotiated and caused to be performed by the mother of the accused the child was held not to have attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage.

IN this case Godi, a girl of ten, calling herself the wife of Jamardhan was charged with marrying Janardan, during the life time of her husband Kondaji, and with having concealed the fact of her first marriage from Janardan. In convicting her of the offence of bigamy, the Sessions Judge of Ahmednagar, remarked :—" I had some doubt whether, having regard to her age, Godi should be convicted of this offence; and before asking the assessors for their opinions I drew their attention to section 83 of the Penal Code. But young as she is, as she had in fact lived with one man as her husband before going though the ceremony of marriage with another, she must have understood the nature and main consequence of her conduct." The accused appealed to the High Court.

PER CURIAM :—We reverse the conviction and sentence. The accused is a child of 10 years of age and has been convicted of the offence of marrying again in the life time of her husband. The marriages were negotiated and caused to be performed by the mother of the accused and we cannot hold that the accused had attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage.

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19 November 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Jamal Lakhan.†

Criminal Procedure Code (Act XI of 1892,) Sec. 118—Security—Magistrate.

It is not competent to a Magistrate to require, under section 118 of the Criminal Procedure Code, a person to give security of *respectable land-holders*; all he can do is to require the security of *persons of respectability and substance.*

PER CURIAM :—The Magistrate ordered the applicants each to give the security of two respectable land-holders in the sum of Rs. 300 under section 118 of the Code of Criminal Procedure. The applicants have been unable to give this security. We see no reason, and the Magistrate records none, why the applicants should be restricted to give land-holders as their securities and we alter the order by substituting the words "persons of respectability and substance" for the words " respectable land-holders."

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*Criminal Ruling 55 of 1896. Criminal Appeal No. 299 of 1896.

†Criminal Ruling 57 of 1896. Criminal Application for Revision No. 241 of 1896.

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10 December 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Ranchhod Hari.*

Presidency Magistrate—Predecessor—Review.

A Presidency Magistrate has no power to review and cancel the order of his predecessor in office.

IN this case, the applicant, filed a complaint against one Natha Hari for cheating, on the 30th September 1896, before the Acting 4th Presidency Magistrate, who ordered a warrant to issue for the apprehension of the said Natha, the same to be sent to the Political Agent, Cambay. Later on the applicant was informed by the office clerks of the Magistrate that extradiction of the said Natha would be applied for in due course. On the 29th October, however, the applicant was informed that for some reasons not explained the latter applying for the extradiction of Natha from Cambay had not been sent to the Political Agent there, and that a fresh order had been passed by the 4th Presidency Magistrate who had then reverted to his post, purporting to revise the order of his predecessor and to set it aside on the ground that the offence was one for which an application for the extradiction of the said accused person could not be made. The complainant, thereupon, applied to the High Court.

PER CURIAM:—The 4th Presidency Magistrate had no power to review and cancel the order of his predecessor in office. We are not instructed as to what offences are and what are not extraditable but the power of refusing or agreeing to extradite the accused persons rests with the Cambay authorities and not with the Presidency Magistrate. We cancel the order of the 27th October 1896.

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10 December 1896. PARSONS & RANADE, JJ.

In re Krishna Anant Pai.†

Criminal Procedure Code (Act X of 1882), Sec. 528—Transfer of a case—Notice.

When an application for the transfer of a case from one Court to another is made the order of tranfer ought not to be made *ex parte* and without notice to the other side.

THE petitioner applied for revision of the order passed by the District Magistrate of Kanara transferring the case between the petitioner and his opponents from the Court of the Magistrate Third Class to the Court of the Magistrate Second Class, Akola, on the ground that the said order was illegal inasmuch as it was passed *ex parte* without notice to the petitioner.

PER CURIAM:—The order of transfer ought not to have been made *ex parte* and without notice to the other side. See Criminal Rulings 32 of 1889 and 21 of 1893. We reverse it and the District Magistrate should dispose of the application after giving proper notice.

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* Criminal Application for Revision No. 306 of 1896.

†*Criminal Ruling* 61 *of* 1896. Criminal Application for Revision No. 252 of 1896.

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16 December 1896. PARSONS & RANADE, JJ.

Queen-Empress v. Bhava Mansing.*

Criminal Procedure Code (Act X of 1882,) Sec. 35—Concurrent sentences.

Where a person is convicted at one trial of two or more distinct offences, and is sentenced to a separate term of imprisonment for each, it is illegal under section 35, Criminal Procedure Code, to order the sentences to run concurrently. One sentence should be ordered to commence after the expiration of the other.

THE accused was charged with the offences of house-breaking by night in order to commit theft and theft in a dwelling house. He was tried by the acting Sessions Judge of Ahmedabad who sentenced the accused to five years' rigorous imprisonment for the offence of house breaking by night in order to commit theft, and again sentenced him to five years' rigorous imprisonment for the offence of theft; these two sentences were directed to run concurrently.

ORDER.—The concurrent sentences are illegal. The Court reduces the sentence in each case to one of 2½ years, the second to commence at the expiration of the first.

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22 December 1896. JARDINE & RANADE, JJ.

Queen-Empress v. Lakshman Bhima.†

Abkari Act (Bombay Act V of 1878), Sec. 43, (2)—Separate convictions.

The accused were convicted and separately sentenced for (1) possessing apparatus and material for manufacturing liquor without a permit and (2) possessing *mhowra* flowers for manufacturing liquor without a permit:—

Held, that the matters about which the two convictions were passed were substantially one transaction.

THE accused were convicted of (1) possessing apparatus and material for manufacturing liquor without a permit and (2) possessing Mhowra flowers for manufacturing liquor without a permit under section 43 clause 1 (*f*) and section 43, clause 2, of the Bombay Abkary Act, V of 1878.

The District Magistrate of Ahmednagar referred the case to the High Court observing :—" The Magistrate, in my opinion, is not right in convicting and sentencing the two accused for the offence under section 43, clause (2) as mere possession of *mhowra* flowers does not seem to be an offence in this District. Act III of 1892 (Bombay) has been made applicable to Thana and part of Colaba Districts, and consequently simple possession of *mhowra* flowers in Ahmednagar District does not come under section 43, clause (2), of the Abkari Act."

ORDER.—Without determining whether Mhowra flowers are "material" within the meaning of section 43, clause (*f*) Bombay Act V of 1878 the Court is of opinion that the matters about which the two convictions

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**Criminal Ruling 64 of 1896. Criminal Appeal No. 330 of 1896.*

†Criminal Reference No. 140 of 1896.

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were passed are substantially one transaction, and therefore sets aside the convictions passed under the sub-section 2 of section 43 interpolated by Bombay Act III of 1892.

1897.

7 January 1897. JARDINE & RANADE, JJ.

In re a Dumb Man.*

Criminal Procedure Code (Act X of 1882), Sec. 341—Dumb man—Magistrate—Procedure.

Section 341, Criminal Procedure Code, does not apply until there is a conviction. To make the section applicable, the Magistrate must come to a definite opinion whether the accused can be made to understand the proceedings; and this opinion may be formed upon evidence.

THE accused entered the house of the complainant who on seeing the accused ran away at first but caught the accused with the assistance of his neighbours. The accused had displaced and searched some earthen jars in the house but had not stolen anything. While the complainant and his witnesses were being examined before the Second Class Magistrate of Igatpuri the accused showed that he was dumb and that he could not understand the proceedings before the Court. The witnesses stated that the accused was not dumb and actually did abuse them when he was caught and taken by them to the Police Officer. The Railway Surgeon on examination of the accused certified that he was in no way dumb.

The District Magistrate of Nasik referred the case to the High Court, under section 341 of the Criminal Procedure Code, observing that as the Second Class Magistrate could not dispose of the case he submitted the papers to the High Court.

PER CURIAM.—If there is no conviction, section 341 of the Code of Criminal Procedure does not apply; and the Court notices that the trial was imperfect, as no charge was framed; and therefore it does not treat the mere opinion expressed by the Magistrate that the accused is guilty as tantamount to a conviction.

The Magistrate must come to a definite opinion whether the accused can be made to understand the proceedings. This opinion may be formed upon evidence; he may examine the Medical officer or any one acquainted with the accused. If the Magistrate comes deliberately to an opinion that the accused cannot be made to understand the proceedings he may nevertheless proceed with the inquiry or trial: and if it results in a conviction or commitment the proceedings must be forwarded to the High Court with a report of the circumstances of the case: as a further guide to the Magistrate the Court draws attention to Criminal Ruling 26 of 1894. The case is returned for disposal to the Magistrate.

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* *Criminal Ruling* 1 *of* 1897. Criminal Reference No. 141 of 1896.

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13 January 1897. JARDINE & RANADE, JJ.

In re Permanand Keshowji.†

Criminal Procedure Code (X of 1882), Secs. 96, 99, 104—Search warrant—Account books, seizure of—Jurisdiction.

A Presidency Magistrate, on being asked by a telegram from the District Magistrate of Agra to take possession of certain account books of one D, living at Bombay, and send them to him, summoned D to produce them and when they were produced, seized and sent them to Agra, purporting to do so under sections 96 and 99 of the Code of Criminal Procedure:—

Held, that as there was no search warrant, neither section 96 nor section 99 did apply, and that as the Magistrate had no authority to summon D to produce his account books, section 104 did not apply to justify the sending of the books out of the jurisdiction.

THE petitioner Permanand Keshowji was a manager of Damodar Ratansey, a merchant of Calcutta and Bombay. On the 28th December, 1896, the said Damodar was served with a witness summons to produce immediately his books of account and the books were produced before the Presidency Magistrate, Bombay, on the account books being produced, the Magistrate informed the petitioner that he required the account books for being despatched to Agra as he had received a telegram from the Magistrate there to seize the books and send the same by a registered post. The telegram ran as follows :—

"Please to take possession immediately of cash books and ledgers of Damodar Ratansi, 27 Kalkadevie Road, from July 1894 to June 1896 and to send them under a securely packed registered parcel."

The Magistrate in explaining the proceedure followed by him, stated:—"It will be seen from the wording of the first telegram of the District Magistrate that it was in the nature of a search-warrant, but with a view to save annoyance and unnecessary hardship to the petitioner, the Court preferred to send to him an immediate summons to produce the books and eventually seized them on their being brought to Court."

ORDER.—There being no search warrant neither section 96 nor section 99 of the Code of Criminal Procedure applies ; the Presidency Magistrate had no authority to summon the petitioner to produce his account books, and therefore section 104 does not apply to justify the sending of the books out of the jurisdiction. The Presidency Magistrate should take what means he can to return them to the petitioner.

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14 January 1897 JARDINE & RANADE, JJ.

Queen-Empress v. Juma.*

Africa Order in Council of 1896, Articles 45, 48, 50, 74,—75.—Consular Court—Uganda—British sphere of influence—Foreign Subjects—Jurisdiction.

†*Criminal Ruling 2 of 1897.* Criminal Application for Revision No. 1 of 1897.

**Criminal Ruling 3 of 1897.* Criminal Reference No. 27 of 1896.

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Her Majesty's Commissioner and Consul-General as a Commander-in-Chief can try foreign subjects committing offences in territory under military occupation and punish them on the spot by the law of war, but he cannot so try them at a place and time both distant from the war-like operations.

The Court of the Commissioner and Consul-General of Uganda is, by various articles of the Order in Council of 1889 (*e g.*, articles 12,22) limited in its powers. If, therefore, the Offices of Judge of the Consular Court and of a Commander-in-Chief happen in a sphere of influence to be held by the same person, who in both capacities under the control of the Crown, the directions in the Orders in Council are binding on him as Consular Judge.

When the Commissioner and Consul-General has avowedly and in terms assumed jurisdiction under the Orders in Council and submitted the case to the Hgh Court under Articles 74 and 75, it would be wrong to impute the act to power lawfully used by the head of a military occupation.

A military occupation, however complete, is not necessarily the same thing as an annexation.

The responsibilities, assumed under Article 1 of the General Act of the Brussels Conference of 1890, are international duties arsing from mutual understandings of the signatory powers, and thus differ from the obligations undertaken by the Sovereign to protect her subjects and others bound to her by allegiance.

The phrase "British Sphere of Influence" is obviously intended to mark out African territories within which other European Powers are by mutual understanding not to extend their conquests to the disadvantage of the British Power in East Africa. The phrase has no significance for purposes of jurisdiction. It is in fact the outer circle beyond the Protected States, and is for purposes of internal jurisdiction independent territory, where the Consular Court has no direct authority, and cannot control the actions of its native rulers, as it might do in Protected territory.

Occupation for purposes of war does not change the law of the country invaded, and such occupation cannot confer jurisdiction on the Consular Courts to try foreigners, to whom the Order of 1892 did not apply, as if they were British subjects.

The Orders in Council of 1892 and 1893 gave no jurisdiction to the Commissioner and Consul-General of Uganda over "foreigners" being subjects of the Signatory Powers, in regard to offences committed by them in territory under the sphere of influence of the British Crown; a plain distinction being drawn about the criminal liability of subjects of the Signatory Powers for offences committed by them within the Protectorate and outside such limits; a distinction based evidently on the difference of the responsibility which the Crown is advised to assume in territories solemnly declared to be under the Queen's protection and those merely placed, *qua* the Signatory Powers, within the British sphere of Influence.

Convictions by the Consular Court under Articles 45, 48 and 50 of the Order in Council of 1889 of German subjects in regard to acts done outside the limits of the Protectorate are without jurisdiction.

JARDINE, J.—Before dealing with the questions of law it is convenient to state our view of some of the matters of fact on which those questions depend.

Mr. *Young* argued for the prisoners that they are not subjects of a Signatory Power, but only dwellers in some region under the protection or influence of Germany. But as this Court has already pointed out, the only evidnce, namely their own statements, is that they are German subjects: and in his report pursuant to the order of this Court, Her Majesty's Commissioner and Consul General clearly assumes this to be the fact. This Court must, therefore, deal with them as subjects of Germany.

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The acts for which the prisoners have been convicted, occurred in the country of Unyoro: and Her Majesty's Commissioner and Consul-General has, in reply to the question of this Court, in para 10 of our order of the 17th March 1896, stated that Unyoro has not been declared to be within a British Protectorate.

He had also submitted the following information :—

"As regards the form adopted, I would venture to make the following observations. Were a "German Subject" to commit a crime and be arrested for it, say in Toru, a peaceful "Kingdom," lying, like Unyoro, within the British Sphere, but onside the Protectorate, one of two courses would, I presume, have to be followed. Either I should permit the "King" of Toru to try him and punish him according to Toru laws, whatever these might be, or I should (technically) "exercise my influence" over the King in order to arrange that he should delegate his jurisdiction to this administration, and thereupon try the accused according to the Procedure laid down for British subjects. In the case of Unyoro, however, the King and all local authorities or jurisdiction had disappeared in consequence of the war and, therefore, what could be done in Toru could not be done in Unyoro. Meanwhile in June 1894 the Earl of Kimberley, then Her Majesty's Secretary of State for Foreign Affairs, had (though under strict limitations, see Blue Book Africa No 7, 1895, page 50) recognized the possible necessity for some temporary and partial occupation of Unyoro. It was in these circumstances and with that sanction that portions of Southern Unyoro have been held by the British authorities in Uganda and it seemed to me that since the king and his judical authorities had disappeared, we must necessarily assume, however temporarily, jurisdiction in their place; in other words that in these portions of Unyoro which we occupied in the terms of Lord Kimberley's despatch for purely defensive purposes with the object of protecting Uganda against aggression we must assume the responsibilities and exercise the rights which we do in Uganda itself. Our temporary presence in these portions of Unyoro must, in practice, mean the temporary extension over them of the British Protectorate over Uganda. In these circumstances I decided to try the accused as though the offence with which they were charged had been committed in Uganda itself."

These remarks of the Commissioner and Consul-General confirm the surmise of this Court that the territory in Unyoro was at the time held by military occupation under the superintendence of Her Majesty's Commissioner and Consul-General by command of the Crown.

The learned Advocate-General has argued that if Unyoro was under military occupation, this *occupatio bellica* transferred the Sovereign Power to the Crown and that it had to be exercised by Her Majesty's Commissioner and Consul-General as a Commander-in-Chief; and that as he might, in Unyoro, have tried and punished these prisoners by the law of war, the convictions passed at Kampala in Uganda long afterwards in the Court established by the Orders in Council may justly be treated as valid. But no case has been shewn us authorizing the trial by the laws of war at a place and time both distant from the war-like operations. Moreover, the Court of the Commissioner and Consul-General is by various Articles of the Order in Council of 1889, *e.g.* Articles 12 and 22, limited in its powers: it is, by Article 22, to exercise Her Majesty's

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jurisdiction "to the extent and in the manner provided by this Order." Therefore if the offices of Judge of the Consular Court and of a Commander-in-Chief happen in a sphere of influence to be held by the same person, who in both capacities is under the control of the Crown, the directions in the Orders in Council are binding on him as Consular Judge. Article 105 of this Order recognizes and preserves the powers of Consular Officers in performing acts not judicial, acts such as they "might by law or by virtue of usage or sufferance or otherwise, have performed if this order had not been made." The Commissioner and Consul-General has avowedly and in terms assumed jurisdiction in this case under the Order in Council and submitted it to this Court under Articles 74 and 75. It would be wrong therefore to impute what has been done to Powers lawfully used by the head of a military occupation, such as are discussed in *Forsyth's* Constitutional Law, p. 210, and by *Mayne* in his Criminal Law of India, Chapter 3, sections 97 to 106. The Advocate-General further suggested that the record and statements submitted shewed that this part of Unyoro had become annexed to the dominions of the Crown. But the Commissioner and Consul-General does not ever anything more than a military occupation, which however complete, is not necessarily the same thing as an annexation. I find a case where the Judicial Committee of the Privy Council distinguished the temporary occupation of Moldavia by Russia in 1853 from a change of dominion: *Cremidi* v. *Powel* (1); see also other cases cited by *Forsyth* at p. 21. We must, therefore, hold that there was no annexation. There was a military occupation, more complete because the King of Unyoro and his officers had disappeared. But before then Her Majesty appears to have acted on the obligations of Article, of the General Act of the Brussels Conference of 1890, which provides not only by clause 1 for the Government of places under sovereignity or protectorate: but also for "the gradual establishment in the interior by the responsible power in each territory of strongly occupied stations," for roads, steam-boats, telegraphs, expeditions and flying columns and the interdiction of arms and ammunition where the slave trade prevails. We are agreed that the responsibilities here assumed are international duties arising from mutual undertakings of the Signatory Powers: and thus differ from the obligations undertaken by the Sovereign to protect her subjects and others bound to her by allegiance.

The sole question remaining for disposal is whether the Court of the Commissioner and Consul-General had jurisdiction under the Orders-in-Council. The Advocate-General has not seriously contested the arguments of Mr. Young already set forth in our former order in Para 6. The

(1) 11 Moor. P. C. 101.

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prisoners are "foreigners" and being German subjects are "foreigners to whom this Order (*i. e.*, of 1892) applies" and if the acts of which they have been found guilty had occurred in Uganda or other Protectorate of Her Majesty, they would have been liable to the jurisdiction under the Order in Council of 1889 "under same conditions as British subjects and to the extent of the jurisdiction vested by law in those Courts." These words are found in Art. 2 of the Order in Council of 1892. But that Article and the preamble, as also the later Order in Council of 1893, shew that Her Majesty has drawn a plain distinction about the criminal liability of subjects of the Signatory Powers, a distinction based evidently on the difference of the responsibility which the Crown is advised to assume in territories solemnly declared to be under the Queen's protection and those merely placed, *qua* the other Signatory Powers, in a British sphere of influence. Mr. *Hall* in his International Law, Pt. III. Chapter 3, Section 93 *et seq*, shows how Germany and France have thought proper to assume fuller jurisdiction over persons, not originally their subjects, than the Crown of England has done, the last having, as these Orders in Council show, acted more gradually. It may be that the restrictions of jurisdiction have been ordained inorder not to offend the susceptibilities of other Powers or inorder not to burden the Queen's administrative and judicial services with cases arising in regions merely in a sphere of influence, whereas yet the word "allegiance" has hardly been heard, and where the Queen has not solemnly declared her prerogative of protection. But it is not the duty of this Court to find reasons for the acts of the Queen's Ministers when the language used by Her Council is, as we think, clear.

For the above reasons the Court holds that as Article 48 of the Order in Council applies in terms only to British subjects, and as these prisoners have not, as regards acts done outside the Queen's Protectorates, been brought into the position of British subjects, the convictions and sentences under Article 48 are on their face without jurisdiction.

The conviction for slave-trading would, if the prisoners were British subjects, probably have been legal under Article 45 which applies the English statutes. But these foreigners are not of any class included in Article 10: nor do the later Orders in Council, as already mentioned, include them for acts done outside of the British dominions or protectorates.

The convictions under Article 50 are for the same reasons bad, as, upon a true construction, the wide phrase of that Article "a person" must be treated as limited by Article 10 and the general scope of this order of 1889 and the later Orders in Council.

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Another reason for distrusting the validity of the convictions under Article 50 is that there is no record of any prohibition of importing arms and ammunition. The Commissioner and Consul-General *presumes* that the authority who prohibited is Her Majesty the Queen. But it has not been suggested that Her Majesty has done this by applying any Act of Parliament, or any Indian Statute on the subject of prohibited or contraband goods; or that Her Secretary of State has sanctioned any Queen's Regulation under Article 99 on the subject.

The Court holds the convictions and sentences of the Consular Court to have been passed without jurisdiction and instructs Her Magesty's Commissioner and Consul-General to cancel them and to set the prisoners at liberty.

The Court will renew its request for a complete collection of such official papers, Queen's Regulation and Orders in Council as are mentioned in Para 13 of our former Order. To avoid delays of justice we seek for authoritative information as regards any new Protectorates declared or other important Orders passed.

RANADE, J.—I concur. As this is a case of some importance, being the first of its kind under the extended Appellate Jurisdiction of this Court over East Africa, I deem it necessary to record a separate Judgement. Her Majesty's Commissioner and Consul-General for Uganda convicted the two prisoners Juma and Urzee of offences described in Articles 48 and 50 of the Africa Order in Council 1889, and Urzee was further convicted of slave dealing, and they were sentenced respectively to two and three years' rigorous imprisonment. These sentences were submitted to this Court for review under Articles 74 and 75 of the Order. In the course of the first hearing which took place on 17th March 1896, we took judicial notice of the fact that Uganda was a Protectorate of Great Britain, and that Unyoro, the territory where the offence was admittedly committed, was within the British sphere of influence. Judicial notice was also taken of the fact that the King of Unyoro had commenced hostilities in December 1893 and was at the time when the offence was commited at war with Uganda and the protecting British Power. We also intimated at the time that we saw no reason to differ from the findings of fact on which the conviction was based—namely, that the prisoners were engaged in carrying gunpowder to Unyoro, knowing the trade in powder to be illegal, and knowing further that the King of Unyoro was in open warfare with Uganda and the protecting Power, and lastly, that prisoner Urzee was further engaged in slave trading. We felt it necessary, however, to obtain fuller information (1) as to whether the gunpowder was imported by the prisoners for the purpose of aiding the King of Unyoro in his war operations, (2) whether there

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was any express authoritative prohibition of the import or smuggling of gunpowder. (3) As no particular Statute or Act was quoted or referred to in the judgment, we wished also to know the particular Act, Statute or Order on which the conviction for slave dealing was based. Besides fuller information on these points, we inquired in reference chiefly to the question of jurisdiction raised before us by Mr. Young; (4) what territory the prisoners belonged to, and whether they were subjects of any signatory or other Power or subjects of Her Majesty or of a territory under Her Majesty's protection or influence; (5) and further whether the Unyoro country was included in any protectorate, and, if so, when and how, and (6) whether Her Majesty had made foreigners to whom the Order in Council of 1892 applied justiciable by the Consular Court for acts done in Unyoro.

The Consul-General has now supplied the information asked for in the interlocutory observations. On the first point noted above, his reply shows that the importation of gunpowder was made by the prisoners not for pacific purposes, but for aiding and abetting the King of Unyoro in his war operations. On the second point, it is stated that the prohibition of the import of gunpowder had been duly notified, and the prisoners themselves knew that the trade was illegal. In regard to the third point, about the prohibitions of slave trading the Consul-General referred to Chapter II Article 9 of the General Act of the Berlin Conference of 1885, and he stated that the treaty obligations there undertaken were applicable to Unyoro under Article No. 3 of the Africa Order in Council of 1893. As regards the points which had reference to the question of jurisdiction, the Consul-General stated that Unyoro had not been included within a British protectorate, but it was within the British sphere of influence. We gather further from the reply that the plea of the prisoners that they were German subjects urged by them in the course of the trial is substantially correct, as it is not traversed in the reply. The Consul-General states that the prisoners, as soon as they raised this plea, were not made over for trial to the nearest German Authorities because in the absence of any established usage or custom, or of a legitimate demand made by a duly accredited representative of a foreign jurisdiction, it is not usual for British administrations to surrender offenders arrested by themselves. There was no such usage established, and there was no demand made in this case, and German subjects had no ex-territorial rights, and the German Government had no representatives in those parts. As the King of Unyoro was at war with Uganda and the Protecting Power, and Unyoro was temporarily occupied by a Military force, the Consul-General held that he felt himself justified in assuming the same respon-

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sibilities and exercising the same rights as regards the part of Unyoro in Military occupation as his Court exercised in protected Uganda. In other words though Unyoro had never been formally included within the Protectorate, the fact of Military occupation justified the extension of British Jurisdiction over that part of it which was so temporarily occupied.

It seems clear to me from the first set of replies that there is not sufficient reason shown which renders it necessary to suggest any modification of the decision of the Consular Court on questions of fact. The questions of jurisdiction stands, however, on a different footing. The question here is, had the Consul-General jurisdiction to try the prisoners or was he bound, as he admits it was open to him to do, to hand them over for trial to the German Authorities in East Africa. For the purpose of the inquiry into this question of jurisdiction, I may take it as proved that the prisoners are admittedly German subjects and that the offences with which they were charged were committed by them in Unyoro, which territory, though within the British sphere of influence in East Africa, was not included in the Protectorate of Uganda, and the King of Unyoro was at the time engaged in a war which necessitated a partial occupation of his territory by Military posts. I have now to consider whether under any of the Africa Orders in Council, the Court of the Consul-General and Commissioner of Uganda was vested with a jurisdiction to try German subjects arrested in Unyoro territory. The principal Africa Order in Council, dated 22nd October 1889, expressly defines the words "British subjects," "foreigners" and "natives" separately. British subjects include persons enjoying British protection, and the subjects of the Princes and States in India resident in the parts of Africa to which the Order relates. Foreigners mean persons who whether native or subject of Africa or not, are not British subjects; and natives are defined as being persons who are not British subjects nor the subjects of any non-African Power. It is clear from this that so far as this Order goes, the prisoners being German subjects fall within the category of "foreigners."

The Consular Courts created by the Order under Articles 5 and 19 and instructions on Article 21 have under Article 10 jurisdiction over the person and property of British subjects as defined above, and in regard to foreigners, they have jurisdiction only over them first when they submit themselves of their own accord to such jurisdiction, or secondly when they are subjects of States which have entered into treaty arrangements with Her Majesty permitting the exercise of this jurisdiction. In the case of natives as well as foreigners consent is necessary to give jurisdiction to treat them as British subjects (Article 17). So far, therefore, as this Order is concerned, the Consul-

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General's jurisdiction could only arise on proof that the prisoners submitted to it, or that the German Government had entered into an understanding with Her Majesty's Government permitting this exercise of jurisdiction over them. The Consular Courts though Courts of Record (Article 24) have no plenary authority, but are bound to exercise their jurisdiction to the extent and in the manner provided by this Order (Article 22). The criminal side of these Courts was constituted principally with the object of maintaining order among British subjects and for the repression of crimes or offences committed by British subjects (Article 12), and the jurisdiction over foreigners comes in only under the exceptions noted above. Part VI, which relates more particularly to the criminal jurisdiction, defines in (Article 45) offences as acts or omissions which are held to be offences under English Law, and this is also the purport of Articles 13, 45 and 65 in regard to procedure and punishments. Article 48 under which the accused were charged in the present case is expressly limited to British subjects as defined by the Order. Article 50 does not contain a similar limitation, but the general scope of the Order also limits its application. The restricted character of the civil jurisdiction of these Courts supports the same inference. Foreigners must expressly consent to civil jurisdiction (Article 100). The existence of native and foreign tribunals side by side with these Courts is expressly contemplated in Article 101. It is not necessary to elaborate this point more fully because the Consul-General himself rests his jurisdiction to try the prisoners in this case not under the Africa Order of 1889, but under the addition made to it by the Order of Council of 1892.

I have next to see what was the nature of the change effected by the Order of 1892, dated 28th June 1892.

It appears from Mr. *Hall's* great work on this subject that the Order of 1889 strictly followed the principles and traditions which have guided the Policy of British Settlements in foreign parts by which Consular jurisdiction is confined to British subjects only. The French and German Governments, however, in their African Protectorates claimed higher powers, and in the new Order of 1892 there was a distinct departure in that direction in regard to British Protected States. The Order in its preamble recites that for the due fulfilment of the obligations undertaken by Her Majesty under the General Act of the Conference of Berlin signed in 1885, the subjects of the Signatory Powers should be justiciable in like manner as British subjects within the limits of the territories which Her Majesty may have declared to be under her protection. The Order then enacts that the words "foreigners to whom this Order applies" shall

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mean subjects of Signatory Powers or any other Powers which have consented that their subjects shall be justiciable under the Order of 1889, and it further enacts that when Her Majesty has declared any territory to be a Protectorate of Her Majesty, the provisions of the Order of 1889 having reference to British subjects shall apply to the foreigners to whom this Order applies; and the requisition of the express previous consent of the foreigner or of his State shall have no effect in regard to such Protectorate, and in respect of such foreigners. Germany is one of the Signatory Powers. Uganda was declared a Protectorate on 19th June 1894, and it is clear that if the offences with which the prisoners were charged had been committed in Uganda, this Order would have given jurisdiction to the Consul-General to try the prisoners, notwithstanding their plea that they were German subjects. As it is, the Order has no application to Unyoro which admittedly has not been declared to be a Protectorate. Mr. Young made some point of the distinction between German subjects proper, and subjects of German Protected States. It is not necessary to consider this point as the distinction would have been material only if the offences had been committed in Uganda. As it is, the prisoners are admittedly not residents either of Uganda, or of the territories under British influence.

The Advocate-General contended that as the offences were committed against Uganda, and within a part of Unyoro under military occupation by a British force, this part of Unyoro might be considered as annexed to Uganda over which the Consular Court had jurisdiction to try foreigners, who were subjects of Signatory Powers. I think this contention is opposed to the general principles of Law and that it is also against the express terms of the Order of 1892 which declares clearly that the Order of 1889 shall be void and of no effect only as regards territories *declared* to be protected in so far as foreigners to whom the Order of 1892 applies, are concerned. Beyond these local and personal limits the old Order must be regarded as still in full force. If the contention of the Advocate-General were sound no express declaration of a Protectorate would be necessary as all territory under British influence and occupied by Military force would be for the purpose of the Order of 1892, protected territory.

The Order of Council dated 17th July 1893 expressly enacts that "natives" as defined by the Order of 1889, of any protectorate of Her Majesty outside the local jurisdiction of Consular Courts shall be triable by such Courts as British subjects when they happen to be within such local limits. This extension of the first Order brings out clearly the distinction between the local and the protectorate jurisdiction of such Courts. It, however, does not support the view that these Courts have

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any jurisdiction over either natives or foreigners in respect of offences committed by them outside local or protectorate limits, solely on account of the fact that such territories came within what is called the sphere of influence.

The phrase, British sphere of influence, is obviously intended to mark out African territories within which other European Powers are by mutual understanding not to extend their conquests to the disadvantage of the British Power in East Africa whose sphere is marked out by 30 Meridian East Longitude. It has no significance for purposes of jurisdiction. It is in fact the outer circle beyond the Protected States, and is for purposes of internal jurisdiction independent territory, where the Consular Court has no direct authority, and cannot control the actions of its native rulers, as it might do in Protected territory. No delegation of power from the native ruler was possible as the King was at war.

As regards the question whether jurisdiction was given to the Consular Court by reason of a part of Unyoro being at the time under Military occupation, or as the Advocate-General put it, by reason of the temporary annexation of Unyoro in part to Uganda, I do not think it is necessary here to consider the point. Lord Kimberley's order is not among the papers sent to us. A temporary and partial occupation of the sort indicated could confer no jurisdiction on the Consular Court, whose powers are strictly limited by the various Orders in Council. The Military authorities might have on the strength of the forcible occupation of the territory of a King at war with Her Majesty's Government, disposed of the prisoners summarily on the spot under Martial Law applicable to such conditions. Occupation for purposes of war does not change the law of the country invaded, and such occupation cannot confer jurisdiction on the Consular Courts to try foreigners to whom the Order of 1892 did not apply as if they were British subjects. The distinction between spheres of influence and Protected territory is a well-recognised distinction, and cannot be got over by such temporary and partial occupation. At any rate this Court in appeal can have no jurisdiction to deal with acts committed under such circumstances. On the whole, therefore, I feel satisfied that the Commissioner and Consul General of Uganda had no jurisdiction under any of the Orders in Council to try the prisoners, who were German subjects, for offences committed by them outside the Protectorate of Uganda. We must, therefore, instruct him under Article 75 to cancel the sentences passed by him on the prisoners, and to set them at liberty.

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20 January 1897. JARDINE & RANADE, JJ.

Queen-Empress v. Ramchandra Shivjiram.*

Criminal Procedure Code (X of 1882), Sec. 145—Attachment—Moveables—Jurisdiction.

Section 145, Criminal Procedure Code, does not confer upon a Magistrate the same powers of attachment of movables as of immovable property.

ONE Balkrishna Appaji presented on the 8th October 1896, an information before the Second Class Magistrate at Bandora charging one Bapuji Raghoba and the petitioners with theft of salt of the value of Rs. 400 from the salt works at Bhynder and applied to the Magistrate that the said salt may be seized. The Magistrate granted a search warrant under section 96, Criminal Procedure Code, in execution of which warrant salt weighing 2032 maunds was seized at Bhynder on the 8th October 1896. The petitioners alleged that they were *bona fide* purchasers of the salt for value and that having made inquiries were informed that their vendor was the licensee of the salt works from which the said salt was purchased. When the case was taken up by the Magistrate the petitioners presented an application for the release of the attachment on deposit of double the value of the salt but the application was not granted. The petitioners, therefore, applied to the High Court.

PER CURIAM:—We point out to the Magistrate that there is no such power of attachment of moveables as is given about immoveable property by section 145 of the Criminal Procedure Code; and that unless the purposes of the trial for theft will be served, the Magistrate might leave the complainant to his remedy in a civil Court. If the Magistrate had *prima facie* evidence of the dishonesty which enters into the offence of theft, he might be justified in seizing the salt. If the salt is not in any way material as evidence on the charge the Magistrate might remove the attachment (See, *Dillon* v. *O' Brien* (1) cited in *Mahamad* v. *Ahmad* (2)), after if necessary any inspection or measurement which he may think necessary. The Magistrate's warrant is not in the form provided by Schedule V Form 8: he has not thought of examining the salt as a Court. He ought to take into consideration also the possible injury to the person accused from the long detention. We do not think sufficient cause has been shown for this Court to cancel the warrant or release the salt. But we are of opinion that the Magistrate should dispose of the charge as soon as may be: and that in the interval he may under the above directions dispose of the salt if he think fit according to law.

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*Criminal Application for Revision No. 319 of 1896.

(1) 20 Ir. L. R., 300. (2) I. L. R., 15 Cal., 109.

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25 January 1897. JARDINE & RANADE, JJ.

Queen-Empress v. Lakshman Sangar.*

Criminal Procedure Code (X of 1882), Sec. 497—Bail—Discretion—Magistrate—High Court.

The High Court would be very cautious in interfering with the discretion of a Magistrate about bail under section 497, Criminal Procedure Code, in a case where the prosecution after the inquiry before the Magistrate has begun does not tender evidence that the accused has some guilty connection with the non-bailable offence.

Two persons named Lakshman and Gangaram Sangar were charged with attempting to commit murder under section 307 of the Indian Penal Code. The accused were arrested at once, but the First Class Magistrate without taking any evidence or seeing papers in the case released them on bail, on the ground that it would take some days before the trial could take place owing to complainant's condition from his wounds, and that the accused were admittedly of respectable character.

The District Magistrate of Ahmednagar referred this case to the High Court observing:—" I think Mr. Brown was mistaken in taking bail in a non-bailable case without taking any steps to satisfy himself that there were grounds for breaking the usual rule, I request that his orders may be quashed. The case is a serious one. There is *prima facie* a strong case against the accused, and the dangerous nature of the wounds caused is no ground for extending an indulgence to them which would not have been granted had the wounds been less severe so as to allow of the trial proceeding at once."

PER CURIAM.—We are of opinion that this Court should be very cautious in interfering with the discretion of a Magistrate about bail under section 497 of the Code of Criminal Procedure: where the prosecution after the inquiry before the Magistrate has begun does not tender evidence that the accused has some guilty connection with the nonbailable offence: see *Manikam Mudati and others* v. *The Queen*, (1) and *Ponnusami Chetti and others* v. *The Queen* (2). It is not stated that the Magistrate was asked to take such evidence or to hold part of the inquiry at the place where the injured complainant, unable to attend the Court, lay so that his evidence might be taken. The Court sees no sufficient reason to interfere.

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28 January 1897. JARDINE & RANADE, JJ.

Queen-Empress v. Sadu.†

Magistrate—Sentence—Custody—Imprisonment—Procedure.

It is not competent to a Magistrate to convict and sentence a person to simple imprisonment for as many days as he may be in custody during the trial, and to view that custody as imprisonment after conviction and release him at once.

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*Criminal Reference No. 133 of 1896. (1) I. L. R., 6 Mad., 63. (2) I. L. R., 6 Mad., 69.

†*Criminal Ruling* 4 of 1897. Criminal Review No. 15 of 1897.

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THE accused was charged with committing theft of property worth Rs. 2-8-0 in a dwelling house and was convicted and sentenced by the 2nd Class Magistrate to undergo simple imprisonment for six days.

The District Magistrate, of Poona, in his report, observed:—"The Second Class Magistrate, Purandhar, not being empowered to pass sentences of whipping submitted his proceedings to this Court which in the consideration of the fact that the accused had already been detained in Police custody from the 15th to 20th recorded an order for the imprisonment for that period alone and at once released the accused. From the remark it appears that the Magistrate allowed the period of the sentence to run before the date of the order convicting the accused, so this order is illegal."

ORDER.—The Court returns record and proceeding with the remark that a sentence follows and does not precede conviction. It was illegal to antidate the execution of the sentence as was done by the District Magistrate.

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25 February 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Savi.*

Indian Penal Code (XLV of 1860) Sec. 380—Theft in a building—Sentence—Imprisonment—Fine.

Under section 380, Indian Penal Code, imprisonment only is a legal punishment; fine need not necessarily be inflicted in addition.

THE Second Class Magistrate of Khed inflicted fine as well as imprisonment for an offence under section 380 of the Indian Penal Code, on the ground that by the terms of the section both punishments must be awarded.

The District Magistrate of Ratnagiri referred the case to the High Court observing:—"The mistake is that the Magistrates understand the words "and shall also be liable to fine" to mean "and also with fine," wherever they occur. I fancy that the wording of column 7 of Schedule II to the Criminal Procedure Code has something to do with it."

ORDER.—Return the record and proceeding informing District Magistrate that as in this case the fine is very small, the Court does not interfere, but that in order to prevent similar misunderstandings in future a Criminal Ruling will be passed to the effect that imprisonment only is a legal punishment and that fine need not be inflicted for an offence under section 380, Indian Penal Code, the words being "and shall also be liable to fine."

**Criminal Ruling 7 of 1897. Criminal Reference No. 13 of 1897.*

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4 March 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Subraya.*

Criminal Procedure Code (X of 1882), Sec. 288—Evidence—Conviction.

Section 288, Criminal Procedure Code, allows evidence taken before committing Magistrate to be treated as evidence at the trial in the Sessions Court, but a conviction based on such evidence alone, specially when it was retracted before the Sessions Court, would not be justified.

PER CURIAM:—This is a very curious case. A dacoity accompanied with murder was committed in June 1894. In July 1894 a bundle containing some of the property stolen in the dacoity was found by the police in the hills in a deserted Berad encampment along with meat and weapons and all sort of other things. The Sessions Judge agreeing with the Jury has acquitted the appellant of the dacoity and murder, but he has convicted him, agreeing with two and differing from three of the members of the Jury who were Assessors for this charge, of the offence of voluntarily assisting in the disposal of stolen property under section 414 of the Penal Code. The Sessions Judge thinks that in order to divert suspicion from himself and throw it on the Berad dacoits the accused placed the property he had stolen in the dacoity in this bundle at this place and with the assistance of Rudrapa the 1st Class Head Constable caused a bogus find of them to be made by the Police. In the bundle mixed up with the stolen ornamets, certain other ornaments were found which are said to have belonged to the accused. The whole case for the prosecution rests upon proof that those ornaments do belong to the accused. We can understand that the accused wishing to get rid of stolen property and to divert suspicion from himself might place the stolen property in a robbers' cave, but we cannot understand why he should mix with it his own property. It is inexplicable why he should wish to get rid of what was his own in order to supply evidence against himself of his connection with the stolen property. This idea does not seem to have struck the Sessions Judge as he says nothing about it. The accused throughout has denied that the property is his. The only evidence that it is, is furnished by the sonar Shatrugun, who, when examined before the committing Magistrate, said that he had made the ornaments for the accused (Exhibit 18A dated 19th June 1895). In the Sessions Court this witness (Exhibit 18, dated 17th November 1896) denied the truth of that statement, said that he had been induced to make it and swore that he made the ornaments for the man who was murdered by the dacoits. Section 288, Criminal Procedure Code, allows evidence taken before the committing Magistrate to be treated as evidence in the case but we do not think that a conviction based on such evidence and on such evidence

*Criminal Ruling 8 of 1897. Criminal Appeal No. 7 of 1897.

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alone would be justified. This is also the view of the other High Courts in India: see *The Queen* v. *Amanullah* (1) *Queen-Empress* v. *Bharmappa* (2); *Queen-Empress* v. *Dan Sahai* (3).

We reverse the conviction and sentence and acquit the accused and order his discharge.

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8 March 1897. RANADE & FULTON, JJ.

Queen-Empress v. Nusserwanji Sheriarji.*

Criminal Procedure Code (X of 1882), Sec. 439—Subordinate Court—Perjury—Sanction—High Court.

The High Court has jurisdiction to deal in revision with an order passed by a Subordinate Court under section 476, Criminal Procedure Code, directing an enquiry into an alleged offence punishable under section 193 of the Penal Code, read with section 249 of the Indian Succession Act.

RANADE, J:—This is an application against an order passed by the Assistant Judge of Broach, directing the District Magistrate of Broach to make an inquiry into a charge of an offence under section 193, Indian Penal Code, of which, in the opinion of the Assistant Judge, the accused Khan Bahadur N. S. Ginwalla had been guilty—in that he stated in a petition made by him on 9th October, 1896, for letters of administration that the property within jurisdiction left by his deceased father consisted only of Rs. 1472 in the Post Office Bank. The Assistant Judge was of opinion that this averment was false, and known or believed to be false by the accused. The first question I have to consider before going into the merits of the case is, whether this Court has jurisdiction to interfere in revision with an order passed by the Assistant Judge under section 476 of the Criminal Procedure Code. There have been conflicting rulings on this point, which it is not easy to reconcile. The Calcutta and Allahabad High Courts have held that they had jurisdiction under section 439 to revise orders passed under section 476, to the same extent that they have in respect of orders passed under section 195 sanctioning prosecution for certain classes of offences. This power of interference is to be exercised with a view to see if the discretion of the Subordinate Courts has been properly exercised. The Bombay and to some extent the Madras High Courts also have, on the other hand, recognised a distinction between sanctions given under section 195 and complaints made under section 476, the first being revokable and the second not revokable by Superior Courts. I shall firstly consider the decisions of the Calcutta and Allahabad High Courts.

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(1) 21 W. R., Cr. 49. (2) I. L. R., 12 Mad., 123. (3) I. L. R., 7 All., 862.

*Criminal Ruling 9 of 1897. Criminal Application for Revision No. 26 of 1897.

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The principal authority on the subject, on which, indeed, the applicant's counsel laid most stress was the ruling in the *Queen* v. *Baijoo Lall, In the matter of the petition of Baijoo Lall* (1) following *Kali Prosunno Bagchee* (2) and followed later on by the decisions reported in *In the matter of the petition of Khepu Nath Sikdar* v. *Grish Chunder Mukerjee* (3) *Chandhari Mahomed Izhoral Hug* v. *the Queen-Empress* (4). The chief point decided by the Judges in *Queen* v. *Baijoo Hall* (1) was that a civil Court should not send a case to a Magistrate except when, after holding a preliminary inquiry, it was satisfied that there was sufficient ground for directing judicial inquiry into the matter of a specific charge. In so far as the necessity of holding a preliminary inquiry was concerned, the ruling in *In the matter of Mutty Lall Ghose and others* (5) has explained the position more clearly by stating that such preliminary inquiry is not necessary in all cases, if there are materials on record on which a definite charge can be grounded. See on this point also *Bapuram* v. *Gouri Nath Dutt* (6), *Shasrah Kumar Dey of Paipah* v. *Shashi Kumar Dey of Khalpatan* (7), in both these cases the necessity of an inquiry as laid down in *In the matter of the petition of Kasi Chunder Mozumdar* (8) and *Sangli Vica Pandia Chinnatambiar Zamindar of Sivagiri* v. *The Queen* (9) was denied. This was also one of the points ruled in *Khepu* v. *Grish* (a) the other point being that the High Court has the same jurisdiction to revise orders passed under section 476 as it has in respect of those under section 195. In the arguments in this last case, the Bombay ruling—*Queen-Empress* v. *Rachappa* and *Queen-Empress* v. *Irappa* (10) to be considered shortly, was referred to, but it was not noticed in the judgment. Finally in *Chandhari* v. *Queen-Empress* (4) this jurisdiction was re-affirmed, and its purpose stated, namely, to see if the discretion given by law was properly exercised. The conflicting Bombay ruling in *Queen-Empress* v. *Rachappa* (10) was referred to without comment in this case. The same view about the High Court's powers of revision under section 439 was approved by the Allahabad High Court *In the matter of the petition of Mathura Das* (11) and *Aikman*, J., distinguished the decisions to the contrary of the Bombay and Madras High Courts and stated his opinion that there was no real conflict between them and the Calcutta and Allahabad decisions. Turning next to the Bombay and Madras authorities, *Queen-Empress* v. *Rachappa* (10) followed in *Queen-Empress* v. *Na-*

(1) I. L. R., 1 Cal., 450. (2) 23 W. R., Cr. R., 39. (3) I. L. R., 16 Cal., 770.
(4) I. L. R., 20 Cal., 349. (5) I. L. R., 6 Cal., 308. (6) I. L. R. 20 Cal., 474.
(7) I. L. R., 19 Cal., 315. (a) I. L. R., 16 Cal., 730. (8) I. L. R., 6 Cal., 449.
(9) I. L. R. 6 Mad. 29. (10) I. L. R, 13 Bom. 109. (11) I. L. R. 16 All, 89.

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rakka (12) I find that the head note in the report of I. L. R. 13, Bombay 109, states that a Superior Court may revoke a sanction to prosecute granted to a private person under section 195 but that it has no power to set aside a complaint made by a Subordinate Court under section 476. The question which the Court had to decide in that case was expressly stated in the judgment to be "whether the District Judge in one case and the Sessions Judge in the other had authority to revoke a sanction granted by the Subordinate Judge of Hubli in one case and by the First Class Magistrate of Hubli in the other." It is thus clear that it was not a question of the extent of the revisional power of the High Court that was under consideration in this case, but the powers of the District and Sessions Judge under section 195. The head-note to the Madras ruling in *Queen-Empress* v. *Narakka* (12) makes it clear that that Court regarded the judgment in *Queen-Empress* v. *Rachappa* (10) which it followed as only settling the question of the limited powers of Superior Courts to interfere *by way of appeal* with complaints made under section 476 by Subordinate Courts. Mr. Justice *Aikman* of the Allahabad High Court in *In re Mathura Das* (11) took the same view of the Madras ruling. To quote his words the Madras case "is an authority for holding that the High Court can interfere in revision with an order passed under section 476. What was decided there was that the High Court had no power to interfere on appeal with a complaint duly made under section 476," and he quotes an extract from the Madras judgment where it is stated expressly that "no sufficient grounds were shown for interfering in revision with the exercise of the Judge's discretion." A later decision of the Madras High Court, *Abdul Khadar and others* v. *Meera Saheb* (13), too, shows that Court is disposed to affirm that the High Court has revisional jurisdiction in such cases. As regards the Bombay case, the same Judge observed that it was a ruling on the antepenultimate clause of section 195, and had as shown above, no reference to the revisional powers of the High Court. The distinction which obtains between a sanction and complaint in this respect has reference only to the power of Superior Courts, even the High Court included, to act under section 195; but this distinction has no place where the powers of the High Court under section 439 have to be considered. The reason for providing a procedure by way of complaint as separate from the procedure by way of sanction has been clearly pointed out in *Ishri Prasad* v. *Sham Lal* (14) and that reason no way justifies a limitation of power in the one case, when such limitation does not exist in the other. The general conclusion to which this consideration of the authorities leads me is that there is

(12) I. L. R., 13 Mad., 144. (13) I. L. R., 15 Mad., 224. (14) I. L. R., 7 All. 871.

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really no conflict between the Calcutta and Allahabad decisions on the one hand, and the Bombay and Madras rulings on the other, so far as the power of revision conferred on High Courts by section 439 is concerned, and that the High Court has power in revision to deal with orders passed under section 476—of course guided and controlled by the same considerations which influence the exercise of its revisional powers in all other matters. The point of law being thus disposed of, I have next to consider whether in the case before us there are circumstances which justify on grounds of law the revision of the order passed by the Assistant Judge. I am of opinion that the Assistant Judge has, in the first instance, misconceived and misconstrued the petition when he thought that the accused had stated therein that the only property left by his deceased father consisted of Rs. 1,472 deposited in the Post Office Bank. Neither the Gujarati petition nor its English translation gives any support to this view. Both state that the moveable property, within jurisdiction, of the deceased was Rs. 1,472. The word *only* is nowhere used, and the deceased is stated to have died in his own house. The supplementary petition in which a few small items of moveable property and the value of the land were added is similarly silent. This circumstance takes away the whole basis on which the charge apparently rests. The Assistant Judge was led, by some newspaper report sent to him, to think that the accused did not make a true statement of his father's property, with the object of evading the payment of succession duty. The official report of the Collector called for by the Assistant Judge, however, fully bears out the statements in the original and supplementary petitions, and the item of a few rupees likely to be saved is too small to induce a man in the position of the accused to wilfully perjure himself. The inaccuracy was more probably due, as stated by his pleader, to inadvertence. There is nothing on record besides the accused's own examination to show that there was any wilful false statement made, and there was thus no sufficient ground for suspecting that an offence had been committed. For these reasons I would set aside the order of the Assistant Judge.

FULTON, J.—I concur with my learned colleague in thinking that the High Court has jurisdiction to review the order of the Assistant Judge directing, under section 476, Criminal Procedure Code, an inquiry into an alleged offence punishable under section 193, Indian Penal Code, read with section 249, Indian Succession Act. Section 439 appears to include all cases dealt with by the Code of Criminal Procedure, and there is nothing to exclude orders made under section 476 from the effect of its provisions. The decision reported in *Queen Empress* v. *Rachappa* and *Queen Empress* v

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Irappa (1) related to the jurisdiction of an Appellate Court to revoke such an order and not to the revisional powers of the High Court. The decisions in *In the matter of the petition of Khepu Nath Sickdar and others* (petitioners) v. *Grish Chunder Mukerji* (opposite party) (2), and *In the matter of the petition of Mathura Das*, (3), show clearly that the Court has jurisdiction. On the merits I concur in thinking that this is no case for prosecution. A Court should not institute a prosecution unless there appears a reasonable probability of being able to prove facts which will support a conviction. Here there seems no such probability. If the application which is said to contain the false statement is literally translated, it will be proved that there is in fact no false statement. The Assistant Judge treated the statement about the deceased's moveable property within the jurisdiction as equivalent to an assertion that the deceased had no other property. Even if the inference was reasonable, still it is impossible to convict a man under section 249 of the Indian Succession Act for making a false averment in a petition or declaration if the averments made are all literally true. The omission of the immoveable property may or may not have been intentional, but the petition contained no averment on the subject. The omission of the value of the old clothes and cooking pots was probably unintentional as such trifling articles are often left out in similar petitions. The evidence on record does not show that the deceased possessed any other moveable property, and a prosecution should not have been undertaken about a petty item of old clothes and cooking pots. Even as regards the immoveable property, it can hardly be said that there was any effectual attempt at concealment, for the petition recited that the deceased died in his own house. In the circumstances I concur in setting aside the order.

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11 March 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Rabha.*

Criminal Procedure Code (X of 1882), Sec. 537—District Magistrate—Commitment, order of—Notice—Irregularity.

Where a District Magistrate, being of opinion that an accused person is improperly discharged by a Subordinate Magistrate, makes an order to commit him to a Court of Sessions without giving any notice to the accused, but the committing Magistrate before so doing issues the notice, the irregularity of the District Magistrate comes within the terms of and is cured by the provisions of section 537, Criminal Procedure Code.

IN this case, the District Magistrate having under section 436, Criminal Procedure Code, recorded his opinion that the accused person

(1) I. L. R., 13 Bom., 109. (2) I. L. R., 16 Cal., 730. (3) I. L. R., 16 All., 80.

*Criminal Reference No. 15 of 1897.

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was improperly discharged, directed him to be committed to a Court of Session without first giving him an opportunity of showing cause to him (the District Magistrate), why commitment should not be made. The District Magistrate in making the order directed the committing Magistrate to commit the case for trial by the Court of Session "after affording accused an opportunity under provision (a) of that section to show cause why the commitment should not be made." The Sessions Judge to whom the case was committed, was, however, of opinion that such direction was "no compliance with the law which requires that the opportunity should be given before any order directing commitment be made." He further observed—"It is true that the accused person when asked by Mr. Pendse (the committing Magistrate) if he had any cause to show why he should not be committed said he had no such cause to show. But (1) under the technical view, of the position, it was useless for him to show any cause in the presence of the District Magistrate's direction that he should be committed; and (2) looking to the merits of the case, I cannot but think that more trouble would have been taken to make the accused person realize his position if the Magistrate had thought he had any choice in the matter. If the Magistrate conceived he had any choice, and the accused person had merely said "you have already found the evidence insufficient to support a charge" I do not see how the Magistrate could have proceeded to frame a charge. Evidently he thought he was bound to commit, and that obligation was created without opportunity given to show cause against it. It was, therefore, illegally created. I can, therefore, only refer the case to the High Court with a view to the commitment being quashed under section 215, Criminal Procedure Code."

PER CURIAM.—We think that we ought not to interfere in this case. Although the District Magistrate did not give the accused notice before making his order, the accused had an oportunity given him of shewing cause before the Magistrate who committed him for trial. The omission of the District Magistrate to give notice would come within the terms of, and be cured by, the provisions of section 537. We may refer to *In re Khamir* (1) on this point. The case is returned.

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11 March 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Abdul Rahiman.*

Public Conveyances Act (Bom., Act II of 1863), Sec. 2—Public conveyance—Carriage.

To support a conviction under section 2, Bombay Act VI of 1863, it must be proved that the carriage was a public conveyance and that the accused kept or let it for hire.

(1) I. L. R., 7 Cal., 662. *Criminal Reference No. 16 of 1897.

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THE accused let for hire his *tonga* without having previously obtained a license for the same for the year 1896, from the authority competent to issue such license, and carried passengers more than is generally allowed for such conveyances when license is issued. He was fined Re. 1, under section 3, and Rs. 2, under section 15 of the Bombay Act VI of 1863 by the Second Class Magistrate of Pen. The District Magistrate of Kolaba in making the reference to the High Court observed:—"The accused though possessed of no license let his *tonga* for hire within the jurisdiction in question and thereby seems to have committed an offence under section 2 of the Act and not under section 3. The conviction under section 3, therefore, seems improper. Again the accused having obtained no license, he cannot be said to have infringed any of the conditions of license. The conviction under section 15 of the Act, therefore, is illegal. The convictions should in the District Magistrate's opinion both be set aside, and the accused retried on a charge under section 2."

ORDER.—For the reasons stated in the reference the Court reverses the convictions and sentences and directs the fines to be refunded. The accused can be retried for an offence under section 2, but it must be proved that the carriage was a public conveyance and that the accused kept or let it for hire, before he can be convicted.

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25 March 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Hari Appa.*

Public Ferries Act (Bom. Act II of 1868), Sec. 14—Ferry.

Section 14, of Bombay Act II of 1868, is to be read by itself; to support a conviction under the section it is wholly immaterial to see from what point the accused started in conveying passengers, animals &c., all that is necessary to consider is only the arriving point and if that is proved to be less than three miles above or below a public ferry, the offence is complete.

PER CURIAM:—Section 14 of Bombay Act II of 1868 makes it penal to convey for hire any passenger across any creek.....to any point on the opposite shore or bank, not being more than three miles on either side above or below any public ferry. The accused in this case has been found to have conveyed passengers from a point on the Tavsal side of the Jaighad creek which is more than three miles above the ferry to a point on the other side of the said creek which is only two miles from the ferry. The Sessions Judge thinks that the accused has committed no offence. He thinks on the analogy of section 14A that the starting point and the arriving point must be both within three miles of the ferry to satisfy the requirements of section 14. But this is not so. Section 14 is a provision to be read by itself and its clear language is that the starting point is wholly immaterial, the arriving point only has to be considered and if

*Criminal Ruling 10 of 1897. Criminal Reference No. 22 of 1897.

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that is less than three miles above or three miles below the ferry, then an offence has been committed. We return the record and proceedings.

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25 March 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Manordas Harakhchand.*

Indian Factory Act (XV *of* 1881), *Secs.* 15, 17—*Occupier—Manager—Proprietor.*

The proprietor of a factory who lives in a house on the factory premises for the greater part of the year is an 'occupier' of the factory within the meaning of section 17, Indian Factory Act; and if he does not discharge his liability by proving that the breach complained of was committed by his manager without his knowledge or consent, he renders himself primarily liable under section 15.

The proprietor is none the less an 'occupier' because he has not sent in any notice under section 14, as no notice is obligatory, and, therefore, none was ever given, the factory having been started before the Act came into force.

THE accused, a proprietor of a Mill at Nariad, was prosecuted under section 15 (*g*) of the Indian Factory Act and section 55 of the Municipal Act for the insanitary condition of the premises and buildings of his Mill. The accused pleaded that the responsibility for the alleged insanitary condition of the Mill rested not with him but with his manager; but the First Class Magistrate of Kaira convicted him and sentenced him to pay a fine of Rs. 101, or in default to suffer simple imprisonment for fifteen days. On appeal, however, the accused was acquitted by the Sessions Judge of Ahmedabad. From this order of acquittal the Government appealed.

PER CURIAM.—The Legislature has throughout the Indian Factories Acts, 1881 and 1891, made very frequent use of the word "occupier," but has nowhere defined the meaning to be placed on the word. The evidence in the present case shows that the accused is the proprietor of the factory, that he has a house on the factory premises and that for the greater part of the year at any rate he lives in that house. The Sessions Judge thinks that he is not the occupier because he has not sent in any notice under section 14 of the Act. This, however, is explained by the fact that the factory in question was started before the Act came into force so that no notice under the section was obligatory nor has such ever been given. We think that the facts that the accused is the proprietor of the factory and has his regular residence there prove that the accused is the occupier of the factory. As such he is primarily liable under section 17. He has not discharged his liability by proving that the breach in question was committed by his manager without his knowledge or consent. We, therefore, reverse the order of acquittal passed by the Sessions Judge and restore the conviction and sentence passed by the First Class Magistrate.

**Criminal Ruling* 11 *of* 1897. Criminal Appeal No. 2 *of* 1897.

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1 April 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Rajmal.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 64—Receipt—Gumasta—Principal.

The words of section 64, Dekkhan Agriculturists' Relief Act, 1879, that the person to whom the payment is made shall tender a written receipt, ought to bear their plain meaning. If, therefore, a *gumasta* of a firm makes a default contemplated by the section, the members of the firm cannot be proceeded with under the section.

THE petitioner was prosecuted under section 64 of the Dekkhan Agriculturists' Relief Act by one Rama on a charge of neglecting to tender a receipt for payment made in kind to one Gulabchand, the petitioner's *gumasta*, on his behalf by one Saoba, a servant of the complainant. The Second Class Magistrate convicted the petitioner and sentenced him to pay a fine of Rs. 25. The petitioner, thereupon, applied to the High Court, contending that the Lower Court erred in convicting the petitioner as he was not the person who received the payment under section 64 of the Act.

PER CURIAM:—When Gulabchand who was the *gumastta* of the firm of which the accused are members received payment of the grain due to that firm from the complainant, he endorsed on the back of the note which demanded payment on behalf of the firm the fact that he had received so much grain and that so much was still payable and gave the note to the complainant. Presumably he signed this endorsement, but he was not asked about this and the note has not been recorded in evidence as the complainant said he had lost it. The Magistrate has convicted the two accused under section 64 of the Dekkhan Agricultarists' Relief Act because he says that the note was given by Gulabchand and was not an acquittance from the creditors. The words, however, of section 64 are that the person to whom the payment is made shall tender a written receipt, and these words ought, we consider, to bear their plain meaning. Here the payment was made to Gulabchand and he tendered a receipt. In point of fact he was authorized by the firm to do this just as he was authorized to receive payment. We reverse the conviction and sentence.

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1 April 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Hasan Samad.†

Indian Penal Code (Act XLV of 1860), Sec. 190—Public Nuisance—Meat, exposing of in a shop.

The mere fact of keeping a shop open for the sale of meat does not constitute the offence of public nuisance. The sight of meat may be offensive to the sentiments of Hindus but it cannot be said to affect seriously, if at all, the health, safety, comfort or convenience of the community at large.

Queen-Empress v. *Byramji* (1), followed.

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*Criminal Ruling 12 of 1897. Criminal Application for Revision No. 36 of 1897.

†Criminal Ruling 13 of 1897. Criminal Revision No. 18 of 1897. (1) I. L. R., 12 Bom. 437.

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THE petitioner was convicted by the First Class Magistrate of Ahmedabad of the offence of committing a public nuisance inasmuch as he kept a meat shop at Kapur Chakla Market in Ahmedabad and was fined Rs. 10.

PER CURIAM:—This is one of several complaints laid against certain Mahomedans charging them with committing a public nuisance in that they have their shops for the sale of meat in the Kapur Chakla (market) in the town of Ahmedabad. No express acts of nuisance are alleged. It is said that the very existence of such shops causes annoyance to those who dwell and carry on business in that locality and to those who go there to make purchases and to passers-by and this is because the meat is visible. It is clear that this annoyance is one to Hindus only of which race all the witnesses against the accused consist. In the eyes of the witnesses for the defence (Europeans, Parsis, Mussulmans) the shops cause no nuisance. The case, therefore, presents a great similarity to that of *Queen-Empress* v. *Byramji Edulji* (2). The sight of meat may be offensive to the sentiments of Hindus but it cannot be said to affect seriously, if at all, the health, safety, comfort or convenience of the community at large. The matter seems rather one with which Municipality ought to be able to deal under powers for regulating places at which meat shall be sold. We do not think the mere fact of keeping a shop for the sale of meat comes within the definitions of a public nuisance and we therefore reverse the conviction and sentence.

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10 June 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Langadaya Balu Koli.*

Criminal Procedure Code (X of 1882), Ss. 195, 467—Indian Penal Code (XLV of 1860), Sec. 188—Disobedience of an order—Magistrate—Jurisdiction.

A Magistrate is not competent to try and convict a person under Section 188, Indian Penal Code, of disobedience to an order issued by himself as Magistrate under section 144, Criminal Procedure Code. The Magistrate is further disqualified from trying such a case by section 476, Criminal Procedure Code, for the offence is one mentioned in section 195 of the Code and it is committed in contempt of his own authority.

Queen-Empress v. *Balji Daji* (1), distinguished.

THE Second Class Magistrate of Uran convicted seven persons, under section 188, Indian Penal Code, of disobedience to an order issued by himself under section 144 of the Criminal Procedure Code. The Sub-Divisional Magistrate of Kolaba submitted this case, under section 435 of the Criminal Procedure Code, to the District Magistrate, observing:—" By section 195, Criminal Procedure Code, a Court is debarred from

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(2) I. L. R., 12 Bom., 437. (1) I. L. R., 18 Bom., 380.

*Criminal Ruling 14 of 1897. Criminal Reference No. 36 of 1897.

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taking cognisance of an offence under section 188, Indian Penal Code, "except with the previous sanction, or on the complaint of the public servant concerned" or of his official superior. Further, by section 487, Criminal Procedure Code, a Magistrate is disqualified from trying a person for an offence mentioned in section 195, Criminal Procedure Code, when such offence has been committed in contempt of his own authority. The Magistrate's want of jurisdiction is, therefore, indisputable." The District Magistrate of Kolaba referred the case to the High Court.

PER CURIAM :—For the reasons given in Para 2 of the letter of the Sub-Divisional Magistrate, we reverse the conviction and sentence in each of the cases referred to us and direct the fine, if paid, to be refunded. The case (1) quoted by the trying Magistrate does not apply for in it the notice was issued by a Mamlatdar whereas in these cases it is stated that it was issued by the trying Magistrate himself in his capacity as a Magistrate.

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17 June 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Bhausing.*

Reformatory Schools Act (VIII of 1897), Sec. 4 (a)—Youthful offender—Sentence.

Where a First Class Magistrate ordered an accused person who was evidently not under 15 years of age, to be confined in a Reformatory School, as per orders dated 11th and 18th March, 1897, the High Court set aside the orders as illegal under the Reformatory Schools Act, 1897, which came into force on the 11th March, 1897.

IN this case, the Second Class Magistrate of Parola convicted on the 2nd March, 1897, two young men Sukhlal and Bhausing of theft and sentenced each of them to imprisonment for one month. On the 8th March, 1897, the Superintendent of the prison wrote to the First Class Magistrate of Dhulia to fix an early date to consider the case of the prisoner Bhausing as the medical officer of the prison was of opinion that the lad was 15 years of age. On the 11th March, the Magistrate ordered his detention in a Reformatory School for two years. On the 13th March, the Superintendent of Dhulia prison again wrote to the Magistrate that as the lad was 15 years of age, the award of only two years appeared inconsistent with the rules framed by Government under section 22 of Act V of 1876. On the 18th March, the Magistrate increased the period to three years. On the 5th April Bhausing appealed aganist his conviction and sentence to the Divisional Magistrate, but that officer rejected the appeal. on the 12th April holding that as the First Class Magistrate passed the sentence under the Reformatory Act, an appeal against the order lay to the Sessions Court. On the 21st April, Bhausing applied to the Sessions Court of

(1) *Queen-Empress* v. *Baiji Daji.* (I. L. R., 18 Bom., 380).

**Criminal Ruling* 15 *of* 1897. Criminal Reference No. 43 *of* 1897.

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Kandesh for revision of the proceedings. The learned Judge submitted this case to the High Court under section 438, Criminal Procedure Code.

PER CURIAM :—It does not appear from the record of this case that the accused person is under the age of 15 years. We, therefore, quash the orders of the First Class Magistrate dated the 11th and 18th of March as illegal under the Reformatory Schools Act, 1897, which came into force on the 11th March last.

We also set aside the orders of the Magistrate of the 12th April 1897 dismissing the appeal of the accused person against his conviction by the Second Class Magistrate and direct the Magistrate to dispose of the appeal according to law.

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24 June 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Mahomed Isa.*

Criminal Procedure Code (X of 1882), Sec. 106—Appeal—Order of security—Jurisdiction.

An appellate Court cannot add to the sentence of the original Court an order under section 106, Criminal Procedure Code, that the accused appellant shall execute a bond to keep the peace.

Aslu v. *Queen-Empress* (1), *Queen-Empress* v. *Ishri* (2), *followed.*

THE accused was convicted by the Third Class Magistrate of Panvel of the offence of using criminal force under section 352, Indian Penal Code, and sentenced to pay a fine of Rs. 5. On appeal, the First Class Magistrate of Kolaba upheld the conviction but reduced the sentence of fine to two annas and passed an order calling on the accused to execute a bond in a sum of Rs. 10 without sureties, to keep the peace for a month. The accused preferred this application to the High Court.

PER CURIAM.—We think that it is clear from the wording of section 106, Criminal Procedure Code, 1882, that an Appellate Court cannot add to the sentence of the original Court an order that the accused, appellant, shall execute a bond to keep the peace. In this we are following the decisions of the Calcutta and Allahabad High Courts: see *In the matter of the petition of Aslu* v. *The Queen-Empress* (1) and *Queen-Empress* v. *Ishri* (2). We reverse the order to furnish security.

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24 June 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Abdulla.†

Whipping Act (VI of 1864), Sec. 2—Criminal Procedure Code (X of 1882), Sec. 390—Whipping.

Where a sentence of whipping is passed as a sole punishment under section 2 of Act VI of 1864 (Act III of 1895, section 5), it is not necessary first to pass a sentence provided for the

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**Criminal Ruling* 16 *of* 1897. Criminal Application for Revision No. 114 of 1897.

(1) I. L. R., 16 Cal., 779. (2) I. L. R., 17 All., 67.

†*Criminal Ruling* 17 *of* 1897. Criminal Reference No. 45 of 1897.

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offence under the Indian Penal Code, and then to convert such sentence into one of whipping.

Section 390, Criminal Procedure Code, authorizes the Court passing a sentence of whipping, only to fix the place and time for its execution, but it does not contemplate a postponement of the execution of the sentence to a future day.

THE accused was convicted of theft, under section 379 of the Penal Code, by the First Class Magistrate of Dhulia, who sentenced him thus: "That he should suffer rigorous imprisonment for one month, and under section 2 of Act VI of 1864 I further direct that in view of this punishment the accused Abdulla should receive 24 stripes to be inflicted in the manner laid down in section 392, Criminal Procedure Code. The whipping shall be inflicted at Taloda at noon on Monday 15th February 1897 in the presence of the Hospital Assistant at that place: sections 390 and 394 Criminal Procedure Code."

The Sessions Judge of Khandesh in referring this case to the High Court observed :—" The sentence as passed by the Magistrate is not strictly legal. Section 2 of Act No. VI of 1864 provides that 'whoever commits any of the following offences (theft is mentioned in Group A, may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code.' The meaning of this section is that whipping may be awarded in lieu of the total punishment provided for the offence in the Indian Penal Code. It is not necessary to sentence the offender to some punishment under the Indian Penal Code and then convert it into whipping. Such a course is plainly illegal for having once meted out an adequate punishment under section 379 of Indian Penal Code, the Magistrate cannot convert it into whipping. The proper course is to sentence the offender to whipping without any further reference in the manner the Magistrate has done. Section 390 of the Criminal Procedure Code authorises the Court to fix the place and time at which whipping shall be administered, when the accused is sentenced to whipping only. But it does not contemplate postponement of the execution of the sentence to any day other than that of the sentence. In the present case the Magistrate passed the sentence on 12th February and ordered the whipping to be administered on the 15th February. The effect of this order was that the accused remained in custody until 15th February. In a case of this kind the Magistrate should execute the sentence on the same day that he pronounces it."

ORDER—The Court concurs with the Sessions Judge and the Magistrate should be so informed for his guidance in future.

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28 June 1897. PARSONS, CANDY & TYABJI, JJ.

Queen-Empress v. Shoma Chatur.*

Indian Penal Code (XLV of 1860), Sec. 379—Theft—Dishonest Removal of Property—Criminal Procedure Code (X of 1882), Sec. 439—Revision—Questions of fact—High Court.

A removal of property dishonestly, that is, with the intention of wrongfully depriving the owner of the possession thereof to which he was legally entitled, for however short a period, is theft.

The power of the High Court upon revision to go into questions of fact is undoubted; whether or not it will exercise the power in any particular case depends entirely upon the merits of the case itself. The High Court does interfere when the interests of justice require it or when the inquiry in the lower Courts has been faulty.

THIS case came up for hearing on the 20th May, 1897, before the Bench composed of CANDY and TYABJI, JJ.; but their Lordships having differed in their Judgments, the case was laid before PARSONS, J.

CANDY J:—The facts found by the lower Courts are that accused took from the possession of complainant's wife two copper pots with a view to compel complainant to pay the balance of a debt due to him (accused). At the time that he took the pots he intended to dishonestly deprive complainant of the possession of them. After a very short interval on being spoken to by one Khengar he repented of his dishonest intention and he replaced the pots.

The smallest amount of moving will satisfy the requirements of the term "move" in section 378, Indian Penal Code. The pots were taken dishonestly, *i.e.*, with the intention of depriving the possessor of the possession of them. That was the intention of the accused at the time of moving; his words and acts clearly show that he did not merely mean to frighten complainant's wife: according to the evidence he would not have replaced the pots had not Khengar remonstrated with him. Had he replaced the pots before moving away from the house, then there might have been ground for holding that the dishonest intention was not completed but this was not so. It was not the taking of almost valueless property: *Reg.* v. *Kasya bin Raoji* (1). It is not denied that the pots have all appreciable value. I see no reason to differ from the ruling of this Court (*Queen-Empress* v. *Nagappa* (2)), that if the dishonest intention, the absence of consent, and the moving are established, the offence will be complete however temporary may have been the proposed retention. But considering that accused so soon repented of his dishonest intention, I think the District Magistrate should have remitted the fine leaving the one day's imprisonment untouched; and I am now prepared to do so.

*Criminal Ruling 19 of 1897. Criminal Application for Revision No. 71 of 1897.

(1) 5 Bom., H. C. R., 35. (2) I. L. R., 15 Bom. 344.

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Since writing the above I have had the advantage of perusing my learned colleague's draft judgment and I would add that I purposely did not weigh the evidence or disturb the finding of the two Magistrates.

The circumstances alluded to by my learned colleague do not constitute the "exceptional grounds" on which alone we in revision should interfere with the findings of fact: see *Queen-Empress* v. *Shekh Saheb Badendin* (3). The false "improvement" added to her story by Janaki in no way shows that the main story of the prosecution is not true. The District Magistrate, an officer of some experience, held that the evidence was "overwhelming". There certainly was evidence on which he could find the facts which he did; and for us in revision that is sufficient. On the facts I have nothing to add except that the ironical language of Janki cannot possibly in my opinion be taken as authority for accused to take the pots; and moreover he never raised such a plea, which would be inconsistent with the further plea that he removed the pots simply as a temporary threat.

I fail to see how on the facts found complainant could have sued in a civil Court for damages.

The Indian Penal Code may have, as was remarked long ago by an eminent authority, an all capacious maw? but in my humble opinion it would be introducing a most dangerous principle if in the present case we reversed the convictions on the ground that that after all it was "such a little one".

TYABJI J:—In this case the petitioner was convicted by the Second Class Magistrate of Matar of theft under section 380, Indian Penal Code, and sentenced to one day's imprisonment and a fine of Rs. 50. On appeal the District Magistrate of Kaira confirmed the conviction but reduced the amount of fine from Rs. 50 to Rs. 25. The facts upon which the conviction is based are shortly as follows:—The complainant Bhana Bhaira a Dhed by caste and a convert to Christianity was indebted to the petitioner in a sum of money. The petitioner made several demands for the debt but the complainant did not pay it. On the day on which the theft is said to have been committed the petitioner went to the complainant's house and asked for his money. The complainant refused to pay and the petitioner is then alleged to have removed the pots for the purpose of enforcing payment but after having gone away a few paces is said to have returned and to have replaced the pots on the threshold of the complainant's house. It is this removal for which the accused has been convicted of theft and sentenced as above stated. On the 3rd day after the above alleged

(3) I. L. R., 8 Bom., 127.

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removal the complainant preferred a charge of theft against the petitioner, but the Magistrate of Kaira refused to proceed upon the complaint and sent the case for investigation to the Chief Constable and on receiving his report called upon the complainant to show cause why the charge should not be dismissed. In the meantime the Magistrate was succeeded by another who enquired into the complaint and convicted the petitioner.

Looking at the facts of the case, the trumpery nature of the alleged offence and the circumstances under which the prosecution was instituted, I have no doubt that this is not a '*bona fide*' prosecution for the vindication of public justice or for obtaining redress against any real wrong. The prosecution does not seem to have been voluntarily or spontaneously started but seems to have been suggested by the Missionary friends of the complainant who appear to consider it their duty to come forward in support of their converted proteges. The complaint was not lodged till three days after the alleged offence. The first Magistrate does not seem to have taken a serious view of the petitioner's conduct and was inclined to dismiss it. Under these circumstances, it seems to me to have clearly been the duty of the lower Courts, and to be now the duty of this Court to approach the evidence with a certain amount of caution not to say suspicion. The case is evidently an attempt on the part of a defaulting debtor to turn the tables upon his creditor and under cover of the law to get a respectable and well-to-do Sowkar convicted of a disgraceful offence and to get him branded for ever as a thief. It is evidently a case in which I think it is the duty of this Court to examine the record carefully in order to prevent a gross mis-carriage of justice. Now I have carefully gone through the evidence for the prosecution, and have come to the conclusion that it is not of a character on which it would be safe to base a conviction. All the witnesses belong to the same caste, most of them are related to each other. They are all chance witnesses giving evidence three or four months after the occurrence, who just happened to be present there when the pots are alleged to have been taken away. Moreover there are most serious discrepancies in the evidence. The complainant's wife Jivi (witness 2) would have us believe that a respectable Baniya in the position of the accused actually entered the house of a Dhed and in addition to the two pots stole from the press Rs. 2½ of the Babashahi currency and half rupee of the British India Currency. The improbability of the accused polluting himself by entering a Dhed's house is sufficiently obvious and is acknowledged by some of the witnesses who try to get out of it by pretending that the accused took away the pots by stretching out his arm without entering the house! The story of the theft of the money is ridiculous, and seems to have been summarily rejected by both the lower Courts. Jivi says that the accused

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had gone to a distance of about five paces from her house when he returned and left the "Beda" (pots) on the verandah of her house. Uklo Aslo (witness No. 3) says "The accused asked Bhana's wife to come out and pay the money. She at once came out and said to the accused 'Bhai, I leave this to you, take it with your hands.' The accused took the *beda* from the house. They were a *degda* and a *gada*. He took the same and came out." If this is true it is evident that the removal of the pots assuming it to have taken place was with the assent of the complainant's own wife, and could not therefore amount to theft: *Empress* v. *Troylukho* (1). This witness who is the cousin of the complainant says that the accused was standing at a distance of five paces only from the house before he brought back the pots. Asi (witness 4) who is the aunt of the complainant professes to have witnessed the whole scene from her own house 4 or 4½ months before she gave her evidence.

Keshaw Kuber (witness 5) also professes to have witnessed the occurrence but admits that he did not see the accused enter Bhana's house.

Pitamber Khengar (witness 6) says "about four months ago on a Sunday I had gone to fetch water. I saw the accused with a *degda* and a *gada* in his hands. He was standing in Bhana's street about two paces distant from front of his house. I told the accused that if anything was due to him, he should have recourse to the Court, but that he should not take away the *beda* (set of pots)". This man admits that he was convicted of theft of blankets and is not a very reliable witness.

Khengar Poonja (witness 7) deposes to have gone to Bhana's house on that day and to have seen the accused seated on the threshold of Bhana's house with copper pots in his hands. He further says "Jivi did not tell me anything about these pots or about the accused. On my going to the bungalow (Missionary's) I did not speak anything to Bhana about this matter". If this evidence is true it shows that the accused was not considered by the parties to have done any wrong at that time.

The case for the defence was that all this evidence was fabricated for the purpose of bringing the accused into trouble and that even if true it does not prove the offence of theft. On a careful consideration of the whole evidence I must confess that I look upon it with the gravest suspicion and that I do not consider it established that the accused did as a matter of fact remove the pots as alleged by the complainant.

Assuming however that the pots were removed I am further of opinion that under the circumstances of the case the removal does not amount to theft. In order to constitute theft a dishonest intention is absolutely

(1) I. L. R. 4 Cal., 366.

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necessary. It ought not to be lightly or wantonly assumed. Now such intention is not only not proved in the present case but is to my mind satisfactorily negatived and even disproved. Assuming the evidence to be literally true the accused took away the pots in broad day-light in the presence of the complainant's own wife and within the sight of a number of witnesses. He merely walked away four or five paces and then returned and replaced the pots on the verandah of the complainant's house. Moreover according to witness 3 Uklo Aslo he had the authority of complainant's own wife for the removal. It is not disputed that a debt was due to him. It is not pretended that anyone looked upon petitioner's act as dishonest. No one tried to stop him. No immediate complaint was made to any body. Under these circumstances the fair inference from the alleged facts is not that the petitioner removed the pots dishonestly for the purpose of wrongfully appropriating them to his own use and immediately afterwards changed his intention, but that he pretended to do so simply as a temporary threat never really intending to take them away, for otherwise it seems to me incredible that he would have brought them back immediately afterwards merely on the advice of the convicted thief Pitambar Khengar (No. 6). The authorities no doubt clearly establish that a dishonest removal of property for however short a period may amount to theft (*Mayne's* Penal Code, notes under section 379). But there must be clear evidence of a dishonest intention. Mere removal of property however unlawful or unjustifiable would not *per se* without such dishonest intention amount to theft. As observed by Mr. *Mayne* (Page 341) " we must look to the petitioner's state of mind and if that state is honest, though the honesty arises from ignorance of Law—the rule that ignorance of Law is no excuse does not apply. The ignorance does not operate to excuse the crime but to show that one of the essential ingredients on the crime is wanting: *Req.* v. *Nobinchandar* (2), *The Queen* v. *Revu Pothadu* (3). Here the District Magistrate has assumed the dishonest intention as if it necessarily followed from the mere fact of the removal of the pots. He has not discussed the question nor examined the evidence nor considered the position of the petitioner with the view of ascertaining whether the act of the accused cannot be explained consistently with perfect *bona fides* or a mistaken notion as to his rights as a creditor. In this case I am of opinion that though the removal of the pots may have been high-handed and illegal, though the petitioner's conduct may have amounted to tort or trespass it did not amount to theft as dishonest intention was wanting. If the act was illegal the complainant was not without remedy. His proper course was to file a suit

(2) 6 W. R., Cr. 70. (3) I. L. R., 5 Mad., 390.

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in the civil Court for recovering damages if he really sustained any and certainly not a charge of theft in a criminal Court.

Assuming however that the removal did technically amount to theft I am further clearly of opinion that the whole affair was so trivial and of such a trumpery character that the complaint ought to have been summarily rejected by the Magistrate on the well known principle of law "*de minimis non curat lex*"—embodied in section 95 of the Penal Code.

It is to my mind intolerable that the complainant in this case who is admittedly a debtor of the accused should be allowed to harass and annoy his creditor by bringing against him such a serious and disgraceful charge as theft and thus ruining his character for ever, supported by such unreliable evidence as that to which I have referred above.

In the interests of justice and for the dignity of law it is far better to acquit the petitioner altogether than to convict him of such an offence as theft and then give him a merely nominal punishment on the ground that it was merely a nominal offence. On the whole therefore I am of opinion that the conviction and sentence should be reversed, and that the fine, if paid, should be refunded to the petitioner.

PER CURIAM:—Under sections 429, 437, we direct that the case be laid before another Judge.

PARSONS, J.—This case has come before me for disposal in consequence of a difference of opinion between the learned Judges who heard it in the first instance. As far as I can gather from the Judgments recorded, there is no difference of opinion on the point of law involved. Both the learned Judges admit that a removal of property dishonestly that is with the intention of wrongfully depriving the owner of the possession thereof, to which he was legally entitled, for however short a period, is theft. In this I quite agree: see the Full Bench decision in *Queen-Empress* v. *Shrichurn Chungo* (1) overruling the decision of the Calcutta High Court in *Prosonno Kumur Patra* v. *Udoy Sant* (2) and the ruling of this Court in *Queen-Empress* v. *Nagappa* (3) and of the Allahabad High Court in *Queen-Empress* v. *Agha Mahomed Yusuf* (4). The difference of opinion is whether in the present case the accused is proved to have removed the property from the possession of the complainant. Upon this point of fact, Mr. Justice *Candy* has considered the finding of the lower Courts, that there was a removal by the accused of the property, binding upon this Court on revision. "There are" he says, "no exceptional grounds on which alone we in revision should interfere with the findings of fact. There certainly was evidence on which the District

(1) I. L. R., 22 Cal., 1017. (2) I. L. R., 22 Cal. 669. (3) I. L. R., 15 Bom., 344, (4) I. L. R., 18 All. 88.

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Magistrate could find the facts which he did and for us in revision that is sufficient." The power of this Court upon revision to go into questions of fact is undoubted, whether or not it will exercise that power in any particular case depends entirely upon the merits of the case itself. In the present case Mr. Justice *Tyabji* has examined the evidence and has come to the conclusion that the charge was a concocted and false one. I am not prepared to say that the course adopted by my learned colleague was an unusual one. When the interests of justice require: *Nobin Krishna* v. *Rasick Lall* (5) and *Queen-Empress* v. *Chagan* (6); or when the enquiry in the lower Court has been faulty: *Bhaw* v. *Mulji* (7); the High Court does interfere. In the present case, the Judgment of the District Magistrate shows that the enquiry was a faulty one, and I presume that Mr. Justice *Tyabji* did act in the interests of justice. The result at any rate justifies the means, for he has shown conclusively that the charge was a false one. Concurring with him on this point, I reverse the conviction and sentence and acquit the accused.

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1 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Chunia.*

Vakil—Appeal—Disposal of the Appeal without hearing the Vakil—Practice.

Where the appellant was represented by a pleader, and the Sessions Judge not knowing the fact disposed of the appeal in chambers, the High Court set aside the order of the appellate Court and directed the appeal to be reheard.

THE accused were convicted of the offence under sections 366 and 109 of the Indian Penal Code by the Assistant Judge of Ahmedabad. Against this conviction they preferred appeals to the Sessions Court. The Sessions Judge rejected their appeals. The accused, threupon, applied to the High Court, under its revisional powers, to set aside the conviction, alleging that the Sessions Court was wrong in rejecting their appeals without hearing their Vakil who had duly filed his Vakalatnama, and without duly notifying the day of hearing so as to give the appellants an opportunity of being heard in support of their appeals.

PER CURIAM:—The Sessions Judge reports that the fact that the appellant in the Sessions Court was represented by a pleader was through inadvertence not brought to the notice of his predecessor who disposed of the appeal in Chambers. We, therefore, reverse the order of the Appellate Court and direct that the appeal be reheard. The Sessions Judge should take proper notice of the subsequent insertion of the pleader's name in the appeal record.

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(5) I. L. R., 10 Cal., 1047. (6) I. L. R., 14 Bom., 331. (7) I. L. R., 12 Bom., 377.

*Criminal Application for Revision No. 79 of 1897.

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15 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Raghu valad Hari.*

Criminal Procedure Code (X of 1882), Sec. 215—Commitment—Joinder of charges—Sessions Court.

The commitment for trial in one and the same case of accused, some for the offence of robbery and the rest for the offence of receiving property stolen in that robbery cannot be said to be illegal, and cannot, therefore, be quashed by the High Court under section 215, Criminal Procedure Code. The Sessions Judge, however, can, in such a case, if it seems to him to be advisable, separate the charges and try the accused separately.

IN this case the accused were committed to the Court of Session by the First Class Magistrate of Satara. The Public Prosecutor of Satara pointed out the following objection to the Court of Sessions :—" That the trial of the offences under sections 392 and 109 and 392, Indian Penal Code, with which the accused Nos. 1, 2, 3, 4 are charged cannot proceed in the same trial as that of accused Nos. 4 and 5 for the offences under sections 411 and 414, Indian Penal Code. These offences being distinct the committing Magistrate should have separately committed them on the separate charges and as such he has committed an error of law to charge them together and send them for joint trial in one commitment."

The Sessions Judge, thereupon, made a reference to the High Court.

PER CURIAM:—The commitment for trial in one and the same case of the accused 1 to 4 for the offence of robbery and of the accused 4 and 5 for receiving property stolen in that robbery cannot be said to be illegal. In the case—*In the matter of A David* (1) it was held to be legal. The Sessions Judge can, if it seems to him to be advisable, separate the charges and try the accused separately but we cannot under section 215, Criminal Procedure Code, quash the commitment. We return the papers.

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15 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Fakira Dharmappa.†

Reformatory Schools Acts (VIII of 1897, and V of 1876)—Criminal Procedure Code (X of 1882), Sec. 399—Sessions Judge—Youthful offender.

Where a Sessions Judge purporting to act under section 399, Criminal Procedure Code, ordered a youthful offender, fourteen years old, to be detained in a Reformatory for a period of one year only, the High Court reversed the order as being illegal, inasmuch as it contravened the provisions of section 8 of the Reformatory Schools Act, 1897, and directed the Sessions Judge to pass a legal order.

Section 399, Criminal Procedure Code, was repealed when the Reformatory Schools Act 1876, came into force in the Presidency of Bombay.

IN this case the Sessions Judge of Belgaum having found the accused guilty of the offence of house-breaking by night in order to commit theft

*Criminal Ruling 20 of 1897. Criminal Reference No. 51 of 1897. (1) I. L. R., 6 Cal., 245

†Criminal Ruling 21 of 1897. Criminal Review No. 191 of 1897.

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under section 457, Indian Penal Code, ordered the offender to be sent to a Reformatory School, as the accused was found to be under 16 years of age. The Superintendent of the Jail reported the matter to the Inspector General of Prisons, stating "The boy, as stated by the Sessions Judge, is about the age of 14 years; he ought therefore to have been sentenced to 4 years' confinement. Under any circumstance the boy cannot be sentenced to a year's confinement, *vide*, latter part of section 8 of the Reformatory Schools Act V of 1876." The Inspector General brought the matter to the notice of the Government of Bombay, as the sentence was opposed to section 8 of the Reformatory Act VIII of 1897; and the Secretary to Government brought the case to the notice of their Lordships of the Bombay High Court.

PER CURIAM:—The order passed by the Sessions Judge for the detention of the accused No. 1 in the Reformatory is illegal since it contravenes the provisions of section 8 of the Reformatory Schools Act, 1897. Section 399 of the Code of Criminal Procedure under which the Sessions Judge purported to act was repealed when Act V of 1876 came into force. We reverse the order and direct the Sessions Judge to pass a legal order. We maintain the sentence passed on the accused No. 2 and we reduce the sentence passed on the accused No. 3 to three years' rigorous imprisonment.

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21 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Adam Isag.*

Sessions Judge—Appeal—Summary disposal—Judgment—Practice.

Where a Sessions Judge having come to the conclusion that the accused were properly convicted and that there was no reason to hear the appeal, summarily rejected it, the High Court ordered the Sessions Judge to hear and dispose of the appeal according to law.

THE petitioners were convicted by the First Class Magistrate of Broach of the offences of rioting and causing hurt, and were sentenced to four months' rigorous imprisonment and to pay a fine of Rs. 300 each. The petitioners preferred an appeal to the Joint Sessions Judge of Broach, who, in summarily rejecting the appeal, recorded the following order:—

"This appeal is summarily rejected. I have heard Mr. Vakharia in support and have come to the conclusion that the accused have been properly convicted, and that there is no reason to hear the appeal. In a Borah riot case there are of course plenty of conflicting statements, and the Police in this and another case appears to have prosecuted members of both factions; but I have no doubt justice has been done."

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* Criminal Application for Revision No. 123 of 1897.

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The petitioners, thereupon, applied to the High Court under its extraordinary jurisdiction, chiefly on the ground that the learned Sessions Judge had not properly tried the questions arising in this case and had not made the findings of fact necessary for a proper disposal of this case.

PER CURIAM.—We cannot accept the summary rejection of the appeal in this case by the Sessions Judge. Considering the important points both of law and fact involved we expect to find some reasons assigned for rejecting the appeal, yet all that the Sessions Judge says is that he has come to the conclusion that the accused have been properly convicted and that there is no reason to hear the appeal. The Sessions Judge admitted that there were plenty of conflicting statements but he did not call for the case to see what they were and how they would affect the result. There are in the memo of appeal allegations of withholding of witnesses, of refusals to grant warrants and summonses to witnesses, and of disregard of certain evidence filed in the case but none of them are even mentioned by the Sessions Judge. We reverse the order rejecting the appeal, and direct the Sessions Judge to hear and dispose of it according to law.

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22 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Baswantappa Lingappa.*

Criminal Procedure Code (X of 1872), Sec. 297—Session Judge—Jury—Charge to the Jury.

A Sessions Judge, in summing up to the Jury, should be careful to set out the evidence fully and should record in his charge what evidence he does read to them.

PER CURIAM.—We cannot on appeal interfere with the verdict of the jury concurred in by the Sessions Judge. The summing up is admitted to be on the whole a fair one. It errs only in not setting out the evidence fully but we cannot presume that the Sessions Judge only said what is recorded. He should, however, record what evidence he does read, and he should be careful to set it out fully to the jury: see *Reg.* v. *Fattechand Vastachand* (1). The appeal is rejected.

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22 July 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Bayaji Natha.†

Forgery—Burden of proof—Prosecution—Practice—Procedure.

Where it is alleged on behalf of prosecution that a deed is forged, it is not sufficient for the prosecution to prove that it is improbable that the deed is genuine, but it must prove for a certainty that the deed is forged.

PER CURIAM:—The evidence, that the deed is forged, is entirely inferential. The executant is dead but there remain the writer and the twelve

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*Criminal Ruling 23 of 1897. Criminal Appeal No. 417 of 1897.

(1) 5 Bom., H. C., 85. †Criminal Appeal No. 317 of 1897.

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attesting witnesses. Yet not one of them has been called as a witness to impeach the genuineness of the document. Six of the latter were accused in this case of forging the deed, and, though the evidence against each one of them appears to be exactly the same, three only have been convicted. Now it is for the prosecution to prove that the deed is a forgery and it is not sufficient for it to prove that it is improbable that the deed is genuine, it must prove for a certainty that the deed is forged. It is here that the Sessions Judge has fallen into error; he says indeed that the prosecution has proved that Babaji died at a time and under circumstances that would render the genuineness of exhibit A impossible, but his Judgement shows that he dealt with probabilities only and his finding rests upon an inference of the improbability of the genuineness of exhibit A. He relies mainly upon three things, (1) the tender age of Babaji, (2) his immediate marriage, (3) his sudden death. The document bears date the 7th May 1894, Babaji died according to the witnesses on Friday the 11th, according to the register (Exhibit B) on the 12th May 1894. He was thus alive on the 7th and his execution of the document on that day is, therefore, not impossible. His age in the document is given as about 25 (not 25 exactly as the Sessions Judge says). The alleged incorrectness of this statement in the document has evidently had a great effect on the mind of the Sessions Judge but the evidence on the point is most conflicting. The death register puts his age as 15. The Kulkarni (11) who prepared the register does not say whence he got this information. It is clearly wrong. The birth register (24) gives 1874 as the date of the birth of a son to Dhondi *bin* Jote. This is the name of Babaji's father and Dhondi's mother Rayai (5) says that he had only one son. Krishna (8) says Dhondi died 10 or 12 years ago and at that time Babaji was 15 years old. Rayai says Babaji was 2 years old when Dhondi died. Bala (1) says Dhondi died 6 or 7 years ago. Gopala (9) says Dhondi died 10 years ago.

Thus Babaji's age in 1894, as deposed to, varies from 5 to 24. It is hopeless to arrive at any conclusion from such evidence. Then as to his prospective marriage. No doubt a person contemplating an immediate marriage would not be likely to adopt a son and make a will, still it can hardly be called an impossible act. The point is whether he is proved on the 7th May to have been contemplating a marriage. Bala, the complainant, told the committing Magistrate that he went to settle the marriage only 2 or 3 days before the day fixed for the ceremony which was May 12. Govinda says that he went with Bala to settle the marriage the Saturday before, which would be the 5th of May. Besides this there is no evidence. We fail to see how the sudden

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death of Babaji on the 11th or 12th of May can lead to any inference as to what he had or had not done on the 7th May. As a matter of fact there is no good evidence that he did die suddenly. The cause of death is in the Exhibit B assigned to diarrhœa or dysentery. This of course is mere hearsay. The witnesses for the prosecution say that he was taken suddenly ill and died of cholera but they are so inaccurate in other matters that it is difficult to place much reliance on them in this. The Sessions Judge says that the witnesses for defence 20 and 21 are beneath discussion. We cannot agree with him. They are respectable persons apparently, quite disinterested, and there is no reason assigned why they should come forward and perjure themselves for the benefit of the accused. The same remark applies to the 12 attesting witnesses to the documents, 5 of whom are patils of villages. The complainant is ofcourse deeply interested in having the will and adoption set aside and the length to which he will go is shown by his having adduced the evidence of Bhiva, who is palpably a false witness and, as such, is not mentioned by the Sessions Judge. We reverse the convictions and sentences and acquit the appellants.

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5 August 1897. PARSONS & RANADE, JJ.

Gadgayya v. Guru Siddheshvar.*

Indian Penal Code (XLV of 1860), Sec. 403—Idol—Temple—Property.

The property of an idol or of a temple must be used for the purposes of that idol or temple; any other use would be a malversation of that property, and, if dishonest, would amount to criminal misappropriation.

PER CURIAM:—In this case the applicant, who calls himself the *pujari* of the temple of Virabhadra at Yadur in the Belgam District, lodged a complaint against the three accused charging them with having dishonestly misappropriated and disposed of certain of the God's ornaments, brass and copper pots &c. and with having wilfully suffered their concubines to do the same. The accused 1 was said to be the trustee or manager of the temple, the accused No. 2 was said to be his agent, and the accused No. 3 his servant. The First Class Magistrate to whom the complaint was made dismissed it under section 203 of the Code of Criminal Procedure "because the nature of the trust has not been determined." The Sessions Judge, to whom the application was made, saw no sufficient reason for interfering revisionally. It is however clear that if the allegations in the complaint are true there is very good ground made out for a criminal prosecution. It is not that the nature of the trust has not been determined. As said in *Girijanund Datta and*

*Criminal Application for Revision No. 126 of 1897.

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another v. *Sailajanund Datta* (1) "Decisions too clear and authoritative to be doubted or disregarded have repeatedly laid down that an idol in Hindoo Law is capable of holding property and that property dedicated to an idol belongs to an idol and not to the *sebait* or priest." The property of an idol or of a temple must be used for the purposes of that idol or temple, any other use would be a malversation of that property, and, if dishonest, would amount to criminal misappropriation. We are not dealing with the case on the merits and express no opinion upon them. All we say is that the Magistrate before dismissing the complaint ought to have decided on the points at issue, namely, whether all or any of the property alleged to have been misappropriated belonged to the temple and whether there had been a dishonest misappropriation of any of it by the accused or either of them.

Under section 437 we direct the Magistrate to make further inquiry into this complaint.

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10 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Hari Bapuji.*

Indian Penal Code (XLV of 1860) Sec. 379—Theft—Bona fide dispute.

A charge of theft cannot be sustained in a case where there is a *bona fide* dispute as to ownership, and the removal of a thing by the accused is under a *bona fide* belief that it is his own property.

THE accused were charged with the theft of fruits from *oondi* tree and were convicted by the Police Patel, under section 15 of Act VIII of 1867, and sentenced to pay a fine. Against this conviction the accused moved the High Court under its revisionary powers, alleging among other things:—"Even the view taken by the Police Patel shows that there is a *bona fide* dispute or misunderstanding regarding the ownership of the *oondi* tree and that therefore the petitioner could not be convicted of theft."

PER CURIAM:—It seems to us that there was in this case a *bona fide* dispute as to the ownership of the tree. The Police Patel's decision as to title may be correct, but the very fact that he had to decide the point shows that the title was doubtful and disputed. Since the accused acted *bona fide* the charge of theft cannot be supported. We reverse the conviction and acquit the accused.

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(1) I. L. R., 23 Cal., 655.

**Criminal Ruling* 24 *of* 1897. Criminal Application for Revision No. 132 of 1897.

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10 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Punya Sakharam.*

Indian Penal Code (XLV of 1860), Sec. 398—Dacoity—Charge.

To justify a conviction under Section 398, Indian Penal Code, there must be a charge framed of the offence in which the carrying of arms is distinctly alleged. Where the accused are charged and convicted for an offence punishable under section 395, they cannot be punished under section 398 of the Code.

PER CURIAM:—As the accused Nos. 1 and 3 were not charged with or convicted of the offence punishable under section 398 of the Indian Penal Code the Sessions Judge was under no obligation to sentence them to seven years' rigorous imprisonment. The obligation would only arise upon a conviction of the offence specified in section 398 and to justify such a conviction there ought to have been a charge framed for the offence in which the carrying of arms was distinctly alleged so that the accused might know what they were charged with and be able to defend themselves accordingly. In the present case the accused were charged with and convicted of an offence punishable under section 395 and are liable to be punished under that section only. We reduce the sentences passed on the accused Nos. 1 and 3 to two years' rigorous inprisonment in each case. We dismiss the appeals of the other accused persons.

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10 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Rama bin Nagappa.†

Bombay Public Conveyance Act (Bombay Act VI of 1863,) Sec. 2—Magistrate—Jurisdiction.

Under Notification No. 1068, dated 18th February 1891 issued by Government in exercise of the power conferred by section 34 of the Bombay Public Conveyance Act VI of 1863, the Second Class Magistrate of Hubli alone is empowered to try cases under that Act.

THE accused was convicted, under section 2 of the Bombay Public Conveyance Act VI of 1863 and sentenced to pay a fine of two annas or in default to suffer one day's imprisonment, by the Third Class Magistrate of Hubli. The District Magistrate of Dharwar referred this case to the High Court observing:—"Under Notification No. 1068, dated 18th February 1891, issued by Government in exercise of the power conferred by section 34 of the Bombay Public Conveyance Act, 1863, (published at page 161 of the Bombay Government Gazette Part I for 1891), the 2nd Class Magistrate of Hubli alone is empowered to try cases under the said Act. The proceedings held by the Third Class Magistrate are, therefore, void under section 530 (*p*) of the Code of Criminal Procedure."

ORDER.—For the reasons given by the District Magistrate, the Court reverses the conviction and sentence.

**Criminal Ruling* 25 *of* 1897. Criminal Appeals Nos. 323 to 331 of 1897.

†*Criminal Ruling* 26 *of* 1897. Criminal Reference No. 59 Of 1897.

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10 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Lagma bin Laxamana.*

Criminal Procedure Code (X of 1882), Sec. 215—Sessions Judge—Commitment—Offenders—Foreign subjects.

If a Magistrate commits a case to a Court of Session without having any jurisdiction over the offence or the offenders, the commitment is clearly invalid, and the Sessions Judge, if satisfied by the evidence before him, on these points could, notwithstanding the commitment, discharge the accused.

If, however, the illegality affects the procedure of the Magistrate and does not affect the jurisdiction of the Sessions Judges, a reference to the High Court under section 215, Criminal Procedure Code, is the only way to set aside a duly made commitment.

PARSONS, J.—The Sessions Judge of Belgaum has reported this case for the orders of this Court. He says that the Public Prosecutor has pointed out that the murder charged if committed at all was committed in Sangli territory, that there is no probability of a conviction for the robbery charged and that the Political Agent Kolhapur has sent his warrant for the extradition of the accused. He asks "what becomes of the committal to his Court." Our reply is that he must try and dispose of the case in the manner directed by law. On the face of it the commitment is perfectly valid. Should the Sessions Judge find after taking evidence that he has no jurisdiction over the accused to try them for the offence of murder charged by reason of their being foreign subjects and of the offence having been committed in foreign territory he must discharge them of that offence. In that case he can make a reference to this Court in order that the proceedings of the Magistrate and the commitment may be quashed as being illegal *ab initio*. Not that any such reference is absolutely necessary for the commitment in such a case would be void and the order of discharge would dispose of the case. It might, however, be advisable to save complications in case the accused were tried again for the same offence. It is not suggested by him that he has no jurisdiction to try the accused for the offence of robbery charged. He must, therefore, try them for that offence and if he finds the offence not proved, he must acquit them of it.

RANADE, J.—In this case after the commitment was made to the Sessions Court, the Sessions Judge was informed by the Government Pleader that the offence was committed out of British India by persons who were not presumably British subjects. The Sessions Judge, thereupon, made this reference to have the commitment set aside under section 215. It is no doubt incumbent on Sessions Judges to make such references when they are of opinion that the commitment was illegally made. It appears from a note in Mr. Prinsep's Criminal Procedure Code to section 215 that

*Criminal Ruling 27 of 1897. Criminal Reference No. 58 of 1897.

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Circular No 7 of 1864 of the Calcutta High Court was expressly issued by that Court to regulate this practice. A later ruling of the same Court, however, shows that such references were only necessary in cases when the procedure was illegal. In the present case the question raised at the trial affects the jurisdiction of the Court. If the Magistrate committed the case without having any jurisdiction over the offence or the offenders, the commitment was cleary invalid, and the Sessions Judge if satisfied by the evidence before him on these points could, notwithstanding the commitment, discharge the accused. This was the view taken by the Calcutta High Court in 13 C. L. R., p. 55. We follow that ruling and direct the Sessions Judge to decide the question of jurisdiction, and dispose of the case according to law. If the illegality affected the procedure of the Magistrate and did not affect his jurisdiction, a reference under section 215 would be the only way to set aside a duly made commitment.

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18 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Masukh Raichand.*

Prevention of Gambling Act (Bom. Act IV of 1887), Sec. 7—Bagatelle Board—Presumption.

As a bagatelle board and billiard balls are capable of being used both for games of skill and for games of chance, no presumption can be drawn under section 7, Prevention of Gambling Act, 1887.

PER CURIAM.—The only point that arises in this application is really one of fact, *viz.*, whether the game found by the Magistrate to have been played in this house was a game of chance and not "a game of mere skill" (section 7 of the Bombay Preventive of Gambling Act, 1887). A bagatelle board and billiard balls are capable of being used both for games of skill and for games of chance so that no presumption can be drawn from a board and eight balls being found in the room, the question is how they were being used. The Magistrate describes the game thus. The 8 balls (4 red and 4 white) were arranged in 2 rows of 4 each red and white alternately at one end of the table (one other ball (white) being sometimes placed just in front of the 2 rows). Bets were made on the red or the white. A man with his two hands then pushed the 8 balls towards the other end of the table where there were 9 holes striking the white ball, if there, on the way. The backers of the colour of which most balls went into the holes won. It is argued that the pusher could by the use of skill cause more red or more white balls at his pleasure to go into the holes. We think that in fair play that is impossible. It evidently was his duty to push the balls fairly and equally so as to give each the same chance of going into a hole. If he favoured one colour by not pushing the balls of

*Criminal Ruling 28 of 1897. Criminal Application for Revision No. 187 of 1897

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the other colour hard enough to reach the holes, his act would not be one of skill, it would be nothing more or less than cheating. The result after a fair push clearly depends upon chance. We dismiss the application.

The Magistrate ought not to have destroyed any of the property before the period for appeal or revision had expired.

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19 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Soma Dalji.*

Criminal Procedure Code (Act X of 1882), Secs. 307, 297—Evidence Act (I of 1872), Sec. 145—Judge—Jury—High Court—Sessions Judge.

In a reference under section 307, Criminal Procedure Code, the High Court is bound to accept the opinions of the Judge and the Jury where they agree but it is not open to it to believe evidence which both have disbelieved.

Where a Sessions Judge read to the Jury the evidence of witnesses taken before the committing Magistrate, and it did not appear that that evidence was ever read over to the witnesses, and the depositions were not recorded in the trial before the Sessions Court, the High Court drew the Judge's attention to the provisions of section 145 of the Evidence Act and asked him to note for his future guidence that, when he admits such statements in evidence, he should record them as exhibits in his own proceedings.

PER CURIAM.—The Sessions Judge has referred this case under section 307 of the Code of Criminal Procedure because he disagreed with the verdict of the jury and was thoroughly convicted of the guilt of the accused. He says that "the circumstantial evidence points conclusively to the guilt of the accused who was the only person who had any conceivable motive for murdering his wife and he as her husband was the only person who had access to the room in which she was sleeping, his story as to his absence and the reason therefor are to me incredible." No doubt on account of previous quarrels grave suspicion falls upon the accused but this is not sufficient ground for a conviction of murder. The house of the accused was it appears from the evidence accessible to the entrance of any person who opened the door. His story that he was absent from his house on that night is borne out by the evidence of Jiji who says that he came back after the murder had been discovered from his field where he had gone with a cart of manure and that she had seen the cart loaded with manure at the house the previous evening. No doubt he could have taken the cart of manure to his field and left it there, and come back to the house during the night but there ought to be some evidence that he did this. The whole case turns upon the amount of credit to be attached to the evidence of the two women Jhaver and Jiji who say that they went to the house hearing the cries of the murdered woman opened the door and saw the accused inside the house

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*Criminal Ruling 29 of 1897. Criminal Reference No. 55 of 1897.

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throttling his wife. The Sessions Judge and the Jury both disbelieved their evidence. We are asked by the Government Pleader to believe it. We are of opinion that it is not open to us to do that. We are bound, we think, in a reference under section 307, to accept the opinions of the Judge and Jury where they agree. As therefore there is no reliable evidence to prove that the accused committed this murder, we acquit him of the offence charged. We notice that the Sessions Judge read to the Jury the evidence of Jhaver and Jiji taken before the committing Magistrate. It does not appear that that Evidence was ever read over to the witnesses and the depositions were not recorded in the trial before the Sessions Court. We draw the attention of the Sessions Judge to the provisions of Section 145 of the Evidence Act and we ask him to note for his future guidance that when he admits such statements in evidence he should record them as exhibits in his own proceedings.

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19 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Daulata Dhondi.*

Criminal Procedure Code (X of 1882), Secs. 215, 235, 239—Joint investigation—Illegality.

Where a Magistrate held a joint investigation in the cases of four accused persons and committed them for trial on charges under Sections 211, 114, 465 and 193, Indian Penal Code, the High Court held the procedure illegal and prejudicial to the accused; and quashing his proceedings and the commitment directed him to enquire afresh into the offences.

IN this case the Magistrate committed the four accused jointly to the Court of Sessions. The Sessions Judge of Satara was of opinion that the four accused could not conveniently be tried in a single trial, accused as each of them were of different offences. The circumstances of the case will appear from the objections advanced by the Public Prosecutor of Satara before the Sessions Judge of Satara. He objected that the trial of the offence under section 465, Indian Penal Code, with which accused 1 and 2 were charged could not proceed in the same trial as that of accused 1, 2, 3, 4, for the offences under section 211 and $\frac{112}{114}$, there was no connection between the two matters; and it was an error in law to charge them together.

The trial of the offences under section 193, Indian Penal Code, with which accused 2, 3, 4, were charged could not proceed with any other trial even if the trials for the offences under sections 465, 211, and $\frac{211}{144}$ Indian Penal Code be now separated and proceeded with. It was an error in law to charge accused 2, 3, 4 together and in a charge framed under other sections as well. A separate charge should have been framed against each of the accused 2, 3, 4 setting out the portions of the evidence given by each of them which the Magistrate considered to be false evidence.

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*Criminal Ruling 30 of 1897. Criminal Reference No. 13 of 1897.

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Again, each of the accused 2, 3, 4 should be separately tried on the charge under section 193, Indian Penal Code, and should have been separately committed if there was any need to commit.

The Sessions Judge, therefore, referred the case for the order of the High Court.

PER CURIAM:—The action of the Magistrate in holding a joint investigation in the cases of the four accused persons and committing them for trial on charges under sections 211, 114, 465 and 193 is so illegal and must have so prejudiced the accused that we quash his proceedings and the commitment and direct him to enquire into the offences afresh. The charges against all the accused are those under sections 211 and 114. These can form the subject of a joint trial. The accused 1 and 2 only are charged with the offence of forgery (section 465). This must form the subject of another trial. The accused 2, 3 and 4 are each charged under section 193. They must each be tried separately for this offence and as the Sessions Judge points out the alleged false statement must be set out in the charge.

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19 August 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Vaman Hari Sabnis.*

Criminal Procedure Code (Act X of 1882), Sec. 437—Magistrate.

A Magistrate having stopped a case without hearing all the evidence and discharged the accused remarking that "to affix the guilt to the accused is an impossibility" and "there is a certain mystery about the whole proceedings which it appears impossible to clear up," and the Sessions Judge having ordered further investigation, the High Court, in an application for revision, applying the principles laid down in Cr. Rg. No. 19 of 1887, transferred the case to the Court of the District Magistrate with permission for him to send it for trial to any other competent Magistrate who has had nothing to do with the case.

PER CURIAM.—We think that it is desirable in the interests of Justice that the further investigation ordered by the Sessions Judge should be made by some other Magistrate than the one who had discharged the accused.

The latter stopped the case without hearing all the evidence and expressed the following opinions "to affix the guilt to the accused is an impossibility" and "there is a certain mystery about the whole porceeding which it appears impossible to clear up." We apply the principles laid down in Criminal Ruling No. 19 of 1887 and transfer the case to the Court of the District Magistrate, who can send it for trial to any competent Magistrate who has had nothing to do with the case.

**Criminal Ruling 31 of 1897. Criminal Application for Revision No. 161 of 1897.*

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2 September 1897. PARSONS & RANADE, JJ

Queen-Empress v. Krishna Shahaji.*

Indian Penal Code (Act XLV of 1860), Sec. 379—Theft—Distinct offences.

Removal by one single act of several articles constitutes one offence of theft only, though the articles may belong to different persons. Hence, where a person steals at the same time two bullocks, which belong to two different owners and which are tied together to the yoke of a cart, he may be sentenced for one offence only.

THE facts are that complainant and his partner one day went to Malegaon Bazar in a cart to which they had yoked one bullock belonging to complainant and another belonging to the partner. On arriving at Malegaon both of them tied the bullocks to the yoke and went into the city. On returning they found the bullocks missing. After some search they came to know that accused had stolen the bullocks and sold them. The Third Class Magistrate of Malegaon convicted and sentenced the accused, for thefts committed in respect of each of the bullocks, to one month's rigorous imprisonment for each offence. The District Magistrate of Nasik referred the case to the High Court observing:—"The accused must have untied both of them and removed them by one single act and thus the Magistrate was wrong in considering the removal as separate thefts merely because they chanced to belong to different persons. The reasoning in case *Reg.* v. *Shaikh Moneah* (1) is applicable."

ORDER.—For the reasons given by the District Magistrate the Court annuls the sentence passed for what is wrongly styled the second offence.

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7 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Kashinath Vaman Lele.†

Criminal Procedure Code (Act X of 1882), Sec. 526—Transfer—Trial—Jury—High Court.

Where an accused made an application for transfer of a trial on the ground mentioned in clause (d) Section 526, Criminal Procedure Code, the High Court transferred the case to itself, and directed under Section 267 of the Code that the trial before it be by Jury, under the circumstances of the case.

IN this case the petitioner was committed to the Court of Sessions at Satara on a charge of exciting disaffection against the Government under section 124A of the Indian Penal Code by the First Class Magistrate Satara. He applied to the High Court that his case be transferred to the High Court Sessions, on the following, among other grounds. That the evidence in the case was similar to that in the *Poona Vaibhav* case which was then pending before the High Court Sessions; that the transfer would be to the benefit both of the prosecution and the defence so far as legal help is concerned.

**Criminal Ruling* 33 *of* 1897. Criminal Reference No. 65 of 1897.

(1) 11 W. R. Cr. 38. †*Criminal Ruling* 34 *of* 1897. Criminal Application No. 253 of 1897.

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PER CURIAM:—The only allegations urged on behalf of the applicant namely those that bring the case within the provisions of clause (*d*) of section 526 of the Code of Criminal Procedure, 1882, have hardly been answered by the Government Pleader. It will clearly be most inconvenient for the numerous witnesses for the defence who are residents of Poona to come here for the trial of the *Vaibhav* case and then go to Satara for the trial of this case. It is to be noted, moreover, that the complaint in the *Vaibhav* case was laid within the jurisdiction of this Court on its Original Criminal Side by the Government. The prosecution witnesses are few in number and no inconvenience will be caused by their coming here. It is not necessary to allude to any expediency for the ends of justice. We order under section 526 of the Criminal Procedure Code that the case be transferred from the Sessions Court of Satara and tried before this Court and we direct under section 267 that the trial be by Jury.

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9 September 1897. PARSONS & RANADE JJ.

Queen-Empress v. Bhagu. Queen-Emp. v. Vishnu.*

Indian Penal Code (Act XLV of 1860), Secs. 379, 409—Forest guard—Cutting of trees—Immovable property—Criminal Breach of Trust—Theft.

V. a forest round, guard, allowed B. a timber merchant, to cut trees without the permission of Government in the Government Forest of which V. was in charge. Some trees were cut in persuance of this arrangement, and some were concealed and the rest taken to an open space preparatory to a removal thereof:—

Held, (1) that V. could not be convicted of the offence of attempting to commit criminal breach of trust by a public servant, because he was not in any manner entrusted with the trees or with any dominion over them, and apparently was not authorised to deal with the trees in any way for the benefit of Government but was merely a watchman employed to guard the trees and prevent injury being done to the forest:

(2) that the trees being immovable property, the offence of criminal breach of trust could not be committed in respect of them;

(3) that, on the facts found, the accused had committed the offence of theft, the intention to steal being carried into effect when they cut the trees and moved the timber.

PER CURIAM.—The first accused in this case (Vishnu) has been convicted of the offence of attempt to commit criminal breach of trust by a public servant and the second accused Bhagu has been convicted of abetment of that offence. Vishnu was a forest round guard, Bhagu was a timber-merchant and the act charged as the offence was Vishnu's allowing Bhagu to cut trees without the permission of Government in the Government forest of which Vishnu was in charge. It is in our opinion exceedingly doubtful if Vishnu can be held to have been in any manner entrusted with the trees in the forest or with any dominion over those trees. Apparently he was not authorized to deal with the trees in any way for the benefit of Government, he seems to have been merely

*Criminal Ruling 36 of 1897. Criminal Applications for Revision Nos. 160 and 197 of 1897.

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a watchman employed to guard the trees and prevent injury being done to the forest. The fact that he omitted to do his duty would hardly, we think, amount to criminal breach of trust. Moreover the trees are immoveable property and according to good authority criminal breach of trust cannot be committed in respect of immoveable property: see *Jugdown Sinha* v. *Queen-Empress* (1) citing *Reg.* v. *Girdhar Dharamdas* (2). We are of opinion, however, that on the facts found the accused ought to have been convicted of theft. The Sessions Judge says that "the conclusion which I have come upon consideration of all the evidence is that the timber in question was felled in pursuance of a conspiracy between both the appellants and by both the appellants to remove the logs dishonestly without payment of the proper dues to Government" and again "the conduct of the appellants is proved in the case in their dealings with the felled timber part of which was concealed and part taken to an open space evidently preparatory to a removal altogether shows that the intention of the appellants was to steal the timber." This intention was carried into effect when they cut the trees and moved the timber.

We, therefore, alter the conviction to one under section 379 of the Indian Penal Code. We maintain the sentences passed on the accused.

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16 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Harprasad Lalta.*

Criminal Procedure Code (Act X of 1882), Sec. 399—Reformatory Schools Act (V of 1876) Secs. 8, 11.

Section 399, Criminal Procedure Code, 1882, was repealed when the provisions of the Reformatory Schools Act, 1876, were extended to the Presidency of Bombay.

IN this case the accused was convicted by the Session Judge of Surat of the offences of (1) theft in a dwelling-house, under section 380, Indian Penal Code, and (2) of house-breaking by night in order to commit theft, under section 457, Indian Penal Code; and was sentenced for the former offence to twenty strokes with a light ratan and for the latter offence to rigorous imprisonment for three years. As to this rigorous imprisonment the Court directed under section 399, Criminal Procedure Code, that the accused be confined for that period in a Reformatory School, as he was under the age of sixteen years.

The Superintendent of the Yarroda Reformatory School, where the juvenile offender was sent, forwarded the papers to the Inspector General of Prisons, stating, "section 8 of the Reformatory Schools Act, V of 1876,

(1) I. L. R., 23 Cal., 372. (2) 6 Bom. H. C., 33.

*Criminal Ruling 38 of 1897. Criminal Review No. 244 of 1897.

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does not provide for any other punishment than confinement for a period of not less than two years and not more than seven years in a Reformatory School and this is the first boy who has been sentenced to receive twenty strokes (by a criminal Court) since the opening of the Reformatory. I am not, however, aware whether the new Reformatory Act of 1897 which came into force on 11th March last provides for any such punishment being inflicted, if it does well and good; otherwise, I solicit your orders as to whether the order to inflict twenty strokes with a ratan is to be carried out or not."

The Inspector General of Prisons laid the matter before the Government of Bombay, observing "the juvenile is at present in the Reformatory School, at Yerrowda, and, as the Reformatory Act, VIII of 1897, does not provide for a judicial whipping, as indicated above, I would respectfully solicit the orders of the Government on the subject." The Secretary to the Government of Bombay attracted the attention of their Lordships of the Bombay High Court to this case.

PER CURIAM.—The Sessions Judge has overlooked the fact that section 399 of the Criminal Procedure Code, 1882, was repealed when Act V of 1876 was extended to the Presidency of Bombay and that the Reformatory Schools Act, 1897, was in force at the time he passed the sentence in the present case. We now cancel the sentence of whipping passed under section 380 of the Penal Code and we remand the case for a legal sentence for the offence under section 457 to be passed under the Reformatory Schools Act, 1897, section 8, after the enquiry specified in section 11 has been made.

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27 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Govind Vinayak Apte.*

Criminal Procedure Code (Act X of 1882) Sec. 257—Prosecution witnesses—Cross-examination—Accused—Magistrate.

Where prosecution witnesses are subjected on behalf of the accused to a very lengthy and strict cross-examination before the charge is framed, the Magistrate has a discretion to refuse an application by the accused, after the charge is framed, to recall them and further cross-examine them.

RANADE, J.—Three points of law were pressed prominently upon our attention by the applicant's pleader in this case. The first contention was that the Magistrate was in error in refusing to recall the three Police witnesses for further cross-examination after the charge was framed. These witnesses had been cross-examined at some length before the charge was framed, and the accused desired to cross-examine them

*Criminal Ruling 41 of 1897. Criminal Revision No. 291 of 1897.

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further, but this permission was not allowed. The authorities cited on both sides in the arguments before us show clearly that this right of recalling witnesses is not an absolute right on which accused can insist except under certain contingencies. It very much depends upon circumstances such as the length of the previous cross-examination, the delay in making the application. These are matters in respect of which the trying Magistrate has a discretion and he may in the exercise of this discretion grant or refuse such an application. This was the view taken by the Calcutta High Court in *Faiz Ali* v. *Koromdi* (1) and it was adhered to in a much more recent case, *Nilkanta Singh* v. *Queen Empress* (2). The case *In the matter of the petition of Sat Narain Singh and another* (3), has no application as it did not relate to the recalling of a witness already examined and cross-examined. Applying the tests furnished by these authorities it appears to us that the trying Magistrate had a discretion in the present case when the application was not made till some ten days after the charge was framed, and the witnesses had been already cross-examined at some length. It is true the trying Magistrate has not rested his refusal upon the reasons the validity of which is recognized by section 257. The reasons assigned by him are not of a character which would justify, if they stood alone, the refusal. We have, however, in revision to see if the accused has been prejudiced by the refusal. It is suggested that the further cross-examination was necessary in connection with a petition to Government which was put in at a late stage. The Police witnesses had, however, nothing to do with that petition, and the further cross-examination would only have resulted in protracting the trial unnecessarily. We must, therefore, overrule this objection.

The second point urged was that the words complained of did not excite or instigate the hearers to any unlawful acts, because the particular section referred to in the charge did not prohibit the lopping of trees or the felling of wood in other than in reserved forest. This contention appears to be unsound. Both the lower Courts have held that the words proved to have been used by the accused were calculated to incite people to draw toddy juice on their own account without permission and to cut trees in Government forests. Further there was an incitement to the use of violence against the Abkari and Forest Sepoys and words of exhortation to rescue those who might be seized by their sepoys were proved to have formed part of the speech. Reading the substance of the speech as given by the Police witnesses who are chiefly relied on by the Magistrate, there seems to be no room for supposing that any distinction was therein

(1) I. L. R., 7 Cal., 28. (2) I. L. R., 20 Cal., 469. (3) I. L. R. 20 All., 92.

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sought to be made between lopping trees and drawing toddy, or between cutting trees in reserved or protected forests. The words must be understood in their natural sense, and the sense they were intended to convey.

Lastly, it was attempted to show that an offence under section 117 of the Indian Penal Code could not be brought home to the accused as the acts abetted, if the offence had been committed, would have been only individual, and not collective offences. The exhortation was not individual but collective, and the offences might be by one or many.. The case cited from 3 W. R. related to incitement to several persons to break their several contracts, which is not the case here. This objection must therefore be overruled. We reject the application.

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30 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Asha Gopal.*

Indian Penal Code (Act XLV of 1860), Sec. 304 (2)—Murder—Provocation, grave—Wife—Sexual Intercourse.

The finding by a man of his wife in actual intercourse with a paramour is a provocation grave and sudden enough to reduce the offence of murder into culpable homicide not amounting to murder; and such an offence must be visited with a light sentence.

PER CURIAM.—The accused Asha, said to be nineteen years of age, came back to his house one night and found his wife and a young Brahman called Chaman in the act of adulterous intercourse. He either had a bill hook in his hand at the time or he took up one that was close by in the house and with it he gave Chaman two blows on the body which caused his death the next day. The Sessions Judge finds that the accused maddened by the sight of his wife and Chaman in *flagrante delicto* committed the offence of killing Chaman, but he thinks the accused did not intend to kill Chaman and he has convicted him of culpable homicide not amounting to murder and sentenced him to two years' rigorous imprisonment. We think the sentence too severe. It has always been recognised that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour. We reduce the sentence to six months' rigorous imprisonment.

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30 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Umar Jamal.

Bombay District Municipal Act (Bom. Act VI of 1873), Sec. 33—Wall, rebuilding of, on old foundations.

The re-erection on the same foundation of a wall which has fallen down is not an offence under section 33, District Municipal Act, 1876.

Quære, whether a bamboo-fence can be described as a wall?

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*Criminal Ruling 42 of 1897. Criminal Appeal No. 439 of 1897.

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THE accused was convicted under section 74 of the Bombay District Municipal Act, for an offence under section 33 of the said Act and sentenced to pay a fine of Re. 1 or in default to undergo simple imprisonment for two days. The District Magistrate of Panchmahals referred this case to the High Court observing: "The Magistrate, it appears to me, has failed to see whether the action of the accused in constructing a bamboo wall in lieu of the old one comes within the scope of section 33 of the Act, and has lost sight of Criminal Ruling No 63 of the 30th August 1888. In my opinion the accused has, so far as the record shows, committed no offence."

PER CURIAM:—For the reasons given by the District Magistrate we reverse the conviction and sentence and remand the case for further enquiry. It is a question whether a bamboo fence can properly be described as a wall so as to come within the terms of section 33 of Bombay Act VI of 1873. At any rate under the Criminal Ruling 63 of 30 August 1888 the re-erection on the same foundation of a wall which has fallen down is not an offence under section 33.

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30 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Osman.†

Indian Penal Code (Act XLV of 1860) Secs. 341, 352, 504, 142—Offence—Insult.

The accused stood in the road while the complainant was driving along it and blocking his way called out to him some insulting words; the Magistrate convicted them under sections 341, 352, 504 and 142, Indian Penal Code and sentenced them heavily :—

Held, that the offence would have been sufficiently dealt with if it had been treated as a silly and reprehensible outbreak of ill manners and not as a grave and serious crime; and that the offenders should have been punished with a small fine.

PER CURIAM :—This case is remarkable for the way in which the Second Class Magistrate has dealt with it. It is alleged that the six accused who are Mahomedans between the ages of 16 and 20 years stood in the road while the complainant was driving along it, blocking his way and called out to him "*a re Aba Saheb ghe amche salaam.*" The Second Class Magistrate found this to be an offence under sections 341, 352, 504, and 142 of the Penal Code, and sentenced each of them to rigorous imprisonment for 67 days, and to pay a fine of Rs. 25 ; in default of payment to simple imprisonment for a month. On appeal the District Magistrate reversed the conviction under section 352, but maintained the conviction under sections 341, 143, and 504, altering the sentence on each to twenty days' rigorous imprisonment and Rs. 25 fine in default a week's simple imprisonment. The Second Class Magistrate says that the complainant is a First Class Sardar with the privilege of private entry and a noble representative of the late Senapati Dabhade's family, and is

†Criminal Application for Revision No. 223 of 1897.

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usually addressed as Sarkar, that is chief or ruler, that even ordinary men of sense do not brook being addressed in the singular with the words "*a re*," "*tu*" "*ghe*" even when they are addressed by their superiors or equals much less could they be borne with patience when addressed by low and inferior persons, and that it is no wonder that the complainant, though naturally calm, should be greatly provoked at the hearing of the words addressed to him. It is thus clear that in the Second Class Magistrate's opinion the *gravamen* of the charge lay in the use of the singular person, if "*tumhi*" or "*ghya*" had been used there would have been no insult. The District Magistrate thought that the offence would have been sufficiently dealt with if it had been treated as a silly and reprehensible outbreak of ill manners and not as a grave and serious crime. We fully agree with him. We will not review the findings of the Courts on matters of fact, but we think that the accused at most should have been punished with a small fine for doing what the Courts have found they did, *viz.*, obstruct and intentionally insult the complainant by the use of the words above quoted. We consider that the 20 days' rigorous imprisonment undergone by the accused is more than enough punishment for any offence they may have committed, and we, therefore, reduce the sentence on each of the accused by reversing the sentence of fine.

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30 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Nawajbai.*

High Court—Conviction—Appeal—Practice.

It has been a practice with the High Courts in India to set aside a conviction where there are in the Judgment no sufficient materials to support it.

PER CURIAM:—The trial by the Magistrate has been a summary one, but in dealing with it we follow the rule that the High Courts in India have always observed, *viz.*, to set aside the conviction where there are in the judgment no sufficient materials to support it. The Magistrate has convicted for breach of Rule 6 of the rules framed under Act III of 1897. Six is no doubt a mistake for 5, for 6 is not a penal rule. Rule 5 requires an occupant of a house or building or the principal surviving member of a family to give information of sickness, &c; in such house or building or amongst the members of such family. The case here was one of plague and the sick person Cursetjee was a Parsee lad of about 16 years of age, the son of one Ratanbai; the father's name is not mentioned. The Magistrate has convicted Nawajbai, the mother, and Jehangir, the son-in law of Ratanbai. He does not find that Nawajbai was an occupant of the house or building in which Cursetjee was sick, but he calls her the

*Criminal Ruling 43 of 1897. Criminal Application for Revision Nos. 242, 246 of 1897.

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eldest and principal surviving member of the family. The family, however, that has to be regarded in this case is the family to which Cursetji belonged,—that is the family of his father, which Ratanbai joined when she married. Nawajbai cannot be the principal surviving member of her son-in-law's family, of which family indeed she is not a member at all. The Magistrate does not find that Jehanghier was either an occupant of the house or a member of the family to which Cursetjee belonged. In each case, therefore, the statements in the judgment are insufficient to support the conviction. The material points on which alone a conviction can rest are not found to exist. We, therefore, reverse the convictions and sentences and acquit the applicants.

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30 September 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Haribai.*

Criminal Procedure Code (Act X of 1882), Sec. 162—Chief Constable—Admissions—Evidence.

It is contrary to the provisions of section 162, Criminal Procedure Code, 1882, to allow the admission in evidence against the accused of a statement made by the Chief Constable of what the alleged complainant and his wife had said to him.

PER CURIAM.—The accused Haribai was charged with and has been convicted of the offence of abetting Mahadeo in taking away Tulsi the wife of Kisansing with a criminal intent. There is no doubt that Mahadeo did take away and detain Tulsi and she was found in his room. The Sessions Judge says that it is also clear that Haribai acted the part of procuress and also took advantage of her influence over the girl to appropriate some of her things. With the latter allegation we have nothing to do. No charge was laid in respect of it. As to the former we are unable to find any evidence which shows that she did so act. The only witness against her is Tulsi. If she did incriminate her, no reliance could be placed on her discrepant statements, but she does not say that Haribai instigated her to go away for any criminal purpose with Mahadeo. She says that "Haribai did not tell me to be with Mahadeo or any one else. I had no idea in leaving my house besides going to Barsi. I meant to stay four days in Barsi and then I could go to Dharwar. I can't say how I was deceived by Haribai. Haribai told me to go with Mahadeo and he would put me into the train at the station. Mahadeo met me at the canal pipe. He took me to his room and opened it. I asked him to take me to the station; he said he was on watch till midnight and I should wait till then. I remained willingly as Mahadeo said he would return."

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*Criminal Ruling 44 of 1897. Criminal Appeal No. 481 of 1897.

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Both Kisansing and his mother Bhagubai say that when Tulsi was missed they asked Haribai who occupied the next room to theirs in the *chal* if she knew where Tulsi was and that she at once said she had gone off with Mahadeo. This is not what a person who was abetting the abduction would have said. We reverse the conviction of Haribai and the sentence passed on her. We dismiss the appeal of Mahadeo. We draw the attention of the Sessions Judge to the provisions of section 162, Criminal Procedure Code. In direct violation of these provisions he has allowed the Chief Constable to give in examination in chief as evidence against both the accused persons the statements that he says the complainant Tulsi made to him.

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7 October 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Bhujia Gujia.*

Reformatory Schools Acts (V of 1876 and VIII of 1897)—Procedure

A Magistrate could act under the Reformatory Schools Act, 1897, only when he is empowered by the Local Government in that behalf.

THE accused was convicted by a Second Class Magistrate, of the offence of mischief, under section 429, Indian Penal Code, in that he poisoned a buffallo, and sentenced him to rigorous imprisonment for two months and to pay a fine of Rs. 10. In the following month, the superintendent of the Prison brought to the notice of the District Magistrate that the convict was about 14 years of age, and seemed to be fit to be sent to the Reformatory School. Upon this, the record and proceedings of the case were referred to an Honorary Magistrate of the First Class for action under Act V of 1876, who made enquiries and directed the detention of the offender in the Reformatory School for four years from the date of the conviction. The District Magistrate finding that the Honorary Magistrate had not been specially empowered by the Local Government under section 8, clause 2, Reformatory Schools Act, 1897, and being of opinion that the order of the Honorary Magistrate was illegal, referred the case for the orders of the High Court.

PER CURIAM:—It appears that neither the Superintendent of the Central Prison, Yerrowda, nor the District Magistrate nor the First Class Magistrate were aware of the repeal of Act V of 1876 by Act VIII of 1897. The orders of the latter two officers dated the 19th June and 20th July 1897 under the repealed Act are illegal under the new Act. The reference of the Superintendent of the Jail if treated as a bringing up of the prisoner might have been legal under section 10th of the new Act at the time he made it, if the convict was under 15 years of age, but we

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**Criminal Ruling* 45 *of* 1897. Criminal Reference No. 75 of 1897.

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cannot direct the Magistrate to take any action on it now as the term of the sentence has expired. All we can do is to reverse the order of the First Class Magistrate dated the 20th July 1897.

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7 October 1897. PARSONS & RANADE, JJ.

In re Shivram Bahirdas.*

Sanction to prosecute—Refusal—Subordinate Judge—Sessions Judge—Reference—High Court.

It is not competent to a Sessions Judge to refer to the High Court a matter which he can dispose of himself.

If a Subordinate Judge refuses to grant a sanction for prosecution, the Sessions Judge, to whom the Subordinate Judge is subordinate has jurisdiction to grant it.

THE facts in this case were that a Subordinate Judge refused to sanction the prosecution of certain individuals. The Sessions Judge submitted the order, passed by Subordinate Judge refusing the sanction, to the High Court under section 439, Criminal Procedure Code, because he was of opinion that it should be set aside as it was illegal, as the Subordinate Judge had not attempted to consider the evidence in the case, but had declined to give sanction because it was not sought from his predecessor who heard the suit originally, and because that the Appellate Court also "hesitated to record any such sanction," the fact being that that Court was of opinion that as a matter of practice the application should be made to the original Court in the first instance and had referred the applicants to it.

PER CURIAM:—The Sessions Judge should not refer to this Court a matter which he is competent to dispose of himself. As Judge of a Court to which the Court of the Subordinate Judge was subordinate he had jurisdiction to dispose of the original application—he has jurisdiction now to grant the sanction which the subordinate authority has refused to grant. We return the case to him for legal disposal.

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7 October 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Dyama Irappa.†

Indian Evidence Act (I of 1872), Sec. 125—Construction.

The words "information as to the commission of any offence" in section 125, Evidence Act, 1872, only enact the rule which, as said by *Eyre*, C. J., in *Hardy's case* (1) has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which detection is made should not be unnecessarily disclosed.

PER CURIAM:—We confirm the sentence of death in the case of the accused Nos. 1 and 3. We sentence accused 2 to transportation for life.

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*Criminal Ruling 46 of 1897. Criminal Reference No. 78 of 1897. (1) 24 How. St. Tr., 808

†Criminal Ruling 47 of 1897. Criminal Confirmation Case No. 20 of 1897.

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We think the Sessions Judge has taken too narrow a view of the meaning of the words "information as to the commission of any offence" in section 125 of the Indian Evidence Act, 1872. These words seem to us only to enact the rule which as said by *Eyre*, Chief Justice, in *Hardy's case* 24 Howell's State Trials at page 808 has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed.

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13 October 1897. PARSONS & RANADE, JJ.

Queen-Empress v. W. E. Lapprey.*

Criminal Procedure Code, (Act X of 1882), Ch. 21—Warrant case—Right of reply—Public Prosecutor—Practice.

So far as the trial of warrant cases is concerned, there is no provision in the Criminal Procedure Code, under which the accused is asked if he means to call witnesses or not. After the charge is framed, the accused is called on to enter on his defence, and to produce his evidence, but he is not asked whether he means to call evidence. The right of reply would seem, therefore, to depend, not on what may be said but on what is done, and if no evidence is produced, there should be no right of reply by the Prosecutor.

PER CURIAM :—We think on the merits the case is clear, the accused is identified and is proved to have tried to obtain money by false representations. Such an offence in the case of a public servant deserves severe punishment.

It is necessary to say a few words on the other objection raised, *viz.*, that the Magistrate wrongly allowed the Public Prosecutor a reply, though the defence called no witnesses. The Magistrate says that he allowed this reply because the pleader of the accused had first said that he called witnesses and so had deprived the Public Prosecutor of the opportunity of summing up his case. So far however as the trial of warrant cases is concerned there is no provision in the Code under which the accused is asked if he means to call witnesses or not. After the charge is framed the accused is called on to enter on his defence, and to produce his evidence, but he is not asked, whether, he means to call evidence or not. The right of the reply would seem. therefore, to depend not on what may be said but on what is done, and if no evidence is produced there should be no right of reply. We dismiss the appeal.

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28 October 1897. RANADE & FULTON, JJ.

Queen-Empress v. Sadashiv Balkrishna Vartak.†

Criminal Procedure Code (Act X of 1882), Sec. 423—Appellate Court—Retrial.

Section 423, Criminal Procedure Code, 1882, authorises an appellate Court to order a re-trial where necessary.

**Criminal Ruling* 48 *of* 1897. Criminal Appeal No. 516 of 1897.

†*Criminal Ruling* 49 *of* 1897. Criminal Reference No. 83 of 1897.

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THE applicant and four others were prosecuted under section 25 (*f*) of the Indian Forest Act No. VII of 1878 for felling 3 black-wood trees in the Reserved Forest of Rabgaon. The Second Class Magistrate of Pen convicted the applicant and sentenced him to pay a fine of Rs. 50 or in default to undergo five days' simple imprisonment. On appeal, the Subdivisional Magistrate set aside the conviction and sentence, and ordered, under section 423, of the Criminal Procedure Code, that the applicant be tried again before the Second Class Magistrate of Uran. The applicant, thereupon, applied to the Sessions Court to reverse the abovementioned order and conviction. The District Magistrate referred the case to the High Court observing:—"It is argued that the order made in appeal is illegal, on the strength of the ruling in *Queen-Empress* v. *Sukha* (1) in which it was held that the appellate Court referred to in section 423, Criminal Procedure Code, can in an appeal from a conviction only order an accused person to be committed for trial when the case is triable exclusively by the Court of Session. The appellate Court in that case was Sessions Court. The facts of the present case are entirely different. The conviction in the present case was reversed on account of an irregularity in the procedure by which material evidence was excluded. There does not seem to me to be anything in section 423, Criminal Procedure Code, restricting the appellate Court's power to order a retrial in such a case and if a retrial be not ordered it seems to me that a failure of justice will occur."

ORDER.—The order of the Sub-Divisional Magistrate was a proper one.

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3 November 1897. RANADE & FULTON, JJ.

Queen-Empress v. Ratnya Raja.*

High Court of Judicature—Sudder Fouzdari Adawlat—Act XI of 1846—Jurisdiction—Political Agent.

The High Court of Judicature at Bombay has the same jurisdiction as was possessed by the Sudder Fouzdari Adawlat to deal with cases under Act XI of 1846, either by way of confirmation or by way of appeal.

RANADE, J.—In this case the Collector of Khandesh, acting in his capacity as Political Agent for the Mehwasi Estates, tried the accused Ratnya on a charge of the murder of his wife at Piprapani village belonging to the Kathi Estate, and sentenced the accused to transportation for life, subject to the confirmation of the sentence by his Excellency the Governor-in-Council. The accused also presented a petition of appeal to the same authority. His Excellency the Governor-in-Council, however,

(1) I. L. R., 8 All., 14. *Criminal Reference No. 104 of 1897.

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directed the Political Agent to submit the proceedings to this Court, and the present reference was accordingly made by the Political Agent under Rule 35 of the Rules promulgated in July, 1855, under the powers conferred on Government by section 3 of Act XI of 1846. Rule 25 invests the Agent with the functions of a Magistrate. Rule 32 empowers him to take cognizance of all crimes and offences perpetrated within the limits of his political charge, and Rule 35 gives him absolute jurisdiction to sentence offenders to fine and imprisonment for 5 years, and it directs that sentences involving punishment beyond that term or of greater severity must be submitted for confirmation to the Sadar Fouzdari Adalat. Rule 43 directs the Political Agent to forward the record of such cases when confirmation is necessary to the Sadar Fouzdari Adalat, and Rule 44 empowers the Adalat to call for proceedings on petition from the prisoner sentenced in such cases, and thereafter to deal with them as laid down in section 4 of Act XI of 1846. Section 4 of this latter Act provides that the Sadar Fouzdari Adalat shall in such confirmation cases pass the final sentence or order in the same manner as if the trial had been sent up in ordinary course by Court of Session. The present reference to this Court comes put for disposal under these provisions, and the point we have to consider is whether this Court possesses the jurisdiction which belonged to the late Sadar Fouzdari Adalat to deal with such cases either by way of confirmation or by way of appeal. There have not been many occasions for the exercise of this jurisdiction since the constitution of the High Courts. In the only reported case, *Queen-Empress* v. *Sarya* (1) a Division Bench of this Court (Justices *Birdwood* and *Jardine*) held that in cases where the sentence passed by the Political Agent was within the limits of his absolute Jurisdiction of that officer, no appeal lay to this Court. Their Lordships held that Rule 44 noticed above was *ultra vires*. *Birdwood*, J. observed that there is no provision in Act XI of 1846 which empowers Government to confer appellate powers on the Adalat as done by Rule 44, and that rule cannot be regarded as a valid rule made under the Act. Mr. Justice *Birdwood* makes a distinction between the rule relating to appeals and the rule directing references to be made to the Sadar Fouzdari Adalat, for he admits that the Act did contemplate that Court as a Court of reference for the confirmation of sentences passed in certain criminal trials. The present case, so far as it is such a reference would thus, in the opinion of Mr. Justice *Birdwood*, not be excluded from the Jurisdiction of the Sadar Fouzdari Adalat, and therefore (under section 9 of the High Court's Act, and section 27 of the Letters Patent) of

(1) I. L. R., 15 Bom., 505

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the High Court, which has taken up the place of the old Fouzdari Adalat in respect to all manner of Jurisdiction. Mr. Justice *Jardine* indeed went much further. While agreeing with Mr. Justice *Birdwood* in his view that Rule 44 was *ultra vires*, Mr. Justice *Jardine* expressed an opinion to the effect that after the enactment of Act XIV of 1876 which repealed Act XI of 1846, these rules under the old Act ceased to be in force, so far as they had reference to the powers of this Court. Mr. Justice *Jardine* was of opinion that section 7 of Act XIV of 1876 did not continue these rules except so far as they related to the Political Agent and his officers, as they cannot be regarded as being in force at the time when the Scheduled Districts Act was passed, and they were in conflict with the Letters Patent of the High Court. These remarks it will be seen have a larger bearing than the validity or otherwise of Rule 44. My colleague, Mr. Justice *Fulton*, is of opinion that section 7 of Act XIV of 1874 continued the Rules of 1855 framed under Act XI of 1846, and that in consequence the powers of this Court as a Court of reference for confirmation purposes were continued. I am myself inclined to hold that this confirmation Jurisdiction of the Sadar Fouzdari Adalut was in force under the operation of Act XI of 1846 and the rules of 1855 at the time when the High Court was constituted, and that until a fresh notification to the contrary has been issued under Act XIV of 1876 cancelling the rules of 1855, they must be held to be still in force by virtue of section 7 of Act XIV of 1876. The notifications of 1879 and 1887 have clearly not the effect. The Rules of 1855 so far as they relate to confirmation proceedings are clearly contemplated by Act XI of 1846, and were in force in 1862 and are, therefore, still in force, and confer this Jurisdiction to the High Court. As the point under consideration is, however, not entirely free from difficulties, I agree with Mr. Justice *Fulton* that it would be desirable to issue notice to the Political Agent and the accused, and to hear further arguments in the case before the reference is finally disposed of. As regards the appeal, No. 593 of 1897, the precedent is more in point, but there is the consideration that in *Queen-Empress* v. *Surya* (1), the sentence passed was for five years within the absolute Jurisdiction of the Political Agent, while the sentence in the present case clearly exceeds his jurisdiction, and certainly requires the confirmation of either this Court or of the Government. I would direct, therefore, before admitting the appeal, or disposing of the reference that notices be issued to the Political Agent and the prisoner.

FULTON, J.—In this case the Agent to H. E. the Governor in Khandesh has submitted for the confirmation of this Court his proceedings in which

(1) I. L. R., 15 Bom., 505.

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he has convicted the prisoner of murder in the Mehwasi Estate of Kathi, and sentenced him to transportation for life. The reference is one for which no precedent has been brought to our notice, and raises a question of considerable difficulty as to the Jurisdiction of the Court. By Act XI of 1846, which was passed to exempt certain Mehwasi Estates from the civil and criminal Jurisdiction of the ordinary Courts, it was enacted that the Governor-in-Council might prescribe such rules as he deemed proper for defining the authority of the Agent in criminal trials, and for determining what cases the Agent should submit for the decision of the Sadar Fouzdari Adalat. It was further provided that on receipt of any criminal trial referred under the said rules, the Sadar Fouzdari Adalat should proceed to pass a final Judgment, or such other order as might after mature consideration seems to the Court requisite and proper, as if the trial had been sent up in the ordinary course by a Sessions Judge. It must be remembered that in 1846, when this Act was passed, the procedure prescribed by Regulation 13 of 1827, section 2, and Regulation 3 of 1830 required the Sessions Judge to submit for confirmation not merely sentences of death but also sentences of transportation or imprisonment for life. In 1856, rules which will be found on pp. 1342—1346 of the Government Gazette for that year, were accordingly made. Rule 35 provided that the absolute Jurisdiction of the Agent in criminal cases should extend to fine and imprisonment for 5 years, and directed that sentences involving punishment beyond that period, or of greater severity, should be submitted for the confirmation of the Sadar Fouzdari Adalat. Rule 43 declared that if the punishment deemed suitable by the Agent should exceed his own absolute Jurisdiction, he should record the punishment he would award, and should forward the case in original to the Sadar Fouzdari Adalat, which Court should proceed to take cognizance of the case, and to pass such sentence or order as they might think proper, and that the instructions conveyed to the Agent from the superior Court should be carried into effect by him. Rule 44 purported to give the Sadar Fouzdari Adalat power to call for the Agent's proceedings in any case on petition being made to that Court by any party against whom a sentence might have been passed by the Agent, and thereafter to proceed according to the provisions of section 4 of Act XI of 1846. In the case of *Imperatrix* v. *Sarya* (1) some prisoners who had been sentenced to 5 years' imprisonment by the Agent for an offence committed in one of the mehwasi villages, petitioned the High Court. Their Lordships treating the petition as an appeal rejected the application on the ground that Rule 44 was *ultra vires* as beyond the provisions of Act XI of 1846. This decision does not directly

(1) I. L. R., 15 Bom., 505.

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affect the case now under consideration, but the laborious researches of the learned Judges who decided it help most materially in enabling us to dispose of the question now before us. Accepting the conclusion that Rule 44 was *ultra vires*, and that the Sadar Fouzdari Adalat had under the Act no jurisdiction as a Court of Appeal or Revision in respect of sentences not exceeding 5 years, it seems nevertheless that its Jurisdiction in the case of sentences beyond that term was unquestionable, being expressly provided for by the act. The Criminal Procedure Code of 1861 did not extend to non-regulation districts (*vide*, section 445), and as it did not touch Act XI of 1846, it left unaffected the jurisdiction of the Agent to refer and of the Sadar Fouzdari Adalat to deal with, cases like the present. In 1862 the High Court was established under 24 & 25, Vic. c. 104, the 9th section of which enacted that its jurisdiction should be determined by Letters Patent save in so far as it might subsequently be modified by legislation. The original Letters Patent were issued in that year. Clause 27 provided that the High Court should be a Court of reference and revision from the criminal Courts subject to its appellate jurisdiction, and should have power to hear aud determine all such cases referred to it by the Sessions Judge, or by any other officers authorized to refer cases to the Sadar Fouzdari Adalat, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction as were then subject to reference to or revision of by the said Court of Sadar Fouzdari Adalat. Now it seems to me clear that this clause preserved to the High Court the powers of the Sadar Fouzdari Adalat as a Court of reference from the decisions of the Agent in all cases which he was authorized to refer to the Sadar Fouzdari Adalat. It is true no appeal lay from his decisions to the Sadar Fouzdari Adalat, or subsequently to the High Court; but the express provision that the High Court should have power to hear and determine all such cases referred to it by any officer possessing criminal jurisdiction as were subject to reference to the Court of Sadar Fouzdari Adalat, when read with section 9 of the High Court, makes it plain that this jurisdiction was retained. If the clause had stood by itself it might perhaps have been argued that the word "and" was explanatory, and that the High Court was only a Court of reference and revision in respect of Courts from which an appeal lay to it. But looking to section 9 of the Act, such a construction becomes impossible, for it cannot be said that the Letters Patent have made any direction curtailing the jurisdiction so as to exclude a class of cases formerly dealt with by the Sadar Fouzdari Adalat. Such a curtailment would be most unlikely for it could hardly be intended to leave such cases wholly unprovided for, and if it had been so intended the matter

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would have doubtless been expressed in clear terms so as distinctly to remove it from the comprehensive provisions of section 9. Moreover, there was no appeal to the High Court from the decisions of Magistrates, and yet certain Magistrates were under section 404 of Act XXV of 1861 empowered to refer cases to the Sadar Fouzdari Adalat, and no question was ever raised as to the continuance of such references after the establishment of the High Court. The amended Letters Patent of 1865 made no change. They simply continued the powers conferred by the earlier Letters Patent on the High Court as a Court of reference. The situation was not altered by the enactment of the Criminal Procedure Code of 1872. It extended to the whole of British India, but preserved all special forms of procedure prescribed by any law not expressly repealed. Act XI of 1846 remained in force, and the arrangements under it were not altered. Then came Act XIV of 1874, which was introduced in the Mehwasi Villages in the manner explained in *Imperatrix* v. *Sarya*. It repealed Act XI of 1846, but by section 7 preserved the rules under it. For the purposes of this case the repeal of that Act is immaterial. The rules prescribing the procedure to be followed by the Agent thenceforward derived their validity not from Act XI of 1846 but from section 7 of Act XIV of 1874. They authorized him to make a reference like the present, and clause 28 of the Letters Patent gave the High Court jurisdiction to hear and determine the case when referred. The High Court's jurisdiction never rested immediately either on Act XI of 1846 or on the rules made under it, but simply on the Letters Patent based on section 9 of the High Court Act 24 & 25, Vict. c. 104. The only other enactment to which it is necessary to refer is the existing Code of Criminal Procedure. It like its predecessor applies to the whole of British India, but as in the absence of specific provision to the contrary it does not affect any special or local law, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law now in force (see section 7 of Act XIV of 1874), it does not touch the Agent's jurisdiction to refer the case, or the power conferred on us by the Letters Patent to hear and determine it. From the foregoing review of the course of legislation on this subject, it appears to me that the High Court has jurisdiction to hear and determine the present reference. The case itself is of a simple nature, and presents no special difficulty, but as probably the accused, whose petition is addressed to the Governor-in-Council is unware that we are going to deal with it, I think it would be desirable to direct notice to be given to him before we finally dispose of it.

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25 November 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Chinnappa.*

Criminal Procedure Code (Act X of 1882), Sec. 349—Reference to a competent Magistrate—Magistrate—Commitment to Sessions—Jurisdiction.

A Second Class Magistrate found the accused guilty but referred the case to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code. The Sub-Divisional Magistrate sentenced accused 1, but regarding the other accused referred the case to the District Magistrate, as he was of opinion that they should be committed for trial to the Sessions Court. The District Magistrate having made a reference to the High Court :—

Held, that the reference by the Second Class Magistrate to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code, would open up the whole case and leave the latter Magistrate free to deal with it according to his discretion and one of the powers he would have would be to order a commitment to the Court of Sessions.

THE accused persons in this case were charged with the offences punishable under sections 457, 380 or 411 of the Indian Penal Code. The Second Class Magistrate of Badami who tried the case, found the accused guilty and convicted them on the 6th September 1897, but referred the case under section 349 of the Code of Criminal Procedure, to the Sub-Divisional Magistrate. The Sub-Divisional Magistrate concurring in the Second Class Magistrate's views as to the guilt of the accused persons, sentenced accused No. 1 to one year's rigorous imprisonment (sections 457 and 380 or 411, Indian Penal Code) and referred the case, as regards the other two accused, to the District Magistrate for orders. The District Magistrate, referred the case to the High Court, stating :—

"It will be seen from the order recorded by Mr. Page in the accompanying proceedings, that, in view of the previous convictions against them, he considers it desirable that they should be committed for trial to the Sessions Court. He, however, expresses his inability to direct the committal as the Second Class Magistrate has recorded a conviction. I am, therefore, of opinion that the conviction, so far as it concerns the two accused persons in question is illegal (*vide*, the High Court's Ruling 38 of 1888)."

PER CURIAM.—Although the Second Class Magistrate said that he convicted the accused persons we think that might have been taken to have been the record only of his opinion of their guilt. His reference of the case to the Sub-Divisional Magistrate under section 349 would open up the whole case and leave the latter Magistrate free to deal with it according to his discretion and one of the powers he would have would be to order a commitment to the Court of Session. To save, however, any possible future objection we reverse the conviction recorded by the 2nd Class Magistrate and direct the Sub-Divisional Magistrate to dispose of the case referred to him according to law.

*Criminal Reference No. 109 of 1897.

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2 December 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Shripati bin Waman.*

Indian Penal Code (Act XLV of 1860), Sec. 182—False information—Public officer.

Where a person gives false information to an officer who has power to be exercised by him to the direct and immediate prejudice of the complainant against whom the information is levelled, he becomes guilty of an offence under section 182, Indian Penal Code.

IN this case the three accused, being the village officers of Urtara were charged with having on the 16th September, 1896, given information, which they knew or believed to be false, to the Mamlatdar of Wai, with intent to cause him to use his lawful power to the injury of the complainant, who was a widow of a military pensioner and as being his widow, she was entitled to receive a pension till her death or remarriage. The three accused forwarded on the 16th September a report to the Mamlatdar of Wai that she had re-married by *murut* ceremony her cousin Rao and as the authority they forwarded a statement by one Kashinath which they alleged was taken in their presence to the effect that he performed the ceremony. They were convicted and sentenced to a fine of Rs. 40 each, under section 182, Indian Penal Code. The accused, thereupon, applied to the High Court.

PER CURIAM :—It is unnecessary for us to discuss the decision of the Madras High Court *The Queen* v. *Periannaw* and *The Queen* v. *Narian* (1); because in the present case the Mamlatdar to whom the false information was given had power to be exercised by him to the direct and immediate prejudice of the complainant against whom the imformation was levelled. He was the officer who disbursed the pension to which the complainant was entitled and as such had the power to stop payment of the pension. This he would naturally have done at once on receipt of information that the complainant had remarried and so forfeited her right to the pension. Again the direct and immediate result of the information was that the Mamlatdar instituted an inquiry and called up the complainant. This he would not have done had he known that the story of the remarriage was false and this alone must have caused annoyance to the complainant.

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9 December 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Balya bin Bhimappa.†

Criminal Procedure Code (Act X of 1882), Secs. 109, 110, 123—Cumulative security bonds.

A Magistrate cannot legally amalgamate sections 109 and 110 of the Criminal Procedure Code and require the execution of two bonds for good behaviour for an aggregate period of 18 months and in default of the same being furnished commit to prison for 18 months' rigorous imprisonment: in such a case, at any rate, the provisions of section 123 (2), of the Code should be observed.

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*Criminal Application for Revision No. 296 of 1897. (1) I. L. R., 4 Mad., 241.

†*Criminal Ruling* 52 *of* 1897. Criminal Reference No. 122 of 1897.

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THE accused was ordered by the First Class Magistrate of Bijapur under section 118, Criminal Procedure Code, to execute two bonds with sureties to be of good behaviour and was committed to prison on his failing to do so. The Sessions Judge of Sholapur-Bijapur referred the case to the High Court observing :—"I have my doubts as to the legality of the order passed because : (*a*) Proceedings were taken both under sections 109 (*b*) and 110. This appears to be a contra-distinction in terms. The sections apply to totally different cases. It is proved on the evidence that accused maintains himself by habitually committing extortion. He cannot, therefore, be said to have no ostensible means of subsistence and proceedings should have been confined to section 110. (*b*) The accused was ordered to execute two bonds one for a period of six months and the other for a period of one year. Both these bonds would date from the date of the order. In that case the order making the period of imprisonment in default commence the one after the expiry of the other would seem to be illegal."

PER CURIAM :—We do not think that the Magistrate could legally amalgamate sections 109 and 110 of the Code of Criminal Procedure and require the execution of two bonds for good behaviour for an aggregate period of 18 months and in default of the same being furnished commit to prison for 18 months' rigorous imprisonment. At any rate in such a case the provisions of clause 2 of section 123 should have been observed. We reverse the order requiring the bond for the period of six months.

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9 December 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Bhagia Bhaoo.*

Reformatory Schools Act (VIII of 1897), Sec. 8—Juvenile offender—Magistrate, specially authorized.

Where an accused who was convicted of the offences under sections 454 and 380, Indian Penal Code, and sentenced to one year's rigorous imprisonment, but being 14 years old was directed to be detained in the Reformatory for the period; the High Court reversed this latter direction on the grounds that the Magistrate had not been specially authorised and that the order was opposed to the provisions of section 8 of the Act.

THE accused, in this case, was convicted of the offences of house-breaking and theft in a dwelling house and sentenced under sections 454 and 380, Indian Penal Code, to undergo rigorous imprisonment for one year for each of the two offences, that is, for two years in the aggregate. As the offender was 14 years of age, the Magistrate directed him to be detained in the Reformatory instead of undergoing his sentence of imprisonment, under section 7 of Act V of 1876. This order was opposed to the provisions of the New Act VIII of 1897, the District Magistrate referred this case to the High Court, remarking.—" (1) The period of detention ordered is of

*Criminal Ruling 53 of 1897. Criminal Reference No. 115 of 1897.

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two years, which is contrary to the provisions of section 8 (1) of Act VIII of 1897. (2) Not being specially empowered as laid down in section 8 (2) of Act VIII of 1897, the Magistrate had no authority to order detention of a convict in the Reformatory."

ORDER:—For the reasons given by the District Magistrate the Court reverses the direction passed by the Magistrate as to the accused being sent to a Reformatory. The Court has no Jurisdiction to reverse the sentence of imprisonment but it may point out that it is open to the officer in charge of the prison to proceed under section 10 of the Reformatory Schools Act, 1897, if it applies to the case.

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9 December 1897. PARSONS & RANADE, JJ.

Queen-Empress v. Kondi Malhari.*

Criminal Procedure Code (Act X of 1882), Sec. 349—Reference—Magistrate.

Where a Second Class Magistrate refers a case to a District Magistrate under section 349, Criminal Procedure Code, the latter Magistrate is competent to deal with it in his discretion according to law.

THE accused was placed on his trial before a Second Class Magistrate on a charge of theft. The Magistrate recorded evidence for the prosecution, and the accused's statement. The accused had been thrice previously convicted of theft. The Magistrate framed a charge setting forth the previous convictions, and ordered the accused to be tried by a First Class Magistrate. The District Magistrate of Poona thought this to be an altogether irregular proceeding, and referred the case to the High Court observing:—"The Magistrate had two courses open to him; either to convict the accused, after framing a charge and recording his plea of guilty, and then to forward the accused and record to this Court under Criminal Procedure Code, section 349; or else (the proper course in my opinion) to stop proceedings before framing a charge, and to send the accused and record to this Court under Criminal Procedure Code, section 346, with a request that the accused should be committed for trial."

ORDER.—The Court sees no reason to interfere. The case has been referred to the District Magistrate under section 349, Criminal Procedure Code, and he is competent to deal with it in his discretion according to law.

**Criminal Ruling* 54 *of* 1897. Criminal Reference No. 123 of 1897.

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1898.

10 January 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Shekh Chand.†

Bombay Abkari Act (Bom. Act V of 1879), Sec. 43 (c)—Mowra selling of.

It is no offence to sell Mhowra flowers without a permit except in the area in which Bombay Act III of 1892 is in force.

The mere selling of Mhowra flowers to persons, who had been convicted of illicit distilling is not in itself sufficient to justify a conviction for abetment of the offence of manufacturing liquor mentioned in section 43 (c) of the Bombay Abkari Act, 1878.

THE accused was convicted by the First Class Magistrate, at Malegaon of the offence of abetment of an offence under Section 43 (c) of the Abkari Act (Bombay Act V of 1878), and sentenced to pay a fine of Rs 30. The Sessions Judge of Nasik forwarded the record and proceedings in the case to the High Court observing:—"The mere selling of *mhowra* to persons who had been convicted of illicit distilling is not sufficient to constitute the offence of which the accused has been convicted in this case. Proof that the *mhowra* was sold to the buyers to help them in their work of illegal distillation would be necessary."

PER CURIAM:—It is no offence to sell Mhowra flowers except in the area in which Bombay Act III of 1892 is in force and the mere fact of a sale would not be in itself sufficient to justify a conviction for abetment of the offence of manufacturing liquor mentioned in Section 43 (c) of the Bombay Abkari Act 1878. The Court, therefore, reverses the conviction and sentence and acquits the accused.

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20 January 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Kaikhusro Cursedji.*

Indian Penal Code (XLV of 1860), Sec. 425—Mischief—Bailiff—Doors, breaking open of.

An agent of a land-lord accompanied by a bailiff broke open the door of a room in his chawl, in the possession of a tenant, in execution of a distress warrant issued aganist the tenant for non-payment of rent. The Magistrate convicted the accused of the offence of mischief:—

Held, (1) that the conviction could not stand; because the bailiff, if he improperly broke open the door, was acting mistakenly in what he supposed to be his duty, and the land-lord's agent, who assisted him, had neither the intention nor the knowledge which is an essential in the definition of mischief:

(2) That the proper remedy of the complainant, if his outer door was improperly broken open, was a civil action for the trespass.

Quære. Whether a room in a chawl rented by a particular person is the dwelling house of that person and its door an outer door which a bailiff who has entered the chawl cannot break open?

THE facts of this case are that Kaikhusro petitioner No. 1 held a power of attorney from Mr. R. E. Dadachanji, for purpose of collecting rents &c.

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†*Criminal Ruling* 1 *of* 1898. Criminal Reference No. 120 of 1897.
*Criminal Application for Revision No. 399 of 1897.

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of a chawl situated at Tardeo in Bombay. The complainant was one of the tenants occupying the said building, and as he did not pay rent for several months, a Distress Warrant was obtained against him from the Bombay Court of Small Causes, in due course of law. Pestonji, petitioner No. 2, as a bailiff of the said Court was entrusted with the execution of the said warrant. In pursuance of this warrant, certain property belonging to the complainant and lying in his room in the said chawl, was seized on the 6th November, 1897. On the 13th November, the complainant lodged a complaint in the Court of the Presidency Magistrate of Bombay, alleging that the petitioners had effected a seizure of his property by forcing open the door of his room which had been locked.

On these facts, the learned Magistrate found petitioner No. 1 guilty of mischief under section 427, Indian Penal Code, and petitioner No. 2, of an offence under section 166, Indian Penal Code. The following were his reasons:—"The accused deny that they broke open the lock and it is contended that even if they did they were justified because the compound gate, or the door at foot of the chawl stairs, was open, and having peaceably entered the outer door they are authorized to break open inner doors—chawls as a rule have no door, they have a common staircase which gives access to passages on the different floors, and the rooms in these passages. Each room usually forms a tenement by itself and is in the occupation of one man. He has no connection with any other room. There is some doubt whether this chawl has a compound gate, or whether there are doors at the foot of the common staircase. The point is not very material for as a fact the gate, or door, wherever it is, is always open. The mere fact that the bailiff peaceably entered the gate, and came up the common stairs, would not give him a right to break open the door of any tenant whose room was locked. If that were so tenants in chawls would have no protection and their rooms might be forcibly invaded at any time. The rule about entering outer doors applies to houses in the occupation of a person and obviously he cannot protect himself or his goods by locking up inner doors. In the case of chawls the only part in the tenant's occupation is his own tenement; the room or rooms for which he pays rent and where he lives and his goods are stored, and which is protected by his locks. He has no concern with the other rooms and has merely a right of way over the stairs. I hold that the bailiff and Kaikhusru were not justified in breaking open Rustomjee's (complainant's) lock and executing the warrant."

The petitioners, thereupon, applied to the High Court under its extraordinary jurisdiction.

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PER CURIAM :—We are not agreed as to whether a room in a chawl rented by a particular person is the dwelling house of that person, and its door an outer door which a bailiff who has entered the chawl cannot break open under section 56 of the Presidency Small Cause Court Act 1882. We agree, however, that the conviction cannot stand. There can be no doubt that the bailiff, if he improperly broke open the door, was acting mistakenly in what he supposed to be his duty, and that the landlord, who assisted him, had neither the intention nor the knowledge which is an essential in the definition of mischief: see section 79 and section 425 of the Indian Penal Code and the remarks of Mayne in the Criminal Law of India at page 360. The proper remedy of the complainant, if his outer door was improperly broken open in the present case, is a civil action for the trespass. We reverse the convictions and sentences, acquit the accused persons, and direct the fines, if paid, to be refunded.

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16 February 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Hirashanker Udayshanker.*

Criminal Procedure Code (Act X of 1882), Secs. 170, 191 (c)—Magistrate—Cognizance of an offence—Jurisdiction—Robbery—Dacoity—Commitment.

The Police acting under section 170, Criminal Procedure Code, sent up to the Magistrate only one man charged with the offence of robberry. The Magistrate in the inquiry that ensued issued warrants for the arrest of four more persons because of certain statements which appeared in the diary of the Chief Constable and of the evidence of two witnesses examined by him. The four persons applied that their case might be committed to the Court of Sessions :—

Held, (1) that the Magistrate could not be said to have taken cognizance of an offence against the four applicants upon a police report;

(2) that, under the circumstances, the Magistrate must be held to have taken cognizance of the offence against the applicants in the manner contemplated in section 191 (*c*), that the provisions of the last paragraph of that section applied to the case, and that, therefore, the applicants were entitled to ask that the case should be committed to the Court of Session.

(3) that the four applicants having been charged with having committed robbery in the company of the first accused, the offence was magnified into a dacoity for which offence a commitment was obligatory.

PER CURIAM :—We do not think that the Magistrate can be said to have taken cognizance of an offence against the four applicants upon a police report. The only section of the Criminal Procedure Code which seem to relate to a police report are sections 155, 157, 169 and 170 and under neither of these was any action taken by the Police in the present case against the applicants. The Police sent up under section 170 one man only charged with the offence of robbery, the Magistrate in the enquiry that ensued issued warrants for the arrest of the applicants because of certain statements which appeared in the diary of the Chief Constable

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**Criminal Ruling* 2 *of* 1898. Criminal Application for Revision No. 8 of 1898.

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and of the evidence of two witnesses examined by him. We think that under these circumstances the Magistrate must be held to have taken cognizance of the offence against the applicants in the manner mentioned in section 191 (*c*) and that the provisions of the last paragraph of that section apply to the case so that the applicants were entitled to ask that the case should be committed to the Court of Session.

We further observe that in the charge framed by the Magistrate five persons are charged with robbery. But a robbery by five persons would amount in law to a dacoity so that it is not understood why the charge was not of dacoity, in which case commitment would be obligatory. We reverse the order of the Magistrate and direct him to commit the case against the applicants and their co-accused to the Court of Session on a legal charge.

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17 February 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Balya Dagdu.*

Indian Evidence Act (I of 1872), Secs. 24 and 25—Confession—Voluntary character of confession.

A confession to be admitted at all in evidence must be proved to have been made voluntarily; and when it is admitted in evidence, it has to be dealt with like any other piece of evidence, and acted on only if it believed to be true.

A confession, though made voluntarily, by an accused person before a Magistrate and subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it.

Reg. v. *Jora Hasji* (1), and *Queen-Empress* v. *Gharya* (2), considered.

PER CURIAM—The Joint Sessions Judge holds that "the identification of the appellant as a dacoit though probable is not proved." He has convicted on a confession made on the 28th September to a First Class Magistrate but retracted on the 2nd October before the same Magistrate who was then enquiring into the case. The way in which the Sessions Judge has dealt with that confession requires some notice. Apparently he thinks that it was only necessary to find that a confession is voluntary to justify his acting upon it. He quotes in support of his opinion the *dictum* of *West*, J. in *Reg. Jora Hasji Bhaiji Rupsang and Bhoga Pira* (1). We are, however, quite sure that that learned Judge intended nothing of the kind. A confession to be admitted at all in evidence must be proved to have been made voluntarily; when admitted it has to be dealt with like any other piece of evidence and acted on only if it is believed to be true. The risk spoken of by *West*, J. is the risk of the Court being induced to believe an untrue statement. In *Queen-Empress v. Gharia and others* (2), the above rule is laid down very clearly. The confessions made

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**Criminal Ruling* 3 *of* 1898. Criminal Appeal No. 791 of 1897.

(1) 11 Bom. H. C., 242. (2) I. L. R. 19 Bom., 78.

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in it were admitted in evidence after they had been proved voluntarily made. They were then considered along with the other evidence and because they were believed to be true and because there was evidence corroborating them, the persons who made them were convicted. In the present case the confession is proved to have been voluntarily made and we have no doubt that it is true. Indeed the Sessions Judge though he has not given the point the importance it deserved, says that it is impossible that it is untrue. We, therefore, dismiss the appeal.

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17 February 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Bhikhi.*

Indian Penal Code (Act XLV of 1860), Sec. 376—Rape—False charge—Jurisdiction.

Rape is an offence punishable with transportation for life or with imprisonment for a term which may extend to ten years. The offence, therefore, of making false charge of rape is triable exclusively by the Court of Session.

THE accused charged one Sakhya and eight others before the First Class Magistrate of Nasik with having committed rape on her: the charge was adjudged to be false and the accused were discharged. At this, the trying Magistrate sanctioned the prosecution (section 195, Criminal Procedure Code) of Bhikhi under section 211, Indian Penal Code, for having falsely charged Sakhya and others: and the case was tried by the First Class Magistrate of Niphad. The District Magistrate of Nasik, being of opinion that the Magistrate had no jurisdiction to try the case, referred the case to the High Court under section 438, Criminal Procedure Code, 1898: the following were his reasons:—"The original complaint related to rape, *viz.*, an offence punishable with imprisonment for 10 years and as it was adjudged to be false, it fell under section 211, clause 2; and an offence under this latter clause is triable by a Court of Session and not by a Magistrate. The trying Magistrate has, however, disposed of the case himself by sentencing her to 15 days' rigorous imprisonment, which term the accused has presumably undergone. This trial appears to be void under section 530, clause (*p*), Criminal Procedure Code."

PER CURIAM.—The charge framed by the Magistrate and upon which he convicted the accused was "falsely charging certain persons with having committed the offence of rape under section 376 of the Indian Penal Code." Rape is an offence punishable with tranportation for life or with imprisonment for a term which may extend to 10 years. The offence, therefore, of making false charge of rape is triable by the Court of Session exclusively: see schedule II of the Criminal Procedure Code.

We annul the finding and sentences and order the accused to be committed for trial on the charge laid.

**Criminal Ruling 4 of 1898. Criminal Reference No. 110 of 1897.*

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18 February 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Govind Raghu.*

Criminal Procedure Code (Act X of 1882), Sec. 412—Appeal—Practice and Procedure.

The mere fact that the appellant pleaded guilty before the trying Magistrate is not by itself a sufficient reason for a Sessions Judge to reject his appeal. It might be a ground for doing so in an appeal to the High Court where the conviction is by a Court of Session or a Presidency Magistrate, though even then the extent and legality of the sentence would have to be considered in appeal. But an appeal to the Court of Session lies on fact as well as on law, and the appeal should have been disposed of in a legal manner.

PER CURIAM :—The Sessions Judge rejected the appeal "as the accused pleaded guilty before the Magistrate". That might have been a ground for rejecting an appeal where the conviction was by a Court of Session or a Presidency Magistrate, though even then the extent and legality of the sentence would have to be considered : see section 412 of the Code of Criminal Procedure. In the present case an appeal lies on fact as well as on law and when made it should have been disposed of in a legal manner.

We reverse the order of the Sessions Judge and direct him to hear the appeal.

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23 February 1898. PARSONS & RANADE, JJ.

In re Subrao Ramchandra.†

Criminal Procedure Code (Act X of 1882), Sec. 200—Magistrate—Complainant—Practice.

Where a complaint is made before a Magistrate, the Magistrate is bound to examine the complainant on oath and then to proceed according to law.

Where a complaint was filed regarding the conduct of a Government officer, the Magistrate called for a report from the officer concerned, and feeling himself satisfied with it, rejected the complaint:—

Held, that the action of the Magistrate in calling for a report was not proper, and that in any case he ought to have heard the complainant and his witnesses before acting upon any statement made by the person complained against. *Baidya Nath Singh* v. *Mushprati* (1) referred to.

THE petitioner presented a complaint for defamation to the District Magistrate of Dharwar against Mr. C. Roper, First Class Magistrate, alleging that he had been conducting a criminal case before the said Magistrate and at a hearing thereof while one of the witnesses for the defence was being examined in chief he requested the Magistrate to record an answer given by the witness, but the Magistrate instead of doing so said; "you sit down damned beggar;" he thereupon wrote Mr. Roper asking him to apologise for his conduct but he (Roper) took no notice of the letter. The District Magistrate summarily dismissed the complaint after perusing the report asked for from Mr. Roper. Against this dismissal the petitioner moved the High Court.

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*Criminal Ruling 5 of 1898. Criminal Application for Revision No. 395 of 1897.

†Criminal Application for revision No. 4 of 1897. (1) I. L. R., 14 Cal., 141.

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PER CURIAM—We return the complaint for legal disposal. The Magistrate was bound to have examined the complainant on oath and then proceeded according to law. The action of the District Magistrate in calling for a report was not proper—see *Baidya Nath Singh* v. *Muspratt* and others (1), and in any case he ought to have heard the complainant and his witnesses before acting upon any statement made by the person complained against.

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24 February 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Dagdu Janaji.*

Criminal Procedure Code (Act X of 1882), Sec. 391—Whipping—Double sentence.

An accused cannot be sentenced to a double set of whipping, where he is convicted of two offences.

PER CURIAM.—The applicant was convicted of the offences of house breaking and theft and sentenced for each offence to two years' rigorous imprisonment and 15 stripes. It may be doubted whether the double sentence of whipping is legal, see section 391, Code of Criminal Procedure, and the case reported at 7 Madras High Court Report Appendix 29; *Nassir Chunder and others* (2) which was followed in *Ruttim Bewa Buhur and Jhowla Buhur* (3). In any case, however, the sentence is too severe for the offence even with the previous convictions.

We alter the sentences to one of two years' rigorous imprisonment and fifteen stripes for both the offences.

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3 March 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Krishnaji Ganesh.†

Indian Penal Code (Act XLV of 1860), Sec. 161—Illegal gratification—Offence.

The accused, the *Kulkarni* of a village, told the ryots who had been given a grant of *tagav* by Government that he had worked for them for 8 days and that they must pay him 12 annas each or they would get into trouble and in consequence the ryots paid him the money:—

Held, that the accused was properly convicted of an offence under section 161, Indian Penal Code, as he made use of his official position and claimed and obtained the money as a reward for rendering services which he had not rendered in that position.

IN this case the accused, who was the Kulkarni of the village of Malsiras, was charged with having obtained 12 annas for himself from one Baku who had just obtained Rs. 8 as *tagavi* in consideration of his having written out the necessary papers and given the necessary evidence to enable him to get *tagavi*, part of the routine work of a Kulkarni. For this, he was convicted by the First Class Magistrate of Poona of an offence under section 161 of the Indian Penal Code, and sentenced to undergo one

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**Criminal Ruling 7 of 1898. Criminal Application for Revision No. 415 of 1898.*

(1) I. L. R., 14 Cal., p. 141. (2) 9 W. R., 410. (3) 24 W. R., 7.

†Criminal Application for Revision No. 24 of 1898.

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month's rigorous imprisonment and to pay a fine of Rs. 25. On appeal, the Sessions Judge of Poona confirmed the conviction and sentence: the following were his reasons:—"The counsel for the accused urges that the accused committed no offence in taking the 14 annas for (1) the money was paid for something already done whereas section 161 of the Indian Penal Code refers to money accepted for something to be done in future, and (2) the evidence is quite consistent with the money having been paid for work done by the accused in his private capacity. For instance, accused may have written petitions for Baku. But illustration (*c*) to section 161 clearly shows that payments for past services are covered by that section and to the second contention the answer is that as the accused who is the Kulkarni of the village came with Baku and others to Saswad when they went to get *tagavi* the natural meaning of the accused's words that he had worked for Baku for 8 days is that he had worked for him officially as Kulkarni in a manner favourable to Baku's interest in the business relating to the *tagavi*. Further the accused did not state to the Magistrate that he had been paid for work done in his private capacity for Baku and if he had so worked it would not probably have been necessary for him to use threats to Baku to get the money. It has, I think, been established that the accused who is a public servant accepted 12 annas from Baku as a reward for doing in a manner favourable to Baku an official act, *viz*, for working as Kulkarni in a manner favourable to Baku's interests in the transaction which resulted in Baku's getting the *tagavi*." The accused, thereupon, applied to the High Court under its extraordinary jurisdiction.

PER CURIAM:—The evidence shows that the accused who is the Kulkarni of the village told the ryots who had been given a grant of *tagavi* by Government that he had worked for them for eight days and that they must pay him 12 annas each or he would take notice of it and they would get into trouble and that in consequence they paid him the money but not of their free will. It thus seems clear that the accused made use of his official position and claimed and obtained the money as a reward for rendering services which he had not rendered in that position and thus committed the offence mentioned in section 161 of the Penal Code. In any other view of the case he would have committed extortion. It is not necessary for us to express an opinion on the point raised by the defence in this Court for the first time, *viz.*, that he was paid only for services rendered by him in his private capacity and for which he could charge, since there is no evidence that he rendered any such services at all. We dismiss the application.

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10 March 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Sangappa.*

Criminal Procedure Code, Secs. 345, 560—Compounding of offences—Compensation.

Where an offence is compounded under the provisions of section 345, Criminal Procedure Code, a Magistrate is not competent to award compensation under section 560, Criminal Procedure Code. The composition of an offence under the former section has the effect of an acquittal but it is not such an acquittal as to bring the case within the provisions of section 560, Criminal Procedure Code.

IN this case the offence of hurt, section 323 of the Indian Penal Code, was compounded under section 345, Criminal Procedure Code, but the Magistrate directed the complainant to pay one of the accused, under section 560 of the Criminal Procedure Code, Rs. 25 as compensation or in default to suffer seven days' imprisonment. The District Magistrate of Dharwar forwarded the record of this case to the High Court observing:—"As there was, in this case, neither a discharge nor an acquittal, section 560, Criminal Procedure Code, does not apply so as to enable the Magistrate to award compensation to the accused (*vide* High Court Criminal Ruling No. 29 dated 26th July 1894)."

PER CURIAM.—In this case the order of the compensation is illegal under section 560, Criminal Procedure Code. The offence was compounded under the provisions of section 345. The composition of an offence under that section has the effect of an acquittal but we think that it is not an acquittal so as to bring the case within the provisions of section 560. We reverse the order.

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16 March 1898. PARSONS & RANADE, JJ.

In re Valji Mahomed.†

Criminal Procedure Code, Sec. 517—Disposal of property—Magistrate—Jurisdiction.

It is not competent to a Magistrate to pass, before a trial is concluded, an order disposing of the property in respect to which an offence is committed.

Section 517, Criminal Procedure Code, provides that such an order shall not be carried out at once in cases which are appealable.

IN this case a person was charged with theft in respect of gold and silver ornaments belonging to the complainant, under Section 380 of the Indian Penal Code, and one X was charged with having dishonestly received and disposed of them, under sections 411 and 414 of the Indian Penal Code. In the course of an investigation the Police seized from the applicant ingots of gold and silver into which they alleged the applicant had converted the ornaments which had been pledged to him by X. The person accused of theft was convicted on the 6th December 1897, and the Magistrate on the very day ordered the gold and silver seized by the

*Criminal Ruling 8 of 1898. Criminal Reference No. 3 of 1898.

†Criminal Ruling 10 of 1898. Criminal Revision No. 50 of 1898.

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Police to be made over to the complainant. The proceedings against X were adjourned and the trial concluded with his conviction on the 8th December 1897. The applicant, thereupon, moved the High Court in its Criminal Revisional Jurisdiction, to revise the order of the Magistrate regarding the disposal of the gold and silver seized from him.

PER CURIAM:—The Magistrate's order mentions ornaments, and there is nothing in the case which shows that the property found with the applicant was not the ornaments of the complainant but the bullion into which the ornaments had been converted. From the arguments addressed to us on behalf of both parties it appears that what was deposed to by Police Inspector Power as produced by the *bora* (the applicant) was not ornaments but bullion though the memo of the evidence has it that a portion of the property pledged by the accused No. 2 was produced. However assuming that the order of the Magistrate which mentions ornaments only, includes property into which the ornaments may have been converted, it is clearly illegal since it was made before the trial was concluded. It was made on the 6th December whereas the 2nd accused was not convicted till the 8th December. We must, therefore, reverse the order and direct the Magistrate to pass a fresh order according to law. As an appeal lay in the case the law provides that the order shall not be carried out at once, but if it has been then it would seem that no restitution is possible if a contrary order be passed. This, however, will be for the Magistrate to decide.

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24 March 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Rahimatkha.*

Criminal Procedure Code, (Act X of 1882), Sec., 545—Compensation order—Indian Penal Code (Act XLV of 1860), Sec. 188.

The accused took his sister who was suffering from plague into a town without informing the authorities about it: he was, thereupon, convicted by a Magistrate of an offence under section 188, Indian Penal Code, and was sentenced to pay a fine of Rs. 20. The Magistrate further ordered that out of the fine so recovered Rs. 10 should be paid to the Municipality as damages on account of the expenses incurred by the Municipality:—

Held, that the order of compensation was illegal.

THE accused took into the town of Ghodnadi his sister who had been suffering from plague. She was concealed in a bullock cart containing boxes of kerosine oil and no information was given to the Municipal authorities although this was required under the Plague Rules issued by the Chief Plague Authority for the town of Sirur. The Second Class Magistrate of Sirur tried the case and convicted the accused of the offence of disobedience of orders lawfully promulgated by a public servant under

*Criminal Reference No. 8 of 1898.

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section 188, Indian Penal Code, and sentenced him to suffer one month's simple imprisonment and to pay a fine of Rs. 20 or in default to suffer further imprisonment for seven days. The Magistrate further ordered under section 545, Criminal Procedure Code, that out of the fine if recovered Rs. 10 should be paid to the Municipality of Sirur as damages on account of the expenditure incurred in disinfecting the house in which the accused brought his sister and also the surrounding houses. The District Magistrate referred this case to the High Court remarking:—"It appears doubtful to the District Magistrate whether the order as regards compensation under section 545, Criminal Procedure Code, can hold good, as no injury was directly caused by the offence of disobeying an order promulgated by a public servant and that the real complainant was the Plague Authority whose order was disobeyed and not that of the Municipality."

PER CURIAM:—The order that out of the fine when recoverd Rs. 10 should be paid to the Municipality as compensation on account of the expenditure incurred in disinfecting the house into which the accused brought the case of plague is reversed as illegal. Assuming that the offence caused injury by polluting the house the Municipality could not by civil suit have recovered from the accused the cost of disinfecting it.

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4 April 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Raoji Moreshwar.*

Criminal Procedure Code, Secs. 476-478—Sanction to Prosecute—Committal to a Magistrate—Subordinate Judge's power to try the case himself.

Where a Subordinate Judge being of opinion that certain documents produced before him were forgeries, sends the case against the applicants to be dealt with by a First Class Magistrate under section 476, Criminal Procedure Code, and the Magistrate discharges the accused under section 209, the Subordinate Judge is not entitled to revive the proceedings against them under section 478, Criminal Procedure Code.

It is clearly stated in Section 478, Criminal Procedure Code, that the procedure therein prescribed is only alternative, that is to say, that the Court may itself proceed under it instead of sending the case to a Magistrate under section 476, but the section gives no power to a Court on failure of one to adopt the other mode of procedure.

PER CURIAM:—The Subordinate Judge on the 11th March 1897 sent the case against the applicants for inquiry or trial to the Magistrate under the provisions of section 476 of the Code of Criminal Procedure and that Magistrate on the 20th October 1897 discharged the applicants under section 209. The Subordinate Judge has now proceeded to revive the case by dealing with the applicants under section 478. We are of opinion that he had no jurisdiction to do this. It is clearly stated in section 478 that the procedure therein prescribed is only alternative, that is to say,

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*Criminal Ruling 13 of 1898. Criminal Revision No. 49 of 1898.

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that the Court may itself proceed under it instead of sending the case to a Magistrate under section 476, but the section gives no power to a Court on failure of one to adopt the other method of procedure.

We quash the order of the Subordinate Judge dated the 20th January 1898 in the case of each of the applicants.

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4 April 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Moghji Kuka.*

Indian Forest Act (VII of 1887), Secs, 25, 75—Fines—Rewards—Magistrate.

The payment of rewards out of fines and confiscations effected under section 25, Indian Forest Act, is not a part of the sentence, but is a matter for the Executive Government to deal with in the power vested in them by the rules framed under the Act. These rules give the Government the power to pay one half of the proceeds of fines and confiscations by way of reward without any order of the convicting Court; and unless the Magistrate so directs more than one-half cannot be paid. A Magistrate, therefore, is under no obligation to make any direction as to rewards unless he thinks that more than one-half should be paid by way of reward.

THE accused was charged with the offence of trespassing in the Reserved Forest of the village of Nadhelav without a permit in order to search for his missing cattle. He had an ox with him. The complaint was instituted by a Round Guard under the orders of the Divisional Forest officer through whose agency the conviction was obtained. Upon these facts, the Third Class Magistrate of Dohad convicted the accused under clause (*d*) of section 25, Act VII of 1878, and sentenced him to pay a fine of Rs. 2; and awarded no reward to the complainant as the conviction was obtained by the Divisional Forest officer. The District Magistrate of Panch Mahals made the present reference to the High Court, observing: "It is compulsory and not optional under the subsidiary Rule 1 of the Rules under section 75 of the Indian Forest Act of 1878 that at least one-half of the proceeds of fine and confiscations *should* be paid as reward to the officer through whose instrumentality the conviction was obtained. As the Magistrate himself states that it was through the Divisional Forest officer, the latter should have been awarded a reward under the above Sub-Rule"

PER CURIAM—We see no reason to interfere because the Magistrate has passed no order setting aside a moiety of the fine for a reward. The payment of rewards out of fines and confiscations is not a part of the sentence but it is a matter for the Executive Government to deal with in the power vested in them by the rules framed under the Act. These rules give the Government the power to pay one-half of the proceeds of fines and confiscations by way of reward without any order of the convicting

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**Criminal Ruling* 13 *of* 1898. Criminal Reference No. 21 of 1898.

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Court (See Criminal Ruling 46 of the 13th October 1892) more than one-half cannot however be paid unless the Magistrate so directs. There is, therefore, no necessity for a Magistrate to make any direction unless he thinks that more than one-half should be paid by way of reward.

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4 April 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Bavabhai Kesarising.†

Criminal Procedure Code, Sec. 560—Compensation—Magistrate.

A Magistrate has no jurisdiction to award compensation under 560, Criminal Procedure Code, in cases where the offence charged is not triable by him.

THE accused was charged with the offence of mischief by fire with intent to cause damage to agricultural produce to the amount of Rs. 10 or upwards, in that he set fire to and destroyed, straw to the value of about Rs. 40, the property of the complainant. The First Class Magistrate of Broach discharged the accused under section 209, Criminal Procedure Code, and ordered that, the charge being a vexatious one, the complainant should pay him the sum of Rs. 30 as compensation, or in default suffer simple imprisonment for 30 days. The Sessions Judge of Surat submitted the record and proceedings in this case to the High Court observing :—"The order to pay compensation is illegal, inasmuch as, the offence being one triable exclusively by the Court of Sessions, the Magistrate had no power to make the order awarding compensation, because the offence was not triable by him, section 560 (1), Criminal Procedure Code."

ORDER.—As the offence in this case was triable exclusively by a Court of Sessions the Court thinks that the Magistrate had no jurisdiction to award compensation under section 560 of the Code of Criminal Procedure. The Court reverses the order.

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4 April 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Lalbu.*

Indian Penal Code (Act XLV of 1860), Sec. 318—Child birth—Concealment of child birth—Jury—Assessors—Irregularity.

The offence contemplated by section 318, Indian Penal Code, becomes complete when the accused conceals the birth of her child by burying the body of child, independently of the question "whether such child die before or after or during its birth."

Where a Sessions Judge tries a charge by a jury instead of with the aid of assessors, the irregularity does not vitiate the trial, which can be treated as one held with the aid of assessors and the verdict of the Jury treated as their opinion as assessors.

PER CURIAM :—The Sessions Judge has committed the irregularity of trying the charge under section 318 of the Indian Penal Code by a Jury instead of with the aid of assessors. The trial on that ground

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†*Criminal Ruling* 14 *of* 1898. Criminal Reference 17 *of* 1898.

**Criminal Ruling* 15 *of* 1898. Criminal Appeal No. 401 of 1897.

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however is not invalid and we treat it as one held with the aid of assessors, taking the verdict of the Jury to be their opinions as assessors. Upon the facts there can be no doubt. The accused confessed that she buried the body of the child which died soon after birth in her house and went away to Petlad locking up the house. The evidence of the Policeman who entered the house first shows that the body was buried. The *panch*, it is true, says that he saw the legs protruding but that evidently was after the Police witness had removed some of the earth. The Sessions Judge was of opinion that the charge under section 318 could not be sustained if the child was born alive (He directed the Jury "if the child was born alive you cannot convict under section 318"). This however is wrong. He has overlooked the words used in section 318 "whether such child die before or after or during its birth." In the present case there can be no doubt that the accused is guilty of the offence specified in section 318 of the Indian Penal Code and we convict her of it and sentence her to six months' rigorous imprisonment.

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6 April 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Ahmedkhan.*

Indian Penal Code (XLV of 1860), Sec. 372—Girl—Let to hire—Prostitution.

The words "let to hire" in Section 372, Indian Penal Code, refer to a making over of a minor either in perpetuity or for a term and not for the commission of an immoral act of sexual intercourse. These words are the counterpart of the word "hire" in Section 373.

Queen-Empress v. *Sukee Raur* (2), *followed.*

PER CURIAM.—We do not think that the actions of the accused persons in this case constitute the offence mentioned in Section 372 of the Indian Penal Code or abetment thereof. The girl was above 12 but under 16 years of age. She was deserted by her husband and after living with prostitutes and others for a time, finally took up her residence in the brothel kept by the accused, well knowing their occupation and there prostituted herself to all comers, the accused apparently by what *Jackson* J. in *Queen* v. *Nourjan* (1) described as a common enough arrangement, housing, feeding and clothing her in consideration of receiving the wages of her prostitution. We cannot hold that the accused by thus receiving money let the girl to hire within the meaning of section 372. These words have formed the subject of several decisions of the High Courts in India of which we may cite the last only: *Queen Empress* v. *Sukee Raur* (2), and they have been held to refer to a making over of a minor either in perpetuity or for a term and not for the commission of an immoral act of sexual intercourse. It seems clear to us that the words "let to hire" in section 372 are the counterpart

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**Criminal Ruling* 16 *of* 1898. Criminal appeal No. 69 of 1898 and Criminal Review No. 121 of 1898.

(1) 6 B. L. R. App. 34. (2) I. L. R. 21 Cal., 1897.

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of the word "hire" in section 373. In the present case it is impossible to hold that the persons, whom the girl in consideration of a money payment to the accused allowed to have intercourse with her, hired her and so committed the offence mentioned in section 373 and as they did not hire her it follows that the accused did not let her to hire. We reverse the conviction of both the accused persons and acquit them and direct their discharge.

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5 May 1898. PARSONS & STRACHEY, JJ

Queen-Empress v. Nilappa Dayappa.†

Indian Penal Code (Act XLV of 1860), Sec. 277—Public spring—Nullah—Fish washing of.

The water of a *nullah* does not constitute a "public spring;" the fouling of the water of a *nullah*, therefore, by washing a fish therein is no offence under section 277, Indian Penal Code.

IN this case, the Magistrate convicted the accused under section 277, Indian Penal Code, for washing a fish in a *nullah*, and sentenced him to pay a fine of Re. 1. The District Magistrate of Dharwar being of opinion that the conviction and sentence was illegal, made this reference to the High Court, stating:—"As the water of a *nullah* does not constitute a 'public spring' within the meaning of Section 277, Indian Penal Code, (Criminal Ruling dated 1st October, 1885 in the case of *Hari son of Bapu*), the fouling of the water of a *nullah* by washing fish therein is no offence under that section. Section 61 of the District Police Act has not been made applicable to the place."

ORDER—For the reasons given by the District Magistrate the Court reverses the conviction recorded against and the sentence passed upon the accused Nilappa *bin* Dayappa.

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5 May 1898. PARSONS & STRACHEY, JJ.

Bai Dahi v. Jagjivan Vamalchand.*

Criminal Procedure Code (Act V of 1898), Sec. 551—Jurisdiction—District Magistrate—Transfer of case.

A District Magistrate alone has jurisdiction to entertain a complaint and make an order under section 551 of the Code of Criminal Procedure. He has no power to transfer such a case to a Sub-Magistrate, and that Magistrate would have no jurisdiction therein.

PER CURIAM.—A District Magistrate alone has jurisdiction to entertain a complaint and make an order under section 551 of the Code of Criminal Procedure. He has no power to transfer such a case to a Sub-Magistrate and that Magistrate would have no jurisdiction therein. We

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† *Criminal Ruling* 17 *of* 1898. Criminal Reference No. 26 of 1898.

* *Criminal Ruling* 18 *of* 1898. Criminal Reference No. 27 of 1898.

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therefore reverse the order of the District Magistrate dated 18th February 1898 and the subsequent proceedings of the First Class Magistrate and direct the District Magistrate to dispose of the complaint according to law.

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20 May 1898. PARSONS & STRACHEY, JJ.

Queen-Empress v. Rawal Arab.*

Indian Penal Code (Act XLV of 1860), Sec. 304A—Attempt—Murder.

An attempt to murder contemplates an intention to murder and an act done which if it caused death would amount to murder but which did not cause death.

THE accused in this case was a convict under sentence of transportation for life in the Yerrowda Jail the set the planks of the bed on fire and when called upon by a convict-warder to extinguish the fire with some water which stood in the cell, he refused to do so and said he would burn down the cell and would kill any one who entered. Subsequently, the lock of the cell was opened and the warders rushed in the cell to seize the accused. Seeing the warders had effectd an entrance, he seized a stone and struck the deceased warder, Naru Lingu, with a stone on his chest and gripping him round the body with his arms he squeezed him till his victim cried out that he was killed. The other warders did their best to effect the release of Narsu and eventually overpowered the accused, but not until he had bitten a finger of Ismal to such an extent as to render amputation necessary. The Sessions Judge of Poona, upon these facts, convicted him of an offence under section 307, Indian Penal Code, and sentenced him to the extreme penalty of the law.

PER CURIAM:—It is somewhat difficult to understand the conviction of attempt to murder for the injured man died. An attempt to murder contemplates an intention to murder and an act done which if it caused death would amount to murder but which did not cause death. If it caused death then it would be murder. Here we can only suppose that the jury either misunderstood the law or thought that death was not the result of the injuries, that the act done did not cause death, but that death resulted from some other cause. According to the medical evidence the death of the warder Narsu was due to cerebral hemorrhage and secondary pneumonia. The pneumonia is not said to have been the result of any violence. The cerebral hemorrhage was due to a rupture of a blood vessel, that rupture was not caused directly by any violence but was the result of excitement. The violence used, that is the throwing of a stone which hit the deceased on the chest and the seizing him round the waist and squeezing him would, it is said, have caused excitement sufficient to cause the rupture of the blood vessel and there is no other assignable cause for it. We have then to consider of what offence the accused is guilty

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*Confirmation Case No. 11 of 1898.

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in doing what he did. It is clear that he did not commit murder for his act comes within none of the provisions of section 300 of the Indian Penal Code. It was not done with the intention of causing death, the bodily injury inflicted was not sufficient in the ordinary course of nature to cause death, and the act was not known to be so imminently dangerous that it must in all probability cause death. It is also clear that the accused did not attempt to commit murder because the act which he did, did not amount to murder. The most that can be said is that the act was done with the knowledge that it was likely to cause death, that is the offence of culpable homicide not amounting to murder. We think, taking all the circumstances of the case as set out by the Sessions Judge in his charge to the jury, that this is the offence which the accused must be held to have committed.

We must, therefore, decline to confirm the conviction and the sentence of death passed for an offence under section 307 and we annul that conviction and convict the accused of an offence under the second part of section 304 and sentence him to 5 years' rigorous imprisonment.

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2 June 1898. PARSONS & STRACHEY, JJ.

Queen-Empress v. Mahadu Nagu.*

Criminal Procedure Code (Act V of 1898), Sec. 396—Penal Code, Sec. 224—Escaped convict, execution of sentence on.

The accused, who was a life convict under sentence of transportation for murder, was convicted under section 224, Indian Penal Code, of attempting to escape from lawful custody, and sentenced to four months' imprisonment which the convicting Magistrate directed to commence immediately:—

Held, that such an order was contrary to the provisions of section 396 of the Criminal Procedure Code.

THE accused was convicted of the offence of attempting to escape from lawful custody, section 224, Indian Penal Code, and sentenced to four months' rigorous imprisonment by the First Class Magistrate of Bijapur. But he was a life convict imprisoned in the Bijapur prison and was then sentenced to transportation for murder. The First Class Magistrate in recording the sentence of four months' imprisonment directed that the sentence "is to commence immediately and should be carried out before he is sent to the Penal Settlement." As this part of the sentence was considered contrary to the provisions of section 396 of the Code of Criminal Procedure by the District Magistrate of Bijapur he referred the case to the High Court observing:—"The Jailor is unable to carry it out—the accused having already been under a sentence of transportation as above stated; while the sentencing Magistrate cannot after the order judicially

*Criminal Ruling 19 of 1898. Criminal Reference No. 33 of 1898.

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recorded by him issue an amended warrant. I am, therefore, of opinion that the part of the Magistrate's order quoted above should be quashed."

ORDER.—For the reasons given by the District Magistrate the Court reverses the order recorded by the First Class Magistrate, Bijapur, *viz.*, that the sentence is to commence immediately and should be carried out before the convict is sent to the Penal Settlement.

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2 June 1898. PARSONS & STRACHEY, JJ.

Queen-Empress v. Mallaya Sanmukhaya.*

Criminal Procedure Code (Act V of 1898), Sec. 288—Evidence—Committing Magistrate.

Although, section 288, Criminal Procedure Code, allows the evidence of a witness taken before a committing Magistrate to be treated as evidence in the case in the Sessions Court, yet, when that evidence has been retracted in the latter Court, it would be very unsafe to act upon it, unless it is clearly proved to be true by some independent evidence.

PER CURIAM.—Section 288 of the Code of Criminal Procedure allows the evidence of a witness taken before a committing Magistrate to be treated as evidence in the case in the Sessions Court, but we think when that evidence has been retracted in the latter Court that it would be very unsafe to act upon it unless it is clearly proved to be true by some independent evidence. In the present case we find that while there is corroboration of the evidence of the complainant as against the accused No. 1 there is none of it as against the accused No. 2, and he does not seem to have been mentioned at first by the complainant as her assailant. We, therefore, reverse the conviction of the accused No. 2 and acquit him and order his discharge.

We dismiss the appeal of the accused No. 1.

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16 June 1898. PARSONS, AG. C.J. & RANADE, J.

Queen-Empress v. Manekshaw Manchershaw.*

Indian Penal Code (Act XLV of 1860) Secs. 188, 511, 116—Epidemic Diseases Act (III of 1897), Secs. 2, 3—Notification—Attempt—Offence.

Held, that the notification issued by the District Magistrate did not appear to be a rule imposing quarantine in such a way as to make it an offence to try and evade quarantine, but was merely a notice informing persons of what they were liable to undergo, and made their detention legal, so that they could not escape detention if called upon to undergo it, but did not compel them to take the first step, and offer themselves for detention.

Held, also, that even if it was an offence for persons liable to be quarantined to try and evade quarantine, the accused could not be said to have abetted even an attempt at evasion of quarantine on the part of these persons until the latter had attempted to evade quarantine and the former had assisted them in so doing.

PER CURIAM.—The accused are found to have purchased at Broach two extra 2nd class return tickets for Ankleshwar with the object of

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**Criminal Ruling* 20 *of* 1898. Criminal Appeal No. 172 of 1898.

**Criminal Ruling* 21 *of* 1898. Criminal Appeal No. 171 of 1898.

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giving them at Ankleshwar to two passengers in the train from Sanjan in order that the latter might avoid being quarantined when they arrived at Broach. They were charged with an attempting to disobey a quarantine rule, but the Magistrate acquitted them, holding that no criminal liability had been incurred since no attempt had been made to transfer the tickets, their possession of the tickets having been discovered immediately they arrived at Ankleshwar. The Local Government has appealed against the order, and the Public Prosecutor has argued that the charge should have been abetment of the offence of disobeying a quarantine rule, and that the abetment was completed as soon as the two extra tickets were purchased and the accused proceeded to Ankleshwar. We think that the order of acquittal is right. On the first place it does not appear to us that any rule has been issued imposing quarantine in such a way as to make it an offence to try and evade quarantine. What is relied on as the rule is a Notification published at *Government Gazette*, 1897, page 1897, which says that certain persons coming to Broach from certain stations are liable to be detained for observation in a camp appointed for the purpose for a period which may extend to ten days. This seems to us to be merely a notice informing persons of what they are liable to have to undergo. It makes their detention legal, so that they could not escape detention if called upon to undergo it, but it does not compel them to take the first step and offer themselves for detention; in other words, it does not order the detention of any persons, or say that if they do not offer themselves for detention they shall be punished. In the next place, supposing that it is an offence for persons liable to be quarantined to try and evade quarantine, we think that the accused cannot be said to have abetted even an attempt at evasion of quarantine on the part of these persons until the latter had attempted to evade quarantine and the former had assisted them in so doing. This could not be until they had given or attempted to give them the tickets they had purchased. Here the parties never met each other, and the idea of giving the tickets to those persons was abandoned, fell through in fact in consequence of discovery, before the persons for whom the tickets were intended ever came to Ankleshwar. We think the Magistrate is right in the view he has taken of this part of the case. We, therefore, dismiss the appeal.

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16 June 1898. PARSONS, AG. C. J. & RANADE, J.

Queen-Empress v. Kazi Fajloddin.*

Criminal Procedure Code (Act V of 1898), Sec. 144—Magistrate—Inquiry.

A Magistrate should, before passing an order under section 144 of the Code of Criminal

*Criminal Ruling 22 of 1898. Criminal Application for Revision No. 147 of 1898.

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Procedure, always hold an inquiry and determine which party has the legal right contended for by both the parties, and then protect the party he finds entitled in the exercise of that right.

IN this case the First Class Magistrate of Dhulia issued an order under section 144, Criminal Procedure Code, forbidding the Kazi and Mulla to go to the Idga outside the city of Dhulia, on the Bakri Id, and directing them not to allow others to do so.

PER CURIAM.—As the period for which the order was to be in force has expired we do not think any interference with it is now called for. We will, therefore, only point out to the Magistrate that his order appears to be of doubtful legality. It appears that there is some dispute between the Kazi and Mulla, each claiming to have the right to read the Kudba first on the Bakri Id at this Idga. The Magistrate has solved the knot this year by issuing an order forbidding both the Kazi and the Mulla to go to the Idga on the Bakri Id day, or to allow others to do so. He should rather, we think, have held an inquiry and determined which has the legal right, and then have protected the party he found entitled in the exercise of that right: *Abdool* v. *Lucky Narain Mandul*, (1). In any case there is nothing to justify the *ex-parte* issue of the order, and it would, we think, be found difficult to justify the general prohibition of going to the Idga and the injunction against allowing others to go there. The Mussalman community certainly cannot thus be deprived of a right of worship in which they ought rather to be protected.

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2 July 1898. PARSONS, AG. C. J. & RANADE, J.

In re Clive Durant*

Criminal Procedure Code (Act V of 1898), Sec. 21—Rules framed under the section—Presidency Magistrate—Practice.

The applicant filed an information of theft before the Third Presidency Magistrate, who examined the applicant, and then thinking that the case could more conveniently be tried by the Chief Presidency Magistrate returned it to the applicant for him to present it to this latter Magistrate:—

Held, that Rule 9, framed under section 21, Criminal Procedure Code, did not justify the action of the Magistrate. The Rule only referred to a division of work, that is to say, an allotment of particular cases or particular days and hours of work.

THE applicant was being tried before the Chief Presidency Magistrate; during the pendency of these proceedings, the applicant applied to the Third Presidency Magistrate for process against two persons charging them with theft and various other offences in respect of certain documents, some of which were exhibits in those proceedings. The Magistrate having examined the applicant on oath, declined to take cognizance of the

*Criminal Ruling 24 of 1898. Criminal Application No. 185 of 1898.

(1) I. L. R., 5 Cal., 132

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complaint and referred it for disposal to the Chief Presidency Magistrate. The applicant, thereupon, applied to the High Court.

PER CURIAM.—The short facts of this case are that an information of theft was laid by the applicant before the acting Third Presidency Magistrate, Mr. Dastur, who examined the applicant, and then thinking that the case could more conveniently be tried by the Chief Presidency Magistrate returned it to the applicant for him to present it to this latter Magistrate. It is this return order which is objected to as being illegal and unauthorised. For the Crown, rule 9 of those framed under section 21 of the Code of Criminal Procedure and published in *Government Gazette*, 1894, page 29, is relied on as authorising this so called transfer (for that is what the Chief Presidency Magistrate calls it in disposing of the case). I do not think that rule 9 justifies the action of the Third Presidency Magistrate. It only applies to a division of work, that is to say, an allotment of particular cases or particular days and hours of work or it may be of localities. We set aside the order of the Third Presidency Magistrate, returning the application after he had taken cognizance of it by examining the applicant, and direct that he receive it and dispose of it according to law.

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18 July 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Dhondoo.†

Opium Act (I of 1878), Sec. 9, cl (e)—Importing Opium.

The accused went on business into foreign territory and while there purchased one anna's worth of opium. He ate a portion of it there, and brought the rest in his turban into British territory. The Magistrate convicted him under section 9, cl. (*e*) of the Opium, Act, 1878 :—

Held, that the conviction was illegal.

IN this case one Dhondoo residing in the village of Babhulda in Sindkheda Taluka had gone on business to Khetia, a town in Badrani (foreign) territory. There he bought one anna's worth of opium, a portion of which he ate while he was in that territory. When he returned to British territory on his way home, he had in his possession 45 grains of opium. As the bringing of it into British territory, was an importation in the sense of the Opium Act the man was prosecuted by a subordinate of the Abkari Preventive Establishment. The Second Class Magistrate of Shahada into whose jurisdiction the importation took place convicted him and sentenced him to pay a fine of Rs. 5. He also ordered the confiscation of the turban in which the opium was stowed. The District Magistrate, being of opinion that the conviction was illegal, made this refrence to the High Court, observing:—"But in view of Government Resolu-

†*Criminal Ruling* 25 *of* 1898. Criminal Reference No. 50 of 1898.

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tion No. 8776 dated 29th November, 1893, Revenue Department, the prosecution ought not to have been instituted at all. I find that the fine is heavy and that the order of confiscation is harsh in consideration of the nature of the offence the man committed. I think that the fine may be reduced to one anna and that the order of confiscation be cancelled."

ORDER.—For the reasons given by the District Magistrate and in view of the Government Resolution quoted by him and of the very small quantity of opium (45 grains) imported by the accused, the Court reverses the conviction recorded against and sentence passed upon Dhondoo *valad* Subaji and cancels the order of confiscation.

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21 July 1898. PARSONS & RANADE, JJ.

Queen-Empress. v. Tulshya Bahiru.*

Criminal Procedure Code (Act V of 1898), *Secs.* 123, 397—*Concurrent sentences—Indian Penal Code, (Act XLV of* 1860), *Sec.* 224.

The accused, while undergoing six months' rigorous imprisonment under section 123, Criminal Procedure Code, in default of giving security for good behaviour, was convicted of an offence under section 224, Indian Penal Code and sentenced to two months' rigorous imprisonment. The Magistrate directed the latter sentence to commence after the termination of the first sentence.

Held, that the sentence for the substantive offence must commence at once and could not be postponed to take effect at the expiration of the sentence of imprisonment which the accused was at the date of the conviction undergoing in default of giving security for good behaviour.

THE accused, Tulshya, was ordered by Mr. Ghosal, Magistrate First Class, on April 15, 1898, to furnish security for good behaviour for six months and in default he was directed to suffer rigorous imprisonment for six months. On 18th April he was convicted by the same Magistrate under section 224 of the Indian Penal Code and was sentenced to two months' rigorous imprisonment. The imprisonment was ordered to commence after the accused had furnished the security required of him or after he had undergone the six months' rigorous imprisonment awarded under section 123 of the Criminal Procedure Code. The Sessions Judge of Ahmednagar, submitted to the High Court the proceedings in this case observing:—" The word ' sentence ' in section 397 of the Criminal Procedure Code does not apparently include an award of imprisonment under section 123. The Magistrate was not, therefore, bound by section 397 to direct that the term of imprisonment for the offence under section 224 should commence on the expiry of the term of imprisonment in default and I not aware of any other section in the Criminal Procedure Code which authorises a Magistrate in passing a sentence of imprisonment for an offence to defer its commencement to some future time. The Magistrate's

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**Criminal Ruling* 26 *of* 1898. Criminal Reference No. 64 *of* 1898.

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action in postponing the execution of the sentence of imprisonment passed under section 224 seems illegal."

PER CURIAM.—This a case not expressly provided for by the Code but we think that the Sessions Judge is right and that a sentence for a substantive offence must commence at once and cannot be postponed to take effect at the expiration of the sentence of imprisonment which the convicted person was at the date of the conviction undergoing in default of giving security for good behaviour. We, therefore, alter the order and direct that the sentence commence from the date thereof.

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28 July 1898. PARSONS & RANADE, JJ

Queen-Empress v. Yakobo.*

24 & 25 *Vic.* c. 100, *s.* 47—26 & 27 *Vic.* c. 44—*Whipping—Imprisonment—Double sentence.*

The accused assaulted one Zena with intent to know her unlawfully and carnally, and was convicted by the Consular Court of Uganda and sentenced to rigorous imprisonment for two years and to 20 lashes:—

Held, that the Statute penalizing the offence did not permit a double sentence for the offence.

PER CURIAM:—Although the Consular Court in the Uganda Protectorate has not mentioned the law under which it makes this reference, it is apparently one under Art. 74 of the Africa Order in Council, 1889, and we peal with it as such.

The case is one in which the accused person has been convicted of assault upon one Zena and having beaten, wounded and ill-treated the said Zena with intent to know her unlawfully and carnally and sentenced to receive 20 lashes with a whip and to be imprisoned and kept to hard labour for two years. No reasons are given for the conviction but having ourselves perused the evidence we are satisfied that the conviction is proper. We feel doubts, however, as to the legality of the double sentence. The Consular Court has not stated the enactment which has declared the offence or defined its punishment as it should have done both in the charge and in the sentence. The statute however dealing with the case appears to be 24 & 25 Vic. c. 100, s. 47 amended by 27 & 28 Vic. c. 47. It provides for a maximum sentence of penal servitude for five years or of imprisonment for two years. It does not authorise a sentence of whipping either alone or in addition to the sentence of penal servitude.

26 & 27 Vic. c. 44 authorises a sentence of whipping only in case of conviction under section 21 of 24 & 25 Vic. c. 100 which this is not. Neither is this a conviction after a previous conviction for felony. We therefore set aside the sentence of whipping.

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*Criminal Reference No. 73 of 1898.

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4 August 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Bagas Asmal Adam.*

Criminal Procedure Codes (Act V of 1898 and Act X of 1882)—Joint Judge—Additional Judge.

Held, that a Joint Sessions Judge under the Criminal Procedure Code of 1882, was invested with the powers of an Additional Sessions Judge under the Code of 1898, in virtue of the Government Notification dated 28th May 1898.

PARSONS, J:—In the matter of this reference Mr. Lord has refused urisdiction on the ground that although he was a Joint Sessions Judge under the Criminal Procedure Code of 1882 the jurisdiction of an additional Sessions Judge is not continued to or conferred upon him by the Code of 1898 which has just come into force. At the hearing of the reference the Crown only has been represented. It appears that Mr. Lord was appointed Joint Sessions Judge under section 9 of the Code of Criminal Procedure 1882, on the 26th May 1898 (see Notification published at *Government Gazette*, 1898, page 477). Section 3 (2) of the Code of 1898 provides that the expression Joint Sessions Judge in Section 9 of the Code of 1882 shall mean Additional Sessions Judge. Section 2 (2) of the same Code provides that all Notifications published and appointments made under the Code of 1882 shall be deemed to have been published and made under the corresponding section of this Code. The appointment of Mr. Lord by the Notification of the 26th May 1898 must, therefore, be deemed to have been made under Section 9 (3) of the Code of 1898 and to have appointed him under that section an Additional Sessions Judge by reason of the change of the name in the title of the appointment. He is, therefore, an Additional Sessions Judge under the Code of 1898. Mr. Lord seems to think that he may be an Additional Sessions Judge but without jurisdiction. This, however, is not so. In the same Notification the Government conferred on him under section 193 of the Code of 1882 certain powers, among them the power to try all cases that may be committed for trial by the Magistrates of the Broach Collectorate. These powers by section 2 (2) of the Code of 1898 are to be deemed to have been conferred under the corresponding section of this Code, that is to say under section 193 of the Code of 1898. In our opinion, therefore, Mr. Lord has full jurisdiction under the Code of 1898 to try as Additional Sessions Judge the cases mentioned in the Notification of the 26th May 1898.

We reverse his order stopping the trial of the case and referring it back to the Sessions Judge of Surat and direct him to resume jurisdiction and dispose of it according to law.

RANADE, J.—I concur. The only change made by the Code of 1898, is the substitution of the name of Additional Sessions Judge in the place

*Criminal Application for Revision No. 208 of 1898.

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of Joint Sessions Judge (section 3 (2)), and the consequent omission of the words "Joint Sessions Judge" in sections 9, 31 and 193. This change takes away no power which Mr. Lord as Joint Sessions Judge by his appointment dated 26th May 1898 possessed, and he was turned into an Additional Sessions Judge since the new Act came into force. His appointment under the old Code is good as an appointment under the new Act by virtue of section 2 (2), and his power to inquire into the cases committed to his Court by the Magistrates of the Broach District remain unaltered. His Court existed before the new Act came into force, and must under section 9 be deemed to have been established under the new Act. Only the designation of the officer presiding over such Court has been changed. Instead of being styled Joint Sessions Judge, Mr. Lord since 1st July 1898 is Additional Sessions Judge, and no separate Notification of his appointment as Additional Sessions Judge seems necessary.

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17 August 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Lagma.†

Criminal Procedure Code (Act V of 1898), Sec. 526—Appeal—Transfer.

The High Court can transfer actual appeals only; it cannot direct that appeals that may be filed in future should, when filed, not be heard by the authority to which they are presented.

THIS reference arose under the following circumstances. A District Magistrate sanctioned the prosecution of certain persons for having escaped from a quarantine camp. The Sessions Judge of the District, thereupon, asked the High Court to pass an order that all appeals arising out of the proceedings in which the District Magistrate had sanctioned the prosecution should not be heard by him, but transferred to some other Court.

ORDER.—The Sessions Judge should be informed that their Lordships doubt their jurisdiction to make any such order as he wishes. Their Lordships can transfer actual appeals only. They cannot direct that appeals that may be filed in future should, when filed, not be heard by the authority to which they are presented.

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18 August 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Nathubhai Nahalchand.*

District Municipal Act (Bom. Act VI of 1873), Secs. 39, 74—Notice—Owner.

One H was required by the Municipality of Poona, under section 39, District Municipal Act, 1873, to white-wash the privy of a house owned by him. The notice was received by the accused, a nephew of H and the receipt also was signed by him. The notice not having been complied with, the accused was convicted by a First Class Magistrate under section 74 of the Act and sentenced to pay a fine of Rs. 15 :—

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†*Criminal Ruling* 27 *of* 1898. Criminal Reference No. 92 of 1898.
**Criminal Ruling* 28 *of* 1898. Criminal Reference No. 84 of 1898.

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Held, that the conviction of the accused was wrong, as the Act concerned itself only with the owner of a house. The fact that the accused received the notice for the owner could not make him liable.

THE accused was charged with having committed an offence under sections 39 and 74 of Bombay Act VI of 1873, in that he failed to act up to the notice issued by the Municipality requiring him to white-wash and chunam-point the privy in house No. 195 in Peth Kasba, Poona City Mr. H. F. Carvalho, City Magistrate of Poona, on 2nd March, 1898, convicted and sentenced the accused to pay a fine of Rs. 15 in default to suffer 5 days' simple imprisonment and ordered him also to pay one anna on account of Court fee expense.

The District Magistrate in making the reference observed as follows: —"House No. 195 stands in the Municipal records in the name of Hirachand Valabhdas uncle of accused Nathubhai. The notice issued by the Municipality under section 39 was accordingly addressed to Hirachand but instead of being served on him was served on Nathubhai and his acknowledgment taken. The notice-server states that he was informed that Nathu looked after the repairs of the house and therefore served the notice on him; that Nathu also said that he looked after everything connected with the house and that nothing was lost by the notice being served on him. Nathubhai on the other hand states that he acknowledged receipt of the notice because the man who brought it told him that the house was talked of as being his and that therefore he should sign it. Section 39 of the District Municipal Act throws the burden of repairing privies &c. distinctly on the owner, and on no one else. The question is:—Is the conviction wrong because Nathubhai is not the owner? or did Nathubhai, by signing the notice, *i. e.*, accepting service of a notice which could be issued to the owner only and which actually was not in his name assumed so far as concerns the notice and all proceedings consequent on it, the status of the owner? The District Magistrate is inclined to think that he is so estopped in which case the conviction is good. But as the point is doubtful it is referred for the orders of the High Court. In the application made by the accused Nathubhai to this Court on 3rd May 1898 he states that he received the summons on the 2nd March, *i. e.*, on the day appointed for the hearing of the case and that the trying Magistrate did not accept his petition asking for time to produce his evidence. The endorsement on the back of the original summons among the papers support the first allegation but go to show further that the accused having declined to accept service of the summons the process-server threw its duplicate at him. The accused has put in an affidavit in support of his second allegation."

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ORDER.—As Hirachand was the owner of the premises in question and the only person noticed under the act the conviction of the accused Nathubhai Nalchand is wrong. The fact that he received the notice for Hirachand could not make him liable. The Court, therefore, reverses the conviction recorded against and the sentence passed on the said accused and directs the fine to be refunded.

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30 August 1898. PARSONS & RANADE, JJ.

In re Clive Durant.*

Criminal Procedure Code (Act V of 1898), Secs. 208, 209, 347—Power of commitment—Magistrate—Practice.

Section 347, Criminal Procedure Code, 1898, empowers a Magistrate to commit at any stage of the proceedings, if it appears to him that the case is one which ought to be tried by the Court of Session or High Court.

THE applicant was charged before the Chief Presidency Magistrate of Bombay with offences under sections 389 and 511 of the Indian Penal Code. The Magistrate after recording a great deal of evidence offered by the prosecution, announced that as the case appeared to him to be one triable by the High Court, he would proceed under section 347 of the Code of Criminal Procedure. The Magistrate, before stopping the proceedings before him, called on the applicant to make any statement if he so desired. The applicant declined to make any statement and forthwith applied to the High Court to quash the order of commitment.

PER CURIAM:—We must reject the application. Section 347 of the Code of Criminal Procedure empowers a Magistrate to commit at any stage of the proceedings if it appears to him that the case is one which ought to be tried by the Court of Session or High Court. It was argued by the applicant that the power to commit was subject to the provisions of section 209, that is to say, that no commitment could be made until all the evidence referred to in section 208 sub-sections (1) and (3) had been taken and the accused had been examined. This, however, ignores altogether the words "at any stage of the proceedings shall stop further proceedings" and is opposed to the clear meaning of the section which is contained in the chapter dealing with general provisions as to inquiries and trials and applies to all inquiries and trials before a Magistrate. It cannot be said to be a new provision for the same existed in 1870. In the case of *The Queen* v. *Kishto Doba* (1) the learned Judges alluding probably to the combined effect of the sections 226 and 256 of the Code of 1861, say "there is a clause in the Procedure Code which empowers Magistrates to commit without inquiring into the defence of the accused." Section

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*Criminal Ruling 29 of 1898. *Criminal Application for Revision No. 231 of 1898.

(1) 14 W. R., 16.

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347 of the present Code is much clearer in its terms than those sections. In the case of *Queen Emp.* v. *Alanadi* (2) the power conferred by this was section not exercised, and so its provisions were not alluded to.

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1 September 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Chhagan Jagannath.*

Criminal Procedure Code (Act V of 1898) Sec. 386—Attachment—Sale—Claim by a third party—Procedure.

Where a claim by a third person is made to a property attached for the realization of fine, the Judge must stay the sale of the property and allow sufficient time to the claimant to establish her right to the property, unless by reason of the nature of the property an immediate sale enures for the benefit of the owner in which case the proceeds should be held over.

Queen Empress v. *Gasper* (1) and *Queen-Empress* v. *Khandappa* (2), followed.

IN this case the Joint Sessions Judge of Broach, having sentenced one Chhagan Jagannath to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000, issued a warrant for the recovery of the fine. In execution of the warrant, the property of Bai Suraj, the petitioner, was attached, and she applied to the Joint Sessions Judge for the removal of the attachment. The learned Judge, however, rejected the application, stating: "The power of the Court of Session to stay execution is not apparent from the Criminal Procedure Code and the correctness of the issue of such an order may well be questioned when no appeal lies from the order under which execution is being had, and there is nothing to be found upon the records of the Court to show that the High Court has been moved in revision in the matter. Be this as it may, I see no reason to hold that I have under the Code any power to stay execution under the circumstances, especially when no suit is as yet pending in a Civil Court with reference to the ownership of the property."

PER CURIAM.—No provision having been made in the Code of Criminal Procedure for inquiring into title by the Criminal Courts it appears to us that the same practice should be followed here as is laid down in the decisions of the High Courts of CALCUTTA and MADRAS: see *Queen-Empress* v. *Gasper* (1) and *Queen-Empress* v. *Kandappa Goundan* (2). We accordingly direct that the sale of the property attached be stayed by the Joint Sessions Judge for such time as in his opinion will be sufficient to give the claimant time to establish her right thereto unless of course by reason of the nature of the property an immediate sale would be for the benefit of the owners in which case the proceeds should be held over.

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(1) I. L. R., 22 Cal., 95. (2) I. L. R. 20 Mad., 88.

**Criminal Ruling* 30 *of* 1898. Criminal Application for Revision No. 206 of 1898.

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5 September 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Shaikh Ansar.*

Criminal Procedure Code (Act V of 1898), Secs. 438, 439—Revision—Appeal.

The High Court will not interfere in revision merely because the Sessions Judge takes a different view of the evidence to that taken by the Magistrate.

Where an accused has his remedy by appeal, but does not choose to exercise it, any subsequent proceedings by way of revision at his instance are barred by section 439 (5), Criminal Procedure Code, 1898.

THE accused and one Ganesh Gangadhar were tried and convicted by Mr. R. C. Brown, Magistrate First Class, for an offence under section 161, Indian Penal Code. The conviction and sentence passed against Ganesh Gangadhar were reversed by the Sessions Court on appeal. Sheikh Ansar did not appeal against the sentence passed on him but after Ganesh Gangadhar was released on appeal he requested the Sessions Court that the papers in his case should be referred to the High Court. The Sessions Judge referred the case to the High Court observing that as the reasons given in his judgment in appeal No. 43 of 1899 for reversing the conviction and sentence on Ganesh Gangadhar applied in the case of Sheikh Ansar he had complied with his request.

ORDER.—The Court sees no reason to interfere in revision merely because the Sessions Judge has taken a different view of the evidence to that which the Magistrate took. The accused had his remedy by appeal but did not choose to exercise it and section 439 (5) of the Criminal Procedure Code 1898, bars these proceedings.

September 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Govinda.†

Criminal Procedure Code (Act V of 1898), Sec. 340—Offence—Charge—Separate cases.

Section 240, Criminal Procedure Code, only applies to charges in the same case and has no application to separate cases.

IN this case the accused was sent up for trial by the Police on eight distinct charges, three of which related to an attempt to rob or extort when armed with a deadly weapon and five to robbery, the accused being in each case armed with a deadly weapon. The First Class Magistrate, however, enquired into two of the latter cases, convicted the accused of two offences under section 392, Indian Penal Code, and stayed the enquiry into the other six cases, purporting to act under section 240, Criminal Procedure Code. The District Magistrate of Thana submitted the case for the orders of the High Court.

ORDER.—Apparently there were eight cases sent up by the Police against the accused person. The Magistrate has enquired into two of

*Criminal Ruling 32 of 1898. Criminal Reference No. 65 of 1898.

†Criminal Ruling 34 of 1898. Criminal Reference No. 76 of 1898.

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them only he has stayed the enquiry into the other six cases purporting to act under section 240, Criminal Procedure Code, but that section only applies to charges in the same case and has no application to separate cases. The Court, therefore, directs the Magistrate to proceed to a legal disposal of the other six cases.

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8 September 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Jivachram Keshavram.*

Criminal Procedure Code, (Act V of 1898), Sec. 480—Appeal—Sessions Judge—Judgment.

A Sessions Judge cannot decline to interfere on appeal merely because in his opinion "the matter is a mere trifle." He is bound to hear the appeal and to come to a finding whether the conviction is legal or illegal.

THE petitioner, a pleader, was fined by the First Class Magistrate of Surat in a sum of one pice under section 480, Criminal Procedure Code, for speaking in the Court in an unnecessarily loud tone. The Magistrate's Judgment was as follows:—"He spoke unnecessarily loudly and was often told by the Court to speak rather slowly. He sometimes pleaded that he could not speak more slowly than he did on account of his habit but this is not true. When he chooses he speaks slowly. When the witness Maneklal was being cross examined by him, he spoke more loudly than before and he was told that he should speak slowly in accordance with the warning often given to him he spoke even more loudly than before and in a defiant tone." On appeal, the Sessions Judge of Surat diclined to interfere and recorded the following judgment:—"The matter is a mere trifle. I decline to interfere."

PER CURIAM.—The Sessions Judge to whom the appeal was preferred dismissed it with the remark that "The matter is a mere trifle. I decline to interfere". We do not know to what the word trifle refers whether to the act of the accused or to the punishment but in any case the Sessions Judge has not heard the appeal as he was bound by law to do and come to a finding as to whether the conviction was legal or illegal. We reverse his order and direct him to hear the appeal and dispose of it according to law.

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22 September 1898. PARSONS, AG.C.J. & RANADE, J.

Queen-Empress v. Mahadev Gopal.†

Epidemic Diseases Act (III of 1897), Rule 6—Information as to plague patient—Plague patient.

*Criminal Ruling 35 of 1898. Criminal Application for Revision No. 225 of 1897.

†Criminal Reference No. 96 of 1898.

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Rule 6, framed under the Epidemic Diseases Act, does not require the person who is himself attacked with plague to give information of his own sickness, albeit he is an occupant of the house in which he is attacked.

PER CURIAM.—We do not construe Rule 6 of the Plague Rules published in *Government Gazette*, 1897, page 597, as requiring the person who is himself attacked with plague to give information of his own sickness albeit he is an occupant of the house in which he is attacked. Looking at the language in which the rule is worded we take it to refer to third persons only. We think, therefore, the conviction of the applicant for failure to give information of his own sickness cannot be supported and we reverse it and order the refund of the fine paid.

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22 September 1898. PARSONS, AG.C.J. & RANADE, J.

Queen-Empress v. Bhikarao.*

The Bombay Abkari Act (V of 1898), Sec. 43 (c)—Indian Penal Code (Act XLV of 1860), Sec. 65—Imprisonment in default of payment of fine—Maximum sentence.

The accused was convicted of an offence under section 43 (*c*) of the Bombay Abkari Act, 1878, and sentenced to pay a fine of Rs. 75 or in default to suffer rigorous imprisonment for three months:—

Held, altering the sentence of imprisonment in default of payment of fine to six weeks, that the sentence passed was illegal under section 65, Indian Penal Code, the maximum term of imprisonment fixed for the offence being six months.

THE accused in this case was prosecuted for illegally manufacturing liquor and was convicted and sentenced by the Second Class Magistrate of Supa, to pay a fine of Rs. 75 and in default to suffer three months' rigorous imprisonment, under section 43, clause (*c*), of the Bombay Abkari Act, V of 1878. The District Magistrate of Kanara in referring this case to the High Court under section 438, Criminal Procedure Code, remarked:—"The maximum term of imprisonment fixed for the offence being six months, I consider that the imprisonment in default of payment of the fine awarded by the Magistrate in this case is illegal under section 65, Indian Penal Code, as it should not have exceeded one month and a half, *i. e.*, one fourth of the maximum term of imprisonment fixed for the offence."

ORDER.—The Court alters the sentence of rigorous imprisonment in default from three months to six weeks.

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6 October 1898. PARSONS, AG.C.J. & RANADE, J.

Queen-Empress v. Waman Lakshman.†

Indian Penal Code (Act XLV of 1860), Sec. 295—Well—Pollution.

Where a person, as a result of a quarrel with a relation, throws a basket containing cooked food (fowl, fish, rice &c), into a well, and without any intention to wound the religious susceptibilities of any one, he cannot be convicted of an offence under Section 295, Indian Penal Code.

**Criminal Ruling 37 of 1898.* Criminal Reference No. 100 of 1898.

†Criminal Ruling 40 of 1898. Criminal Reference No. 106 of 1898.

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THE accused, as a result of a quarrel with a relative, threw a basket containing cooked food (fowl, fish, rice &c) into a well. The Second Class Magistrate of Mahim convicted the accused under section 295, Indian Penal Code, for having defiled and polluted the water of that well. The District Magistrate of Thana in referring this case to the High Court observed:—" The Second Class Magistrate in passing judgment has omitted to frame any issues and he has therefore given no reason for his supposing that the well is "an object held sacred by any class of persons." Hindus undoubtedly object to any caste pollution of their water, but that they hold the water sacred is questionable. The Magistrate should have framed an issue as to whether accused by throwing the articles into the well intended thereby to insult the religion of any class of persons. He omitted to do so, and so far as the record goes, there is nothing to show that accused's object was any other than that of annoying his relative Bajubai. I am of opinion that although possibly an offence under section 426, Indian Penal Code, has been committed, there is nothing at all to show that the accused is guilty under section 295 and I, accordingly, refer the case for orders."

ORDER.—The Court agrees with the District Magistrate that the act of the accused does not constitute an offence under section 295 of the Indian Penal Code and therefore reverses the conviction and sentence.

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6 October 1898. PARSONS AG.C.J. & RANADE, J.

Queen-Empress v. Dama Ghela.

Bombay Village Police Act (VIII of 1867), Sec. 15—Disobedience of an order—Removal of wood from a public road—Patel.

A Police Patel has, under the Bombay Village Police Act, no power to order the removal of a piece of wood lying on a public road; the disobedience of such an order, therefore, is no offence under section 15 of the Act.

THE accused was convicted by the Police Patel of Navagam, who held a commission under section 15 of the Bombay Village Police Act, VIII of 1867, for disobeying the order of the Police Patel in that he failed to remove a piece of wood lying on a public road though he was asked to remove it. The District Magistrate of Kaira thought that under the Village Police Act the Police Patel had no power to order the removal of a piece of wood lying on a public road and therefore the disobedience of such an order was no offence under section 15 of the Act.

PER CURIAM.—The Police Patel has power to issue orders under section 16 of Act VIII of 1867, and refusal to obey a lawful order issued by such Patel personally is punishable under section 15 ; in the present case, the order hardly seems to fall within section 16 clause (3), a log of wood

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not being dirt, filth or rubbish, and it was not issued by the Patel personally but by the Ravania Bala Natha. The Court, therefore, reverses the conviction recorded against and the sentence passed upon Dama Ghela and orders the fine paid to be refunded.

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6 October 1898. PARSONS AG.C.J. & RANADE, J.

Queen-Empress v. Usman Gulmahomed.*

Criminal Procedure Code, (Act V of 1898) Sec. 517—Disposal of property—Magistrate.

Under section 517 of the Code of Criminal Procedure, a Judge has no jurisdiction to make an order for the disposal of the property unless he finds that some offence appears to have been committed regarding it or it has been used for the commission of some offence.

THE petitioner and two others were convicted by the First Class Magistrate of Ahmedabad with cheating under section 420, Indian Penal Code. During the course of the Police investigation certain ornaments were seized by the Police from the custody of the petitioner and brought before the Court for the purposes of the trial. After the conclusion of the trial the Magistrate purporting to act under sections 517, 523 and 524 of the Criminal Procedure Code, passed an order as to the disposal of the said ornaments directing six of the ornaments to be given to the complainant and the three remaining to be retained by the Police. On appeal, the Sessions Judge of Ahmedabad reversed the conviction and sentence passed upon the petitioner, but allowed the Magistrate's order regarding the disposal of property to stand good. The following were his reasons:—"On a careful consideration of the record I see many things which point to the complainant having lost his ornaments at cards. It is quite possible that as the Magistrate seems to think the appellants are a gang of robbers. I cannot, however, hold that they obtained these ornaments in the manner described by the complainant...the complainant's ornaments to be returned to him as directed by the Magistrate." The petitioner presented an application to the High Court under its extraordinary jurisdiction, chiefly upon the ground that no offence having been committed, the Sessions Judge ought to have passed an order directing the ornaments to be restored to the petitioner from whose possession they were taken for the purposes of the trial.

PER CURIAM:—This is a case under the Code of 1882. We are therefore concerned to see whether or not the Legislature has now made any alteration in the law. Under section 517 of that Code the Sessions Judge had no jurisdiction to make his order for the disposal of the property unless he found that some offence appeared to have been committed regarding it or it had been used for the commission of some offence—*In re*

*Criminal Application for Revision No. 213 of 1898.

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Ratanlal Rangildas (1). This he does not expressly find. He says something about gambling, but whether the gambling amounted to an offence or not is not stated.

We, therefore, reverse his order and direct him to pass a legal order after such further enquiry as he may think fit to make.

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27 October 1898. CANDY & RANADE, JJ.

Queen-Empress v. Fakira.*

Criminal Procedure Code (Act V of 1898), Sec. 423 (1) (b)—Appellate Court—Retrial—Competent Court.

Under the provisions of section 423 (1) (*b*), the retrial, if ordered, must be by a Court of competent jurisdiction, subordinate to the appellate Court; the appellate Court cannot order he retrial to proceed before itself.

THE accused was convicted on the 6th July 1898 under section 381, Indian Penal Code, by the Second Class Magistrate of Hangund. In appeal the sub-divisional First Class Magistrate reversed the conviction and sentence, but directed that the case be re-tried by his own Court. In referring the case for the orders of the High Court, the District Magistrate remarked :—"This direction is contrary to the provisions of section 423 (1) (*b*) of the Code which does not empower an appellate Court to retry such case itself."

ORDER.—Mr. Kabraji's order directing the case to be tried by himself is plainly illegal and is therefore quashed. Under the provisions of section 423 (1) (*b*) the retrial if ordered must be by a Court of competent jurisdiction subordinate to the Appellate Court.

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21 November 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Chunilal Vithal.†

Criminal Procedure Code (Act V of 1898), Secs. 302, 303, 304—Indian Penal Code, (Act XLV of 1860), Secs. 302, 304—Jury—Verdict—Sessions Judge—Second verdict.

The accused was tried before a Court of Sessions on charges of murder and of theft in a dwelling house. At the conclusion of the trial the jury by a majority of 4 to 1 returned a verdict of not guilty of murder but guilty of culpable homicide not amounting to murder. The jury were then asked by the Sessions Judge to consider whether the accused intended to cause death for the purposes of section 304, Indian Penal Code, and the jury after this became unanimously of opinion that the accused was guilty of murder and the Sessions Judge accepted this verdict, convicted the accused of murder and setenced him to transportation for life:—

Held, (1) that the second verdict was merely a reply to the point which the jury were asked to consider:

(2), that the offence proved fell under the first clause of section 304.

(3), that the second verdict could not stand, as all that the Judge had wished the Jury to consider was, which of the two classes of offences under section 304, Indian Penal Code, the majority of the jury had found the accused guilty of, and they had, therefore, no power to

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(1) I. L. R., 17 Bom., 748. **Criminal Ruling* 42 *of* 1898. Criminal Reference No. 99 of 1898.
†*Criminal Ruling* 44 *of* 1898. Criminal Appeal No. 594 of 1898.

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reconsider the whole case, and bring in an unanimous verdict of guilty of murder; an erroneous verdict not having been delivered by accident or mistake such as would entitle them to amend under section 304, Criminal Procedure Code, and the Judge not having asked them to reconsider this first verdict under section 302 of the Code.

PARSONS, J.—The record has it that the Jury by a majority of 4 to 1 returned a verdict of not guilty of murder but guilty of culpable homicide not amounting to murder that they were then asked to consider whether the accused intended to cause death for the purposes of section 304, Indian Penal Code, that after this they said that they were unanimously of opinion that the accused was guilty of murder and that the Sessions Judge on this convicted the accused of murder and sentenced him to transportation for life. It would thus appear that the majority of the jury first brought in a verdict of not guilty of murder but guilty of culpable homicide that is of the offence punishable under section 304 of the Indian Penal Code. As section 304 contains two offences the Sessions Judge wished to ascertain of which one of them it was that the majority of the jury found the accused guilty and he asked them to consider this point. Apparently instead of so doing the jury reconsidered the whole case and brought in a unanimous verdict of guilty of murder. The point is whether this latter verdict can stand as a verdict of murder. I am of opinion that it cannot. The first verdict was an acquittal on the charge of murder, it was not a unanimous one and it was open to the Judge to have asked the jury to retire for further consideration (section 302 of the Code of Criminal Procedure.) He did not do this. His conduct shows that he accepted the verdict and he proceeded to ask them only to consider under what part of section 304 they found the accused guilty. This then was the only point left for the jury to find upon and it was not open for them to review their former verdict or to amend it unless by accident or mistake a wrong verdict has been delivered (section 304 of Criminal Procedure Code). It is not alleged that any such thing had been done. I would therefore treat the second verdict merely as a reply to the point which the jury were asked to reconsider a reply to the effect that they were of opinion that there was an intention of causing death and that the offence thus fell under the first clause of section 304. I have little doubt myself that this really was the case that the verdict really was the expression of opinion of the Jury on the point left for their consideration and that it was wrongly recorded as one of murder.

We therefore alter the conviction of murder under section 302 of the Indian Penal Code to a conviction of culpable homicide under the first part of section 304 and the sentence to one of transportation for ten years. The offence really was one of murder committed in order to steal the ornaments of the murdered men and therefore was a very serious offence but

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we pass this lenient sentence in view of the youth of the accused and the strong recommendation of mercy made by the Jury.

RANADE J.—In this case, the appellant Chunilal, a goldsmith boy 16 years old, was committed for trial before the Sessions Court at Ahmedabad on two charges, of murder under section 302 triable by Jury, and of theft under section 380 triable by the Judge with the help of assessors. At the conclusion of the trial, the jury returned a verdict that they were not unanimous on the charge of murder, that by a majority of 4 to 1 they found that Chunilal was guilty of culpable homicide not amounting to murder (section 304), and not of murder, and that he was guilty of theft in a dwelling house. The Sessions Judge asked them to consider with reference to their finding on the first charge whether for the purposes of section 304 they found that Chunilal had intended to cause the death of the deceased. The Jury retired, and on returning to the Court they informed the Sessions Judge that they wished to alter their verdict and that they were now unanimously of opinion that the accused was guilty of murder. The Sessions Judge recorded this verdict and sentenced the accused to transportation for life. He also found him guilty under section 380, and sentenced him to 4 years' rigorous imprisonment. In the appeal before us, it was urged that the Sessions Judge was in error in accepting the altered verdict, and that the jury had no right to bring in a second verdict after they had declared the first verdict, and the principal point for consideration is how far the procedure followed in this case vitiated the verdict of the Jury which was accepted by the Sessions Judge.

Section 302 provides that when the Jury are not unanimous, the Judge may require them to retire for further consideration. In this case, the verdict of the Jury first returned by them was not unanimous, and the Sessions Judge would have been perfectly justified in not accepting it and in asking the Jury to retire for further consideration. As a matter of fact however it appears from the record that the Judge did not ask the Jury to retire for the further consideration of their first verdict on account of their want of unanimity. He asked them to retire for the consideration of the further question raised by the first verdict of the majority namely whether they found for the purposes of Section 304, Indian Penal Code, that the accused had intended to cause the death of the deceased. Section 303 permits such questions to be put to ascertain the true nature of the verdict. Section 304 includes two classes of culpable homicides, one when the act by which death is caused is done with the intention of causing death and another when the act is done with the knowledge that it is likely to cause death, but without any intention to cause death &c. It

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was with a view to require the Jury to remove this defect of their first verdict that they were asked to retire, and when they so retired the jury, instead of considering the point so raised, brought in their second verdict. The record leaves no room for doubt on this point. It shows clearly that the Sessions Judge was not prepared to differ from the first verdict so far as it found the accused guilty of culpable homicide and not of murder. In his charge to the Jury he had expressly directed them that "if they found that the accused had provocation, they must consider whether it was sufficiently grave and sudden to reduce the offence from murder to culpable homicide not amounting to murder." The Sessions Judge apparently accepted the first verdict in this light, and as a general verdict of guilty under section 304 was defective for the reasons stated above, he asked them to find on the further question whether the act was done with or without the intention of causing death. There was no mistake or accident in the case such as is provided for by section 304. There was a deliberate verdict of a majority that the accused was not guilty of murder and was guilty of culpable homicide and this verdict was apparently given in accordance with the express direction of the Sessions Judge and was accepted by him as such and acted upon in the further question referred by him to the Jury. Under these circumstances it is clear from the authorities that the Jury had no power to bring in a secoud verdict in direct contradiction to their first verdict and the Judge was certainly in error in accepting this second verdict and giving judgment accordingly. The judge was free not to accept the first verdict because it was not unanimous, but having accepted it, it was not open to him after referring to the Jury a question suggested by the first verdict to accept their contradictory second verdict. The authorities are quite clear upon the point. In *Queen-Empress* v. *Madhavrav* (1) it was held that where there is no ambiguity in the first verdict, the Sessions Judge was bound to record that verdict and apply the law accordingly. The second verdict could not be sustained because the Sessions Judge gave no fresh directions or explanations in that case which could lead the Jury to change their opinion. The present case is similarly circumstanced in this respect. The case noted above came by way of appeal before this Court. Another case which came up as a reference under section 307 was similarly decided by the same Bench: *Queen-Empress* v. *Devji Govindji* (2). In that case the first verdict was that the accused was guilty of murder under sudden and grave provocation. The Judge did not accept this verdict, and asked the Jury to find the prisoner either guilty or not guilty of murder. The Jury then brought a verdict of not guilty with which the Judge disagreed and made

(1) I. L. R., 19 Bom., 735. (2) I. L. R., 20 Bom, 215.

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the reference. It was held in that case that the Judge was in error in not accepting the first verdict and the High Court acting as both Judge and Jury under section 307 held it to have been a verdict of guilty of murder, as the Jury while finding that there was grave and sudden provocation did not find that it was sufficient to destroy the powers of self-control. The first verdict was similarly given effect to in *Queen* v. *Joy Kisto Gossamy* (3). The ruling in *Government* of *Bengal* v. *Mahaddi* (4) was to the same effect. The High Court ordered the first verdict to be entered on the record and judgment was passed accordingly. The ruling in *The Queen* v. *Sustiram Mandal* (5) where the second verdict was accepted must be distinguished from the cases cited before inasmuch as in that case the Judge did not accept the first verdict but put questions to the Jury which questions had to be answered before final decision was passed. For these reasons I hold that the Sessions Judge in the present case having accepted the first verdict and referred a question arising out of such acceptance to the Jury was wrong in accepting their second verdict. Following the authorities cited above, I would decide this appeal in accordance with the first verdict.

The next question to be considered is how to give effect to their first verdict in the absence of a definite finding on the question about intention referred to the Jury by the Judge. The High Court in the case already noticed where the verdict was guilty of murder under grave and sudden provocation interpreted this verdict which they upheld to mean "guilty of murder" inasmuch as there was no specific finding that the provocation was sufficient to destroy all self-control: *Queen-Empress* v. *Devji Govindji* (6). In *Queen* v. *Hurry Prasad Gangooly* (7) the High Court similarly interpreted the intentions of the Jury from the record, though the verdict was somewhat defective. In *Queen* v. *Sustiram Mandal* (8) the High Court inferred from the findings of fact disclosed by the answers given to the questions put to the Jury by the 'udge after their first verdict that they meant to find the prisoners guilty of murder, and the Judge was directed to find accordingly. In *Imp.* v. *Posha Hari Gharat and another* (9) this Court determined from the record under which clause of section 304 the case fell and reduced the sentence. Following these precedents I think the record of the case shows clearly that the act was done in the opinion of the Jury with the intention of causing death. That seems to have been the circumstance which led them to bring in their second verdict. It does not seem necessary accordingly to require the Judge to ascertain again the opinion of the Jury on this point.

(3) 7 W. R., 22 (4) I. L. R., 5 Cal., 871 (5) 21 W. R., 1. (6) I. L. R., 20 Bom., 215.
(7) 14 W. R. 59. (8) 21 W. R., 1. (9) Appeal No. 312 of 1894 decided on 24th January, 1895.

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I would, therefore, accept the first verdict and convict the accused under the first clause of section 304. In consideration of his youth I would sentence him to transportation for ten years.

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14 December 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Nadirshaw H. Sukhia.*

The City of Bombay Municipal Act (III of 1888), Secs. 68, 231, 471, 517—Complainant —Person entitled.

The Municipal Commissioner is the only person empowered under the City of Bombay Municipal Act, 1888, to take proceedings against any person who is charged with any offence against the Act. He has, however, powers under section 68 to delegate his functions under section 517 (*a*) to any Municipal officer by writing in this behalf and then that person can take proceedings, but no one else can.

THE petitioner was prosecuted by Mr. Smith the Drainage Engineer of the Bombay Municipality before the Acting Second Presidency Magistrate under section 471 of the City of Bombay Municipal Act, 1888, for having failed to comply with the requisition made upon him by the Municipal Commissioner by a notice under section 231 dated the 25th March 1898, requiring him among other things to lay in certain premises the drains as specified in the said notice and remove the existing drains. The remaining facts appear from the Judgment.

PER CURIAM.—There can be no doubt, and indeed it was not contended otherwise at the hearing that the Commissioner is the only person empowered under the Act (City of Bombay Municipal Act 1888) to take proceedings against any person who is charged with any offence against the Act (Section 517). Under section 68 he has power to delegate his functions under section 517 cl. (*a*) to any Municipal officer by writing in this behalf and then that person can take proceedings, but no one else can. In the present case it does not appear certain who was the complainant. There is no written complaint. Mr. Smith in his evidence calls himself the complainant, the Magistrate calls Inspector Atts the complainant. However that may be no writing is produced empowering either one or the other or any one to take these proceedings. We think, therefore, that the present prosecution has been improperly instituted and we reverse the conviction and sentence.

**Criminal Ruling* 45 *of* 1898. Criminal Application for Revision No. 270 of 1898.

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15 December 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Dajiba Totaram.*

Criminal Procedure Code (Act V of 1898), Sec. 437—Absence of complainant—Dismissal of complaint—District Magistrate.

Where a complaint under section 323, Indian Penal Code, is dismissed by a Magistrate owing to the absence of the complainant, the District Magistrate is competent to deal with the case under section 437, Criminal Procedure Code.

IN this case a complaint under section 123, Penal Code, was fixed for hearing on 31st August 1898. It was not taken up that day as the Court had other cases pending before it and the parties were told to be present next day, apparently not at any particular time. Next day the case was again not taken up and a similar order was given. Next day, *i. e.*, on 2nd September 1898 at the comparatively early hour of 12-30, the case was called on. Complainant was not present and the accused was discharged under section 259, Criminal Procedure Code, although he too was not present. The District Magistrate, to whom an application for revision was submitted by the complainant, referred the case to the High Court—doubting the legality of the order of discharge in the absence of the accused.

ORDER.—We do not know why the District Magistrate has referred this case to the High Court; he is himself competent to deal with it under section 437, Criminal Procedure Code. We return the case.

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15 December 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Huseinsaheb.†

Criminal Procedure Code, (Act V of 1898,) Ch. XXII—Magistrate—Summary trial.

Where the offence charged in a complaint is one under section 325, Indian Penal Code, and all the surrounding circumstances go to show that grievous hurt is actually caused, the trying Magistrate is not justified in treating the case in a summary way for an offence under section 323, without recording any reason why he treated the offence as one under section 323 and tried it in a summary way or recording a statement that he discredited any of the allegations made in the complaint.

THE petitioner was charged before the First Class Magistrate at Belgaum under section 325, Indian Penal Code, but the Magistrate treated the offence as one under section 323 and tried it in a summary way and convicted the accused.

PER CURIAM :—The offence charged in the complaint was one under Section 325 of the Indian Penal Code and all the facts alleged therein and

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**Criminal Ruling* 46 *of* 1898. Criminal Reference No. 126 of 1898.

†*Criminal Ruling* 47 *of* 1898. Criminal Application for Revision No. 267 of 1898.

Note.—See also, *Imp.* v. *Rowla Vista* (Cr. R., 19th March, 1885., *Imp.* v. *Shrinivasa* (Cr. R., 6th May 1886;) ; *Queen-Empress* v. *Dorabji*, (I. L. R., 10 Bom., 131); *Haridas* v. *Saritulla*, (I. L. R., 15 Cal., 608); *Queen-Empress* v. *Palasinuatambi* (I. L. R., 14 Mad., 334).

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the evidence including a medical certificate sought to be adduced went to show that grievous hurt was actually caused. The Magistrate does not say that he discredited any of these allegations or give any reason why he treated the offence as one under section 323 and tried it in a summary way. We, therefore, reverse the convictions and sentences and direct a fresh trial for the offence of grievous hurt complained of.

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15 December 1898. PARSONS & RANADE, JJ.

Queen-Empress v. Lakshman Martand.*

Indian Penal Code (Act XLV of 1860), Sec. 265—Fraudulent use of false measures—Ingrediants.

To ascertain whether a measure is false or not, the only proper test to apply is that of measure, and the same article must be measured in each case, and proof should be adduced that this had been done. The weight of the grain that a measure is found to hold is no evidence of its capacity, as compared with that of another measure, unless the very same grain is used.

THE accused in this case was convicted by a Magistrate under section 266, Indian Penal Code, of the offence of being in possession of false measures. It appeared that twelve measures, denominated *adholis* were found in the possession of the applicant who was a *shetya* whose business it was to supply correct measures to people in the bazaar on market days. The Sessions Judge of Poona, being of opinion, that the conviction was not legal, referred the case to the High Court, stating:—"The evidence of the Head Constable Daji goes show that the actual weight of grain (rice) contained in a true measure is 212 tolas or rupees' weight. The capacity of the measure found with the accused is stated to vary from 212 to 220 tolas. There is no evidence of any sort to show that any of the measure contained less than 212 rupees weight of grain. The standard of measurement adopted is at best a fallacious one as it is obvious that the density of the grain measured must vary with the variety of the grain and the fertility and constituents of the soil on which it is ground. A bushel of pedigree wheat weighs much more than a bushel of ordinary wheat. There is nothing whatever in the evidence to support the charge of a fraudulent intention. No complaint appear to have preferred by any trader or grain dealer. The Police Patil Gulabroa states that the two measure he procured from the Kasba contained 214½ rupees weight of grain whereas the contents of that of the accused weighed ½ a rupees less, *i. e.*, less than a quarter per cent. The Magistrate speaks of the accused's measures as containing from 210 to 220 tolas, there is no evidence that any of these contained less than 212 tolas, he also speaks of the current measure of Supa containing 214 tolas in weight. The evidence shews it

*Criminal Reference No. 121 of 1898.

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contains 212 only. There is certain to be some slight variation in the capacity of measures which are in daily use in the bazaar but find nothing to support the inference that any fraud was intended by accused and I consider the conviction is improper."

PER CURIAM.—The accused had been convicted of having in his possession false measures. The finding of the Magistrate is that the measures which the accused had in his possession held rice which weighed from 210 to 220 tolas whereas the standard measure held rice which weighed 214 tolas; from the evidence however for the prosecution 210 seems to be a mistake for 212 and 214 for 212. The Sessions Judge has referred the case on the ground that there is no legal evidence of any fraudulent intention. We agree with him in this. We would also point out that the weight of grain that a measure is found to hold is no evidence of its capacity, as compared with that of another measure, unless the very same grain is used. Grains of rice may be large or small, light or heavy. One sample of rice may contain more large and light grains than another and would therefore measure more though weigh less than the latter. To ascertain whether a measure is false or not, the only proper test to apply is that of measure, and the same article must be measured in each case, and proof should be adduced that this had been done. We reverse the conviction and sentence and acquit the accused. The fine, if paid, to be returned.

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controlling the buffalo laden with it. NAGOWA.... 306

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———**S. 43 (c)**—*Ganja plant—Cultivation.* Mere cultivation of *ganja* plants is not a process of manufacturing intoxicating drugs within the meaning of section 43 (*c*) of the Bombay Abkari Act, 1878. DADU... 415

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———**S. 43 (d)**—*Cashew-nut tree—Juice-drawing.* The drawing of juice from a cashew-nut tree does not constitute the offence of drawing *toddy*, punishable under section 43 (*d*) of the Bombay Abkari Act, under the definition of *toddy* as given in the Act. MHADOO. 308

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———**S. 43 (f)**—*Liquor—Possessing apparatus—Liability.* Where apparatus for manufacturing liquor is found in a house, it is safe doctrine to lay down that the head of the house should be proceeded against; since it is obviously possible in any family that a son may act in contravention of the Act, while the father may be quite innocent, though the material for illicit manufacture may be actually in a room of the house he is living in. DHAGO. 504

———**S. 43 (f)**—*Apparatus—Possession—Intention.* To support a conviction under section 43 (*f*) of the Bombay Abkari Act, 1878, it is not sufficient to prove that the apparatus in the possession of the accused is such as can be used for the purpose of manufacturing liquor or any intoxicating drug; but it must be proved that he has the apparatus in his possession for that purpose. MUKUND. ... 510

———*Separate sentences.* The possession of materials for manufacturing liquor and the act of manufacturing liquor are distinct offences punishable, respectively, under clauses (*f*) and (*g*) of section 43 of the Abkari Act, and that, therefore, separate sentences may be passed where an accused is convicted of these offences. SHIVDIA 523

———**S. 43 (g)**—*Transfer—Ganja—One shop to another.* A transfer of *ganja* from one shop to another, both shops belonging to the same licensee, does not constitute an offence under section 43 (*g*) of the Bombay Abkari Act. MOHAN. 214

———*Toddy—Selling in quantities not permitted by law—Gomasta.* The holder of a license and his *gomasta* were convicted under section 45 (*c*) of the Abkari Act, 1878, for selling a larger quantity of *toddy* than

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permitted by the rules:—*Held*, that the act of the *gomasta* fell within the provisions of section 43 (*g*) of the Act. DORABJI. ... 616

Abkari Act, S. 43 (g)—*Licensee—Servant—Naukarnama.* A servant of a country spirit farmer holding a *naukarnama*, issued by the spirit farmer and countersigned by the Collector, but not himself holding a license granted under the Bombay Abkari Act, 1878, is not liable to conviction under section 45 (*c*), but can be convicted under section 43 (*g*) of the Act. BALAPA. ... 671

———**S. 43, (2)**—*Separate convictions.* The accused were convicted and separately sentenced for (1) possessing apparatus and material for manufacturing liquor without a permit and (2) possessing *mhowra* flowers for manufacturing liquor without a permit:—*Held*, that the matters about which the two convictions were passed were substantially one transaction. LAKSHMAN BHIMA. ... 878

———**S. 44 (a)**—*Hydrometre—Prescribed quantity of liquor—Accounts.* The not keeping of a hydrometre is made an offence by section 44 (*a*) of the Bombay Abkari Act, 1878. Mere omissions to fulfil the terms of the license are not punishable under section 45 (*c*) of the Act. GANGARAM. 617

———**S. 45**—*License—Condition—Breach—Farmer—Agent—Interpretation.* A licensee was convicted of having broken the condition of his license, which provided that the licensee should deliver the juice of the trees as soon as drawn to the farmer, inasmuch as he delivered the juice to a servant of the farmer who came for the juice on behalf of the farmer as his agent:—*Held*, that the conviction was bad since under the terms of the license a delivery to the farmer in person was not essential, but that the latter could depute a servant or agent to take delivery of the juice drawn. SHAPURJI RATANJI. 754

———**S. 45 (c)**—*Licensee—Servant.* Section 45 (*c*) of the Bombay Abkari Act applies only to the "holder of a license" and not to a mere servant of the licensee. GAFFUR 214

———*Toddy shops—Failure to open shops.* The accused was convicted of a Breach of the license under section 45 (*c*) of the Bombay Abkari Act, in that he did not establish *toddy* shops at certain places within a certain time:—*Held*, reversing the conviction, that the license by not specifying any time for opening of shops, left the matter to subsequent adjustment between the Collector and the contractor, who finally came to terms. RAJARAM ... 290

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———*Breach of the condition of the license—Minimum amount of liquor—Act—Omission.* The accused was convicted of not keeping, according to his license, the minimum amount of certain kinds of liquor. The District Magistrate was of opinion that the negligence of the accused amounted to an omission, and not an act, and under section 45 (*c*) of the Bombay Abkari Act, an act but not an illegal omission, was punishable:—*Held*, that the conviction should be upheld, and that an act failing to comply with terms legally imposed is illegal in the affirmative as well as in the negative sense. PEDRU 323

———*Breach of the condition of the license—Licensee—Servant—Liability.* Under section 45 (*c*) of the Bombay Abkari Act, the servant of a holder of a license, granted under the Act, cannot be made liable for breach of the conditions of the license. GOPAL. ... 406

———*Breach of the conditions of the license—Licensee—Servant—Liability.* Under section 45 (*c*) of the Bombay Abkari Act the servants of a holder of a license granted under the Act cannot be made liable for breach of the conditions of the license. RAMJI. ... 416

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———*Licensee—Servant—Breach of license.* An agent of the holder of a license to sell liquor cannot be legally convicted of an offence under section 45 (*c*) of the Bombay Abkari Act, 1878, for breaches of such license committed by the licensee's servants. JAMSHEDJI. 668

———*License—Breach of the conditions of license—Servant selling by short measure—Liability of the licensee.* The holder of a license for the sale of country liquor cannot be convicted of a breach of his license, merely

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because his servant, a liquor shop-keeper, has given short measure to a customer, where it proved that he has taken all reasonable precautions such as reasonable men would use to prevent the commission of such offences by his servants. DADABHOY 691

Abkari Act S. 46 (a)—*Liquor—Water.* Mixing water with liquor is not an offence under section 46 (*a*) of the Bombay Abkari Act, 1878. BHIMA. 597

——— **S. 47**—*Liquor—Possession—Quantity.* The Bombay Abkari Act, 1879, renders a man punishable for the offence of possessing more than a particular quantity of liquor within a certain local area or place, except under the authority of some license, permit or special order obtained under that Act. It is, therefore, immaterial to consider whether the possession in any case was illegal before the Act came into force. SORABJI. 144

——— *Moura Liquor—Quantity in excess.* Under s. 47 the possession of 2 gallons and 2½ seers of mowra liquor is illegal in the absence of any license, permit, pass or special orders and the law does not allow the head of a family to exceed that limit merely because he has a family of ten or twelve members, of whom five are adults. FARSU. 292

——— *Country liquor—Possession—Quantity—Judgment—Contents.* The accused was convicted of the offence of being in possession of more than a gallon of country liquor without a permit or pass from the Collector, under section 41 of the Bombay Abkari Act:—*Held* that the conviction was on its face insufficient as the section did not make the possession of more than one gallon of country liquor penal. Every conviction by a Court of limited jurisdiction ought to contain a statement of its legal justification within itself. KANA. 310

——— *Liquor—Possession.* To justify a conviction under section 47, Bombay Abkari Act, there must be evidence against the accused showing that the liquor was "in his possession." PANDURANG 486

——— *See,* RANCHOD... 593

——— **S. 53**—*Servant's offences—Master's liability.* *Per Birdwood,* J.—The holder of a license under the Bombay Abkari Act can be held to be criminally liable under the second para of section 53 of the Act for an offence committed by his servant only, when such an offence, if committed by the master, would have been a breach of the conditions of his license. Per *Parsons,* J.—The second of section 53 of the Bombay Abkari Act applies only to acts which would be offences under sections 43, 44, 45, or 46, if these acts are done by a person when actually in the employ or acting on behalf of a holder of a license. VIRBAIJI 542

Abkari Act S. 53. *See* DADABHOY. 631

——— **S. 55**—*Magistrate—Confiscation—Collector.* A Magistrate is not competent to order confiscation under the Bombay Abkari Act, the Collector alone being invested with such power by section 55 of the Act. BASLINGAPA.... 149

——— **S. 59**—*Reward.* Under the rule under section 59 of the Bombay Abkari Act, a Magistrate is bound to name each person to whom a portion of the fine is to be given by way of reward. AMBA BALYA ... 482

——— **S. 60**—*Land Revenue Code (Bom. V of 1879), Sec. 209—Magistrate—Appeal—Enhancement of sentence.* The accused was convicted by a Second Class Magistrate of the offence of a breach of license under the Bombay Abkari Act, 1878, and fined Rs. 10. In appeal the First Class Magistrate under section 60 of the Act and section 209 of the Bombay Land Revenue Code, enhanced the fine to Rs. 100:—*Held,* that section 60 of the Bombay Abkari Act did not apply. The accused was convicted by a Magistrate under section 56 of the Act and in appeal the First Class Magistrate could not make any order under section 209 of the Bombay Land Revenue Code. MIYA SAHEB. 254

Accomplice—*Witness after disclosing the conspiracy to authority, associating with their confederates to ensure their conviction—Corroboration.* Persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates till the matter can

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be so far matured as to ensure their conviction, fall under the class of persons, "apparently accomplices," to whom the rule requiring corroborative evidence does not apply. The early disclosure is considered as binding the party to his duty, and though a great degree of disfavour may attach to him for the part he has acted as an informer, yet his case is not treated as that of an accomplice. SHANKER SHORAG. 428

Accomplice *pardoned—Conviction—Criminal Procedure Code (Act X of 1882), Sec. 338—"Supposed"—Interpretation.* The evidence of pardoned accomplices taken with the statements of unpardoned co-prisoners is not sufficient by itself to warrant the conviction of those who never confessed. The word "supposed" in section 338, Criminal Procedure Code, 1812, only excludes those who have been actually convicted and, therefore, the tender of pardon to a person or persons who had pleaded guilty but not convicted, is not prohibited under the section. BHAGYA. 750

———*Confirmation—Evidence.* The confirmation usually required of an accomplice witness must be not merely as to the circumstances of the crime but as to the identity of each person accused of taking a part. DHONDI BIN RAOJI. 840

Accused—*Appearing without summons—Practice—Absence of summons or complaint.* When the accused appears voluntarily to answer a charge, the want of summons or of a complaint antecedent to the issuing of a summons becomes immaterial SUDASEVAPPA. 8

———*Testimony of. See* CHATUR... 102

Act XI of 1846—*High Court of Judicature—Sudder Fouzdari Adawlat Jurisdiction—Political Agent* The High Court of Judicature at Bombay has the same jurisdiction as was possessed by the Sudder Fouzdari Adawlat to deal with cases under Act XI of 1846, either by way of confirmation or by way of appeal. RATNYA RAJA. 939

Act I of 1849—*Nizam's authorities—Arrest—British India—Detention—Custody—Orders of Government.* H. H. the Nizam's authorities have no power to make an arrest in British territory. Unless it is clearly alleged by the complainant that the accused had been resident in British territory for six months before the offence was committed, the accused should not be imprisoned. In any case, he should not be detained in custody without the orders of Government obtained under Act I of 1849. KALADJI MAGISTRATE'S QUARTERLY RETURN. 35

Act XXVI of 1850 *Secs.* 7 (5), 10—*Municipal rate—Non-payment—Penalty.* A person is not liable to a penalty for non-payment of a Municipal rate, notwitstanding that the rate is recoverable in the same manner as a penalty. FAKIRA. 77

Act XXXI of 1850—*Salt—Removal for one's own use—Bed of a creek—Act XXVII of 1837—Detention of the salt.* Removal for one's own use of salt from the bed of a creek not forming part of any salt work, constitutes no offence either under the Indian Penal Code or Act XXXI of 1850 or XXVII of 1837, though under section 7 of the Act made applicable by section 8 of the former, the salt removed becomes liable to detention. FAKIRA. 66

———*S. 3—Fine—Default—Imprisonment—Partial payment of fine—Commutation of the sentence of imprisonment—Section 69 applicable to offences under the Penal Code.* A Magistrate, F. P., on convicting an accused person under section 3 of Act XXXI of 1850 sentenced him to pay a fine of Rs. 250 commutable to six weeks imprisonment. On the payment of Rs. 238-14-3, the balance, being the "amount proportional to 2 days' imprisonment," was remitted under section 69 of the Indian Penal Code:—*Held*, that the sentence of imprisonment in default was not warranted by law. *Held*, also, that the application of section 69 of the Indian Penal Code to the case was improper as that section would only apply to offences under the Code. If the section had been applicable, it was not a procedure warrantable under the following section of the Code, to remit a portion of the fine tendered. Had the accused, in a case to which the law quoted was applicable, tendered only a portion of the fine, he might legally have been released, if the term of imprisonment already suffered were

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not less than proportional to the amount of fine unpaid; but under section 70 of the Indian Penal Code, the unpaid amount would still be leviable. MAYA DEVJEE. 40

Act III of 1852. *See* GANGA ... 59

Act XLVIII of 1860, S. 11— *Licensee.* On proof that a person has or keeps any such eating-house as is described in section 11 of Act 48 of 1860, he is liable to fine as in that section provided; and the sole circumstance that the Commissioner has refused to grant him a license under section 12 does not justify his acquittal. ELLAHIBAX. ... 835

Act II of 1864— *Regulation II of* 1891—*Sheikh Othman—Aden.* For the purposes of Act II of 1864, the village of Sheikh Othman is made by Regulation II of 1891 part of the Settlement of Aden and placed under the jurisdiction of the Court of the Resident at Aden. NURADIN ... 825

Africa Order in Council of 1896, *Articles* 45, 48, 50, 74,—75—*Consular Court—Uganda—British sphere of influence — Foreign Subjects—Jurisdiction.* Her Majesty's Commissioner and Consul-General as a Commander-in-Chief can try foreign subjects committing offences in territory under military occupation and punish them on the spot by the law of war, but he cannot so try them at a place and time both distant from the war-like operations. The Court of the Commissioner and Consul-General of Uganda is, by various Articles of the Order in Council of 1889 (*e. g.*, articles 19,22) limited in its powers. If, therefore, the Offices of Judge of the Consular Court and of a Commander-in-Chief happen in a sphere of influence to be held by the same person, who in both capacities under the control of the Crown, the directions in the Orders in Council are binding on him as Consular Judge. When the Commissioner and Consul-General has avowedly and in terms assumed jurisdiction under the Orders in Council and submitted the case to the High Court under Articles 74, and 75, it would be wrong to impute the act to power lawfully used by the head of a military occupation. A military occupation however complete, is not necessarily the same thing as an annexation. The responsibilities, assumed under Article 1 of the General Act of the Brussels Conference of 1890, are international duties arising from mutual understandings of the signatory powers, and thus differ from the obligations undertaken by the Sovereign to protect her subjects and others bound to her by allegiance. The phrase "British Sphere of Influence" is obviously intended to mark out African territories within which other European Powers are by mutual understanding not to extend their conquests to the disadvantage of the British Power in East Africa. The phrase has no significance for purposes of jurisdiction. It is in fact the outer circle beyond the Protected States, and is for purposes of internal jurisdiction independent territory, where the Consular Court has no direct authority, and cannot control the actions of its native rulers, as it might do in Protected territory. Occupation for purposes of war does not change the law of the country invaded, and such occupation cannot confer jurisdiction on the Consular Courts to try foreigners, to whom the Order of 1892 did not apply, as if they were British subjects. The Orders in Council of 1882 and 1893 gave no jurisdiction to the Commissioner and Consul-General of Uganda over "foreigners" being subjects of the Signatory Powers, in regard to offences committed by them in territory under the Sphere of influence of the British Crown; a plain distinction being drawn about the criminal liability of subjects of the Signatory Powers for offences committed by them within the Protectorate and outside such limits; a distinction based evidently on the difference of the responsibility which the Crown is advised to assume in territories solemnly declared to be under the Queen's protection and those merely placed, *qua* the Signatory Powers, within the British sphere of Influence. Convictions by the Consular Court under Articles 45, 48 and 50 of the Order in Council of 1889 of German subjects in regard to acts done outside the limits of the Protectorate are without jurisdiction. JUMA.... 880

Appeal, *disposal of without hearing the Vakil—Practice.* Where the appellant was represented by a pleader, and the Sessions Judge not knowing the fact disposed of the appeal in chambers, the High Court set aside

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the order of the appellate Court and directed the appeal to be reheard. CHUNIA. ... 914

Appeal—*Judgment—Practice.* Where a Sessions Judge having come to the conclusion that the accused were properly convicted and that there was no reason to hear the appeal, summarily rejected it, the High Court ordered the Sessions Judge to hear and dispose of the appeal according to law. ADAM ISAG....916

———Does not lie against as order of discharge made by a Presidency Magistrate. *See* HOWARD *v.* MAHOMAD ALI. ... 335

———Does not lie to the High Court from its own Judgment. *See* ADEVAPPA... ... 691

Arms Act (*XI of* 1878), **S. 19**—*Khandesh—Saltpetre—License — Government of India Notification No.* 518, *dated* 6-3. 1879. As Khandesh is neither a district on the external land frontier of British India nor a sea-board District of British Burma, clause iv of the Notification of the Government of India No. 578 of 6th March 1879 has no application to it and as the Government of India has not, by any other Notification, extended section 19 of the Act to saltpetre in the Khandesh District, a person cannot be convicted under section 19 of the Arms Act, for keeping salt-petre without a license. SAKHARAM,...227

———**S. 19 (e)**—*Arms—Spear.* The carrying of a spear is not an offence against section 19 (*e*) of the Arms Act, 1878, because under clause (*j*) of section 2 of the rules under section 27 of the Act, spears are exempted from the operation of the prohibition contained in sections 13, 14, 15 and 16 of the Act. NUR MAHOMED. 507

———**S. 35**—*Magistrate—Jurisdiction —Criminal Procedure Code* (*Act X of* 1872), *Sec.* 2. A Magistrate of a grade lower than 1st class has no jurisdiction to try offences under Act XXXI of 1860. (See section 35 of the Act and the definition of the expression, "Officer excercising the powers of a Magistrate," in section 2 of the Code of Criminal Procedure). The term Magistrate in section 35 of Act XXXI of 1860 applies only to the Magistrate of a District. BASAPA. 80

Bail—*Granting of bail—Defamatory applications—Practice.* An accused should not be admitted to bail where the possibility of his conviction being wrong depends on a mere technical ground. The Courts have powers to delete the defamatory portions from applications presented to them. CLIVE DURANT. 480

Bhagdaree Act (Bom. Act V of 1862.) *See* MAHOMED ISMAL 70

Bigamy. *See* PENAL CODE, *s.* 494.

Breach of Trust. *See* PENAL CODE *s.* 409.

Burden of Proof. ... 172,772,779,860

Cantonement Act (*Bom. Act III of* 1867), **S. 11**—*Cantonement Rules —Rule* 39— *Milk — Adulteration — Water— Noxious as drink—Cheating.* The mere admixture of water with milk, not being ordinarily sufficient to render it noxious as drink, cannot be punished as an offence of adulterating milk by mixing water with it so as to render it noxious as drink as contemplated by Rule 39 of the rules; but such cases (that is, cases in which there is no proof that the adulteration is noxious), when penal, are generally so on account of their involving the offence of cheating and should be dealt with under section 420 of the Indian Penal Code. HIRI.... 367

———**S. 13, 14**—*Imprisonment—Default of payment of fine.* Notwithstanding the amendment by section 1 of Act VIII of 1882, of section 40 of the Indian Penal Code, and the amendment of section 64 of the Code, by section 2 of the Act, the provisions of sections 13 and 14 of Bombay Act III of 1867, which is a special and local Law, still (under section 5 of the Indian Penal Code) remain unaffected. The ruling in *Reg.* v. *Lalla* that in cases coming under the Cantonement Act, 1867, simultaneous sentences of fine and imprisonment in default of payment of the fine, are illegal, held to be still in force. BIRAM 221

———**S. 22**—*Bombay Municipal Act* (*Bom. Act III of* 1872) *Sec* 226—*Government —Cantonement Taxation Regulation.* Section 22 of the Cantonements Act, 1880, does not empower the Government to extend section 226 of the Bombay Municipal Act, 1872, to a Cantonement. A Cantonement Taxation Regulation, reproducing section 226 of the Municipal Act, is, therefore, invalid. MARUTI. 413

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Cantonement Act (*XIII of* 1889), *S.* 2,—*Whipping.* Section 21 of Bombay Act III of 1867, having been repealed by Act XIII of 1889, which substitutes a new section (13), containing no mention of whipping, that punishment is not kept alive by section 2 of Act XIII of 1889. LAKSHMAN...682

——— *Playing cards for money—Club house—Community.* A house was rented by some members of the Goanese community in the name of one of the members who kept the house. The use of the house was not open to the public but was restricted to the members. Some members played for money with cards, the members keeping the house not making any profit by way of charge for the use of either the cards or the house:—*Held*, that the house was not a "common gaming house" within the meaining of Rule 75, Chapter III, of the Rules passed under Bombay Act III of 1867, section 11, and legalized by section 2 of Act XIII of 1889. ANTONE FERNANDES...706

——— *Rules framed under sec.* 9—*Rule* 59 —*Chabutra building of—Cantonement Magistrate.* According to Chapter III of the Rules and Regulations made by the Governor in Council under section 9 of the Bombay Act III of 1867, and maintained, on the repeal of that Act, by section 2 of the repealing Act XIII of 1889, any temporary construction is an offence only if it shall be declared by the Cantonement Magistrate, *with the sanction of the Cantonement Committee* to be objectionable on sanitary grounds, or on account of causing encroachment. GOVIND BAPUJI.... ... 875

——— **S. 13** *See* LAKSHMAN. ... 682

——— **S. 27**—*Indian Penal Code, Secs.* 64, 67—*Sentences.* The special provisions contained in sections 13 and 14 of the Bombay Act III of 1867 having been repealed by the Cantonements Act, 1889, the general provisions contained in sections 64 to 67 of the Indian Penal Code apply by virtue of section 40 of the Code to sentences passed under section 27 of the Cantonements Act, 1889. Criminal Rulings dated 8th August 1870 and 3rd December 1885 under theCantonements Act, 1867, are no longer applicable. PEDRU.563

Cantonement Rule 7—*Compound dirty—Offence.* The mere finding that the compound of a house, of which the accused is the landlord, was kept in a dirty state, is not sufficient to support a conviction under Rule 7. To justify a conviction under the rule, it must be found that the accused, being the owner or occupier of the house, had allowed dirt, filth, refuse, rubbish, or noxious, or offensive matter to be kept for more than 24 hours on the ground attached to and occupied with the house. GAMBHIRMAL. 398

Cantonement Rule 9—*Privy—Building a privy.* A person who fails to construct a privy, according to a notice issued to him by a Cantonement Magistrate under Rule 9, cannot be convicted of any offence under that Rule because (1) the Rule does not make failure to comply with any notice punishable and (2) it does not authorise a Cantonement Magistrate to require any person to construct a privy of any particular kind or indeed any privy at all. SANTAN. 541

——— **Rule 17**—*Butcher— Slaughter house—Diseased cattle.* The accused, butchers, took diseased cattle to a public slaughter-house for getting them passed by the Inspector in charge as fit for food and for slaughtering them if passed:—*Held*, that these acts did not render the accused liable to punishment under Rule 34, Chap. III of the Cantonement Rules, as that rule applied only to owners or occupants of places used as slaughter-houses, who have killed a diseased animal therein, or have failed to report to the Cantonement Magistrate that such an animal had been taken thither for being killed. RAMJAN....471

——— **Rule 48**—*Offensive trade—Proceedings—Declaration.* In the case of offensive trades, the Cantonement Magistrate should, before instituting proceedings, make the declaration specified in Chapter III, Rule 48 of the Rules and Regulations passed by his Excellency the Governor in Council of Bombay under Act III of 1867. CHEGAN. 54

——— **Rule 50**—*House—Hut—Lattice work structure.* A structure of lattice-work erected as a fowl run in the compound of a house in a Cantonement is not a house or a hut within the meaning of Rule 50, Chapter III, Cantonement Act, 1864. CHARLES MACIVOR. 609

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Cantonement Rule 59—*House—Repair—Cantonement.* A person who neglects to repair his house within the cantonement, limits does not comit an offence punishable under Rule 57, Chapter III of the Cantonement Rules. NAVALMAL. 636

———*Public Road—Encroachment Cantonement Committee—Sanction.* Before a person can be convicted under Rule 59 (3) of the Cantonement Rules, of the offence of encroachment by erecting a building on a public road, it is necessary that the Cantonement Magistrate should have made, with the sanction of the Cantonement Committee, such declaration in respect of the building as is contemplated in that rule. The omission to make such a declaration cannot be cured by a sanction given by the committee after the trial. FAKEERA. 505

———**Rule 63**—*Public road—Management—Forbidding the use of public road.* Cantonement Rules must, if their language admits, be interpreted so as to uphold their legality under the law under which they are passed. Rule 63 of the Rules passed under Bombay Act III of 1867, section 10, clause 6, which gives power to make rules for the management and regulation of the public road, did not authorize the Cantonement authorities to forbid altogether the use of a public road under ordinary circumstances. SUKOO. 476

———**Rule 68** — *Public nuisance—Drum, beating of.* The accused was convicted of a breach of Rule 68 of Chapter III of the rules under the Cantonement Act, on account of having beaten a drum at a certain specified time:—*Held*, that the act did not come within either sub-sections 5 or 6 of section 11 of Bomby Act III of 1867, the beating of a drum *per se* not being a public nuisance, or coming within the management and regulation of public roads. BHAYA RAMRATAN. ... 480

———**Rule 71**—*Public place—Lock Hospital.* A lock hospital is not a public place within the meaning of Rule 71 of the Cantonement Rules. CHANDRI.... ... 361

———**Rule 74**—*Owner—Letting a house to prostitutes—Keeper of the house.* The owner of a house who lets it to prostitutes but does not himself live in it or exercise control over the inmates is not a "keeper of a house or place of public resort or entertainment," within the meaning of Rule 74. DOLLATTA. 572

Cantonement Rule 76—*Owner—Resident agent.* Rule 76 of the Cantonement Rules which requires every owner of certain property within the limits of a Cantonement to appoint a resident agent, who shall be responsible for the observance of the rules referring to the owners of such property, is not a rule, the omission to comply with which is penal under section 11 of the Cantonement Act, 1867. MOTILAL. 497

Cattle Trespass Act (*Act I of* 1872). *See* KALLAPPA. 602

———**S. 22**—*Compensation — Appeal.* No appeal lies from an order passed under section 22 of the Cattle Trespass Act awarding compensation for illegal seizure of cattle. SADASHIV. 520

———**S. 24**—*Seizure of cattle—Escape.* Certain cattle impounded in a cattle pound escaped: the next day they were found grazing in charge of their owner. The Police Patel attempted to seize them again, when the owner resisted. The Police Patel, thereupon, instead of attempting to seize the cattle, lodged a complaint before a Magistrate, who under section 24 of the Cattle Trespass Act, fined the accused :—*Held*, that to resist the seizure of cattle under the circumstances was not an offence punishable under section 24 of the Act. KAOJI. 294

———**S. 25**. *See* LINGU. 60

———**S. 26**—*Conviction — Intention—Knowledge.* Section 26 of Act I of 1871 provides for carelessly allowing *pigs* to do damage, but in case of oher animals there must apparently be an intention to cause damage or a knowledge that damage is likely to be caused (section 25 of Act I of 1871 and illustration (*h*) of section 425 of the Indian Penal Code.) When the accused therefore admitted that he was the owner of a buffalo and that the buffalo had done damage to the complainant's property, but when intention or knowledge on the part of the owner was neither charged nor proved, the conviction and sentence were reversed. LINGO. ... 60

———*Trespass — Owner.* Before any person can be convicted under section 26, Cattle Trespass Act, 1871, the prosecution must

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establish that the owner has, through neglect or otherwise, damaged or caused or permitted to be damaged land &c. by allowing his cattle to trespass thereon. A personal neglect on the part of the owner, and his allowing his cattle to trespas must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to exist. RAMZAN SHAKEBHAI. 867

Cheating. *See* PENAL CODE, *s.* 420.

———*False representation — Criminal liability.* Where a person makes a promise intending at the time to keep it, his subsequent inability to do so does not render him criminally liable for false representation. LAKHMICHAND. 546

City Surveys Act (*Bom. Act IV of* 1868). **S. 12** GAJANAN. 67

Commitment—*Practice— Magistrate.* A Magistrate ought to commit a case to the Court of Sessions when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. NAMDEV. 319

Compensation. *See* CRIMINAL PROCEDURE CODE, *s.* 560... 560

Complaint should be investigated by a Magistrate though civil proceedings are pending 206

Complaint vexatious ... 549

Compounding of Offences... 331

Concurrent sentences ...19,383

Confession—*Admissibility—Co-accused.* The confession of an accused is not admissible against another accused, where it amounts only to a confession of abetting the principal offence charged against him and the other. KEDARI. 153

———*Accused — Inducement — Truth— Recording of confessions.* A confessions induced by false allegations is irrelevant even f it be true. Where an accused makes a confession before one Magistrate, and again confesses before the committing Magistrate, it is not open to the latter to read to the accused his statement before the former Magistrate and to ask him if it was true: in such cases it is very desirable to test the value of statements made on different occasions by taking them fully and in detail and seeing in what respects they agree and in what particulars they differ. CHINTAMAN.... 153

Confession-*Admissibility-High Court.* Where a confession was objected to on the ground that it was improperly received into evidence by the Lower Court, the High Court declined to disturb the discretion exercised by the Lower Court on the grounds that the objections now advanced could well have been advanced before the Lower Court, and that there was nothing improper on the facts of the case in the Lower Court's admitting the confessions. VIJIALAKSHMI.... 163

——— *Co-accused —Admissibility of— Indian Evidence Act* (*I of* 1872), *Sec.* 30. The confession of one co-accused, where he does not substantially implicate himself to the same extent as he implicates the other co-accused, is not admissible in evidence against the latter. Confessions made by accused persons at a joint-trial cannot be treated as the evidence of accomplices against one another. A confession must be taken as a whole and considered along with the admitted facts of the case, and the accused must be juged by his whole conduct. BALAJI. 330

———*Admissibility—Co-accused—Judge —Jury.* Where an accused makes a confession exculpating himself and inculpating the co-accused, the confession must be taken altogether, and it is evidence for the prisoner as well as against him, but still the jury may, if they think proper, believe one part of it and disbelieve another. JHINA VALI. ... 436

———*Admissibility of— Value— Corroboration.* When a confession has been made in the manner required by law as a condition of admissibility, and when there is no suspicion of cruelty or improper inducement, and it is amply sufficient to prove the guilt of the accused, it may be accepted as conclusive in itself without material corroboration. SANGAPPA 463

———*On-looker—Statements of accomplices—Evidence Act* (*I of* 1872), *Sec.* 30—

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Bombay Village Police Act (VIII of 1867)—A confession by an accused of his mere presence at a murder as a neutral on-looker is not, in the absence of any other evidence, sufficient to convict him of that murder. Statements of accomplices, co-prisoners, who may not be cross-examined and who may have motives in telling lies against the other co-prisoners, cannot be accepted as the criterion of guilt or innocence of the accused, especially in a capital case and where they have retracted their stories. There is no law to authorize a Police Constable to take upon himself any part of the duties of the Village Patil as a Coroner under the Bombay District Police Act, 1867. SAHADU LAKSHMAN... 771

Confession. *Admissibility — Truth.* Where a confession appears to be made voluntarily, and where it agrees with all the circumstantial evidence in the case and the account contained in it is not an improbable or unlikely one, the confession can be accepted as true. JANU DHONDI 817

———See pp. 108,256,285,311,400,510.

———**Retracted**—*Evidence—Corroboration.* It is obviously important that, in cases where a retracted confession is the evidence chiefly relied on by the prosecution, not only should the Court be satisfied as to the falsity of any allegations as to improper pressure by the Police, but should use every reasonable effort to ascertain to what extent, if any, the details of the confessions are corroborated. BHAGI 242

———*Police-beating and inducement—Criminal Procedure Code (Act X of 1882), s. 298—Judge.* The accused, who was charged with the offence of murder, had made two confessions: the first before the First Class Magistrate of Junnar and the second before the committing Magistrate. On his trial before the Court of Sessions he retracted the confessions and alleged that he was beaten by the Police and that the confessions were caused by inducement offered by the Police:—*Held*, (1) that for the proper deposal of the case it should have been determined whether the confession was first induced by the illegal promise to which the Police Patel deposed, and whether that inducement still existed, or had been effectually dispelled when the Magistrate recorded the confessions. If such inducement had been given, and had not been effectually dispelled until after the respective confessions had been recorded, it must be held that they were inadmissible; (2) That under section 298 of the Code of Criminal Procedure it is the duty of the Judge, "at his direction, to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;" and also "to decide upon all matters of fact, which it may be necessary to prove in order to enable evidence of particular matters to be given." The Judge ought, therefore, to have made some inquiry into the allegation of the prisoner about the tutoring, which, he said, had resulted in his confessions. RUPYA. 245

Confession retracted. *Magistrate—Recording of confession.* The Courts, being well aware of the safeguards with which the law expressly surrounds the action of the Police, are bound to approach confessions in the same spirit as the Legislature, and to remember that these intended safeguards would become little better than pitfalls if the confessions were treated on the mere record, as conclusive of their own validity. The practice of taking prisoners before Magistrates not having jurisdiction in the case, for the purpose of getting a confession is not generally desirable. It is still more objectionable to send prisoners before different Magistrates, each of whom would have imperfect knowledge of the matter from only taking one or two examinations. RUVUBAI. ... 254

———*Recording of confession—Custody of Police.* The omission of the Magistrate, before whom a confession is made, to record the circumstance that the accused was not then in the custody of the Police, cannot invalidate the confessions, if the requirements of the Criminal Procedure Code are complied with by the Magistrate. BORKU.... ... 534

———*Evidence—Practice.* It is the practice of the High Court of Bombay to deal with confession in connection with all the facts of the particular case; and while not ignoring the difficulties that surround retracted confessions, it has not avoided these difficulties by applying any stringent rule. DANJI. 720

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Confession retracted. *Confession obtained by deceit.* A confession otherwise voluntarily made is not inadmissible merely because it was induced by deceit. MATHUR KUBER. 756

Consular Court at Uganda, jurisdiction of 880

Contempt—*High Court.* The power of the High Court to imprison for contempt is irrespective of the Code. RAMCHANDRA.... 614

Conviction, *reversal of—High Court—Conviction—Appeal—Practice.* It has been a practice with the High Courts in India to set aside a conviction where there are in the Judgment no sufficient materials to support it. NAWAJBAI. 934

———*Magistrate — Pleader — Magistrate's powers.* A criminal Court has no right to tell the pleader to sit down in the middle of his cross-examination because he is asking irrelevant questions. It can only rule a particular question irrelevant, and refuse to allow it to be put, and order the pleader to proceed with another question. It has no right to refuse to allow the pleader to cross-examine some witnesses because he has not purged himself of the contempt shown towards it or to allow him to cross-examine witnesses thereafter called, only if he apologized for his previous contumacious behaviour. The Court has no power to tell the accused, who has a right to be defended by a pleader of his choice, to engage another pleader, as the pleader already engaged by him did not know how to behave in Court. JAMES FITZGERALD. 861

Corroboration of a witness. ... 508

Court fee—*Judgment—Warrant case—Appeal.* In an appeal from a conviction in a warrant case, it is not necessary to affix the Court fee stamp on the copy of judgment appealed against. RAGBA. 369

Court Fees Act (*VII of* 1870), **S. 18 (16)**—*Complaint—Cognizable offence—Stamp.* No stamp is necessary to petitions of complaint made to Magistrates of cognizable offences. NASIK MAGISTRATE'S REFERENCE No. 939... 70

———**S. 31**—*Court Fees—Refund—Complaint of non-cognizable offence—Conviction of cognizable offence.* Where a complaint of a noncognizable offence results in a conviction for a cognizable offence, the stamp duty upon the complaint can properly be refunded. CHIMAYA. 29

Court Fees Act, S. 31 *Court-fees Accused—Refund of fees—Order of refund must be directed jointly to the accused.* Where two persons are convicted of the offence of using criminal force, the Magistrate cannot order one only of the two convicted persons to refund the fee paid on the petition of complaint. In such a case the Magistrate must direct repayment of the amount of the fee by the convicted persons jointly and should recover it from both or either of them. SANKRA. 61

———*Complaint of non-cognizable offence—Conviction of cognizable offence—Court-fee—Refund.* Where a complaint of a non-cognizable offence results in a conviction for a cognizable offence the complainant is under section 31 of the Court Fees Act, entitled to be recouped by the accused to the amount of stamp fee paid upon his complaint: the test, by which to determine whether the recoupment should be made, being the nature of the complaint not of the conviction. BHIMYA. ... 80

———*Fees—Repayment to the complainant—Sessions Court—Committing Magistrate.* When a case to which section 31 of the Court Fees Act of 1870 applies is disposed of by a Court of Session, such Court and not the committing Magistrate is the proper authority to make the order for the repayment to the complainant of the fee paid by him on his petition of complaint. KHANDESH MAGISTRATE'S LETTER No. 19. 49

———*Criminal Procedure Code* (*Act X of* 1882), *Sec.* 545—*Conviction of cognizable offence—Payment of court-fees to complainant.* When a person accused of a non-cognizable offence, is convicted of a cognizable one, the Court cannot legally direct him to pay the expenses incurred by the complainant under section 31 of the Indian Court Fees Act, as that section applies only to cases where the accused has been convicted of a non-cognizable offence. The expenses so incurred can, however, be awarded to the complainant as compensation under section 545 of the Code of Criminal Procedure. LIMBA.... ... 397

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Criminal Breach of Trust. *See* PENAL CODE *s.* 405.

Criminal Force. *See* PENAL CODE *s.* 352.

Criminal Intimidation *See* PENAL CODE *s.* 503.

Criminal Misappropriation. *See* PENAL CODE *s.* 403.

Criminal Procedure Code (*Act XXV of* 1861), **Sch.—Expl. 7**—*Interpretation.* The 7th explanatory note at the head of the Schedule of the Code of Criminal Procedure as amended by Act VIII of 1869 refers to procedure and not to the class of officers by whom an offence is punishable. LAKHA JIBHAI. 24

———**Ch. XX**—*Magistrate—Order—Judicial proceeding.* A Magistrate's order made under Chapter XX of Code of Criminal Procedure is a judicial proceeding. GANPAT-PRASAD.... 60

Criminal Procedure Code (*Act V of* 1898), **S. 4 (a)** (*Act X of* 1882),—*Complaint—Report made by a village officer in his executive capacity.* The report made by a village officer to a Mamlatdar in his executive capacity, regarding a theft of Government property, is not a complaint within the meaning of section 4 (*a*) of the Criminal Procedure Code. SHIVRAM. 554

———**S. 4 (n)**—(*X of* 1882),—*Accused—Mother-in-law—Absence—Representation.* A woman was charged with causing obstruction, under section 48 of the Bombay District Municipal Act. She having gone to a village her mother-in-law appeared in Court on her behalf and the Magistrate proceeded with the case and convicted her:—*Held*, that the conviction must be set aside as the accused was neither present nor duly represented in the case. VITHI. 205

S. 4 (n) *Accused—Personal—Appearance — Father-in-law. — Absence—Representation.* A woman was charged with the offence of "fouling water," under section 61 of the Bombay District Municipal Act: she being unwell her father-in-law appeared in Court on her behalf and the trying Magistrate proceeded with the case and convicted her: *Held*, that the father-in-law of the accused might probably have been received by the trying Magistrate as a person appointed by her to act in the proceedings before him consistently with section 4 of the Code of Criminal Procedure. CHANDRABHAGA... 207

Cr. P. C., S. 6 (*X of* 1882),—*Police Patel's Court—Compensation* As the Police Patel's Court is not a Criminal Court within the enumeration contained in section 6 of the Criminal Procedure Code, he has no power to make an order under section 545 of the Code. RAMIA 317

———**S. 9 (4)**—*Joint Judge—Additional Judge. Held*, that a Joint Sessions Judge under the Criminal Procedure Code of 1882, was invested with the powers of an Additional Sessions Judge under the Code of 1898, in virtue of the Government Notification dated 28th May 1898. BAGAS ASMAL 972

———**S. 12 (1)**—(*XXV of* 1861, *Secs.* 23 *G*, 273)—*District Magistrate—Reference—Practice.* A Magistrate Full Power is not a Subordinate Magistrate within the meaning of Chapter XVI of the Code of Criminal Procedure, section 23G. of which has not altered the law as regards the power of the District Magistrate to refer cases under section 273 of the Code. AHMEDNUGGUR MAGISTRATE'S LETTER No. 1984 OF 1869. 18

———*District Magistrate—Allocating business by districts—Court sending a case under section* 471 *not bound by such allocation.* Although section 49 of the Code of Criminal Procedure enables the Magistrate of the District to allocate the business arising within particular portions of such District to particular subordinates and that negatively as well as affirmatively, yet a reference to section 141 shows that this power is intended to extend to complaints preferred by the party injured or by a Police Officer; and is not intended to control or limit the more special power conferred on a Court in contempt of which an offence has been committed from sending the criminal case, thence arising, for inquiry to any Magistrate having power to try or commit for trial according to the provisions of section 471. If the Magistrate to whom such a case is sent is competent to transfer it to another Magistrate, he may exercise that power; but

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in default of such competence he must, in the words of the section cited, "thereupon proceed according to law" *i. e.*, hold the inquiry directed by the Court. LETTER FROM THE SESSIONS JUDGE OF TANNA No. 4414. ... 89

CR. P. C. S. 12 (1)—(*XXV of* 1861, *Secs.* 23 *G*, 273, 276, *Chap. XIV*)—"*Subordinate Magistrate*" —*District Magistrate—Referring a case.* The words "Subordinate Magistrate", as used in the title to Chapter XVI, Criminal Procedure Code, and throughout that Chapter, apply only to the particular class of Magistrates denominated Subordinate Magistrates, and do not include Magistrates, F. P., notwithstanding that the latter are, by section 23 G. made subordinate to the Magistrate of the District. The Magistrate of the District cannot, therefore, refer a case to a Magistrate F. P., under section 273, Criminal Procedure Code, because, although the words of the first paragraph of that section are sufficiently wide to allow of such a reference, such a liberal construction is limited by the subsequent use of the words "Subordinate Magistrate" in the same section. The Magistrate of a District may, under section 36, refer a case to a Magistrate F. P., as being "a Court subordinate to him," and also under section 276, the Magistrate F. P., being "an officer subordinate to him." LETTER FROM THE SECRETARY OF GOVERNMENT, No. 1043. ... 50

——**S. 19** (*X of* 1882),—*Presidency Magistrate—Jurisdiction.* The Presidency Magistrate of Bombay has jurisdiction over the Port of Bombay upto high-water mark. JOOMABHAI 193

——**S. 21**—*Rules framed under the section—Presidency Magistrate—Practice.* The applicant filed an information of theft before the Third Presidency Magistrate, who examined the applicant, and then thinking that the case could more conveniently be tried by the Chief Presidency Magistrate returned it to the applicant for him to present it to this latter Magistrate:—*Held*, that Rule 9, framed under section 21, Criminal Procedure Code, did not justify the action of the Magistrate. The Rule only referred to a division of work, that is to say, an allotment of particular cases or particular days and hours of work. CLIVE DURANT 968

CR. P. C., S. 29 (*X of* 1882)—*Third Class Magistrate—Jurisdiction.* A Magistrate of the Third Class has under section 29 of the Code of Criminal Procedure, jurisdiction to try an offence under section 68 of the Bombay District Municipal Act, 1873, which makes the offender liable to the penalty prescribed by section 273, Indian Penal Code. NARAN NARSING 763

——**S. 31 (3)** (*X of* 1872, *Sec*, 18)—*Assistant Judge.* Having regard to section 18 of the Code of Criminal Procedure, an Assistant Sessions Judge has no power to pass a sentence of transportation or to commute a sentence of imprisonment to one of transportation. BALKRISHNA 144

——**S. 32.** *See*, VITHYA, GULAB..49,683

——**S. 33** (*X of* 1872 *s.* 309 (2)) *Penal. Code* (*XLV of* 1860), *Sec.* 65—*Fine—Imprisonment.* Clause 3 of section 309 of the Code of Criminal Procedure does not remove the necessity of conforming to section 65 of the Indian Penal Code. It merely provides that, when the sentence is one of fine only, the Magistrate may award imprisonment in default upto the full extent of his powers, (provided always the amount do not exceed the limit allowed by section 65 of the Indian Penal Code); whereas, when the sentence is one of imprisonment as well as fine, the period awarded in default may not exceed one-fourth of the amount which the Magistrate is competent to inflict. ALI MATYA. 69

——**S. 35** (*X of* 1882). *See* PIR MAHOMAD. 225

——*Whipping—Consecutive sentences.* The accused was convicted of house-breaking by night in order to commit theft and of theft in a building and sentenced to suffer rigorous imprisonment for eighteen months and to receive twenty stripes with a light ratan, the sentence to commence after the expiration of the one in another case (*viz.*, eighteen months' rigorous imprisonment and twenty stripes):—*Held*, that a sentence of whipping must be executed fifteen days after the sentence is pronounced or on confirmation of the sentence in appeal. It is only sentences of imprisonment that can be pronounced to take effect in succession (sections 35 and 397, Criminal Procedure Code). The sentence of whipping should not

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have deferred the infliction of the punishment so as to contravene the provisions of section 391 of the Code of Criminal Procedure. SAGRAM. 300

CR. P. C. S. 35. *Concurrent sentences —Transportation.* A direction that several sentences of transportation passed on an accused person on a conviction of two or more distinct offences at the same trial, should be concurrent, is illegal, being contrary to the provisions of section 35 of the Criminal Procedure Code. RAMA. 383

———*Previous convictions—Separate sentences.* A separate sentence cannot legally be passed against an accused person on account of previous convictions recorded against him, though the Court can use the same for the purpose of awarding to the accused a severer sentence for the offence of which he is convicted than it would otherwise do. NARAYEN. 417

———*Separate sentences—Different offences.* Where there are two separate convictions for two distinct offences in the same case, it is not illegal to pass one sentence for both offences but it is generally the proper course in such a case to pass a separate sentence for each offence. MAHOMED. ... 597

———*Concurrent sentences.* Where a person is convicted at one trial of two or more distinct offences, and is sentenced to a separate term of imprisonment for each, it is illegal under section 35, Criminal Procedure Code, to order the sentences to run concurrently. One sentence should be ordered to commence after the expiration of the other. BHAVA MANSING. 878

———(*XXV of* 1861 *s.* 46)—*Guilty of more than one head of charge.* Where a Court considers the evidence sufficient to convict an accused person under more than one head of the charge, and considers a certain term of imprisonment adequate to meet the offence under each head, it should not record a formal conviction under the first head and drop the others, but its best procedure is, to convict on each head of charge and pass concurrent sentences. RAMCHANDRA. 19

———**S. 40**(*X of* 1882) *See* DONGAR. 279

CR.P.C. S. 40—*Magistrate—Powers—Investiture and continuance.* Section 40 of the Criminal Procedure Code relates only to transfer from one district or area to another. A Mamlatdar invested by name with Second-class Magisterial powers in a district retains them though he ceases to be a Mamlatdar, his revenue title being matter of description only. RAMA. 322

———**S. 44** (*X of* 1882) *Indian Penal Code* (*Act XLV of* 1860), *Sec.* 176—*Police officer—False answers—Information.* An accused who was tried under section 193, Indian Penal Code, for giving false evidence to the Police in the course of an investigation made under section 161, Criminal Procedure Code, into a charge of murder, contended that if he had spoken truly, his answers would have had a tendency to expose him to a criminal charge under section 176, Indian Penal Code:—*Held*, (1) that when once information of the fact of a crime had reached the Police, the object of section 44, Criminal Procedure Code, had been fulfilled and no further, duty imposed by it remained; (2) that as information had already reached the Police Patel of the murder, there was no liability imposed on the accused to inform the Police *proprio motu* of the murder, and his admission of failure to give information would not have exposed him to a criminal prosecution, under section 176, Indian Penal Code, and he was therefore bound to answer truly all questions relating to the case put to him by the Police. SADA ... 679

———**S. 45** (*X of* 1882) *See* WAMAN DHONDDEV 794

———**S. 54** (*X of* 1882), *Police Officer —Complaint—Arrest—Warrant.* A Police officer to whom a complaint of a cognizable offence is made ought, if there be circumstances in the case which lead him to suspect the information, to refrain from arresting persons of respectable position, and leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of warrant of arrest. IRRAPA 795

———**S. 60** (*XXV of* 1861, *Secs.* 109 152)—*Accused—Arrest—Police Officer—Village Police Act* (*Bom. Act VIII of* 1867)—24 *hours—Detention by Police—Computation of time—Time required for carrying the accused*

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to the Magistrate. When an arrest is made under section 109, Criminal Procedure Code, by an officer of the District Police not authorised to make an enquiry under Chapter IX, Criminal Procedure Code such Police Officer must forward the accused "without unnecessary delay" to a Magistrate having jurisdiction or to the officer in charge of the Police Station. He has no authority to detain the accused person 24 hours under section 152, Criminal Procedure Code. When a Police Officer has authority to make enquiry under Chapter IX, Criminal Procedure Code, the 24 hours of detention under section 152 are to be counted upto the time when the accused person leaves the Police Station on the way to the Magistrate. The time occupied on the journey to the Magistrate is not to be counted in the 24 hours, but it is the duty of the Magistrate to see that the time so occupied is reasonable with reference to the distance to be traversed and other local considerations. The 24 hourse during which the village Police may detain an accused person under (Bombay) Act VIII of 1867 are not to be counted in the 24 hours allowed to the District Police Officer under section 152, Criminal Procedure Code. CIRCULAR 1260, 1869. 22

CP. P. C. S. 64 (*X of* 1882). *See* VANKANA. 339

———**S. 96** (*X of* 1882),—*Search warrant—Property, production of—Property in the hands of third parties.* Section 96 of the Criminal Procedure Code authorizes and compels the production of property in respect of which a search warrant is issued; but, when property not alleged to be stolen is in the hands of third parties, such production can only be demanded for the purposes of evidence, and ought not to be granted for the sole purpose of attaching property, the title to which is in dispute. BHANJI.... ... 677

———*See* PERMANAND. 880

———**S. 99** (*X of* 1882)—*Search warrant—Account books, seizure of—Jurisdiction.* A Preisdency Magistrate, on being asked by a telegram from the District Magistrate of Agra to take possession of certain account books of one D, living at Bombay, and send them to him, summoned D to produce them and when they were produced, seized and sent them to Agra, purporting to do so under sections 96 and 99 of the Code of Criminal Procedure. *Held*, that as there was no search warrant, neither section 96 nor section 99 did apply, and that as the Magistrate had no authority to summon D to produce his account books, section 104 did not apply to justify the sending of the books out of the jurisdiction. PERMANAND KESHOWJI. 880

CP. P. C. S. 100 (*X of* 1882), *Minor—Custody — Magistrate — Jurisdiction.* The accused were charged with kidnapping a minor boy, under section 363, Indian Penal Code, from the guardianship of a lawfully appointed guardian. The Magistrate discharged the accused under section 253, Criminal Procedure Code, and refused to pass any order under section 100 of the Code regarding the custody of the minor boy. On a reference by the District Magistrate; *Held*, that the Magistrate was not bound to issue a search-warrant and pass order under section 100 of the Criminal Procedure Code in the absence of any reason to believe that the minor was wrongly confined. The jurisdiction under section 100 is not as wide as that conferred by section 491 of the Code. MUKTABAI... 837

———**S. 104** (*X of* 1882). *See* PARMAND. 880

———**S. 106** (*X of* 1882)—*Security—Theft.* A person convicted of an attempt to commit theft cannot be asked to furnish security under section 106, Criminal Procedure Code, because the section does not apply to the offence. MUNIRAM. 622

———*Appeal—Order of security—Jurisdiction.* An appellate Court cannot add to the sentence of the original Court an order under section 106, Criminal Procedure Code, that the accused appellant shall execute a bond to keep the peace. MAHOMED ISA... 906

——— (*XXV of* 1861, *Sec.* 280)—*Alternative charge—Penal Code* (*Act XLV of* 1860), *Secs.* 299, 307—*Conviction—Order for recognizance for good behaviour—Recognizance for keeping the peace.* The accused was convicted on alternate charges, under sections 299 and 307, Indian Penal Code, (attempt to commit murder) and section 324 Indian Penal Code, (voluntarily causing hurt

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by instrument for cutting) and sentenced to 2 years' rigorous imprisonment, and at the expiration of the sentence to execute a recognizance for good behaviour for one year:—*Held*, that the recognizance should have been for keeping the peace, under Chapter XVIII of the Code of Criminal Procedure, and not for good behaviour under Chapter XXI, but that otherwise the order was such as was warranted by section 280 of the Code of Criminal Procedure. SHRAVAN. 48

Cr. P. C. S. 109 (*Act X of* 1882),—*Cumulative security bonds.* A Magistrate cannot legally amalgamate sections 109 and 110 of the Criminal Procedure Code and require the execution of two bonds for good behaviour for an aggregate period of 18 months and in default of the same being furnished commit to prison for 18 months' rigorous imprisonment: in such a case, at any rate, the provisions of section 123 (2), of the Code should be observed. BALYA BHIMAPPA. 946

———*Security for Good behaviour.* A person was ordered by a First Class Magistrate to execute a bond for Rs. 25 for his good behaviour for six months, and to deposit a sum of Rs. 7 which would be returned to him at the end of six months, if he had not in the meanwhile violated the order:—*Held*, that the order as to deposit was illegal under sections 109, 118 and 513 of the Code of Criminal Procedure. FATA. 671

———(*Act XXV of* 1866, *ss.* 295. 296)—*Evidence—Habitual Robber.* No evidence as to general character having been adduced before the Magistrate that eiher of the persons before him was "by repute a robber, house breaker, or thief &c." as required by section 296 of the Code of Criminal Procedure, the order requiring securities under that section was illegal. It is also, necessary to record evidence under section 295, before requiring security under that section. BUDHYA GURYA. 44

———(*Act XXV of* 1861, *Sec.* 295—*Magistrate— Security— Suspected characters —Persons having no ostensible means of subsistence.* Section 295 of the Code of Criminal Procedure provides for taking security not from persons suspected of a particular offence, but from persons lurking within the Magistrate's jurisdiction who have not ostensible means of subsistence or cannot give a satisfactory account of themselves. BHUJA 63

Cr. P. C. S. 110 (*X of* 1882)—*Security for good behaviour.* Where a person is charged with being an habitual offender and there is nothing but evidence of general repute to go upon, that evidence must be so general and overwhelming as to leave no practical doubt that the accused has been in the habit of committing thefts and robberies or other offences of the kinds specified, and before making an order for security under section 110, Criminal Procedure Code, the Magistrate must be satisfied that as a matter of fact the suspected person has committed several offences in the past. SHERKHAN. 639

———*Magistrate—Jurisdiction.* A Magistrate of the First Class having jurisdiction throughout a District, but not specially empowered under section 110 of the Code of Criminal Procedure, cannot exercise jurisdiction in a case arising under that section upon a transfer thereof to him by the District Magistrate under section 192 of the Code. KHANDU GANU. 838

———(*X of* 1872, *s.* 509)—*Security for keeping peace—Recognizance for personal appearance—Court Fees Act* (*VII of* 1870), *Sec.* 19. Having regard to sections 489, 490, 500 and 504 of the Code of Criminal Procedure, when taken in combination with Forms E and G of Schedule II. of the same Code, bonds given by the person, under section 509 of the Code whose keeping of the peace or whose good conduct is stipulated for, are exempted from any Court Fee by section 19, article XV of Act VII of 1870, which mentions "recognizances for personal appearance *or otherwise*" as not chargeable with any fee. But the bonds given by sureties for the person whose keeping of the peace or good conduct is guaranteed by them, are not either bail bonds or recognizances, and are not so exempted, but are chargeable with an eight-anna fee under Schedule II, Article 6 of the same Act as they fall within the words "Other instrument of obligation not otherwise provided for by this Act when given by the direction of any Court or executive authority." AHMEDABAD

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MAGISTRATE'S ENDORSEMENT No. 768. ... 127

CR.P.C. S. 110. (XXV *of* 1861, *Sec.* 296)—*Magistrate—Security for good behaviour—Separate proceedings.* Action under section 296 of the Code of Criminal Procedure, requiring security for good behaviour, should be quite irrespective of any proceedings on account of any offence committed. SUNDAR BHIM. 23

———**S. 117, 118** (*X of* 1882),—*Evidence—Joint trial.* An order to execute a bond for good behaviour cannot be made under section 118 of the Code of Criminal Procedure, in the absence of any evidence; sections 117 and 118 of the Code prescribe inquiry and proof that it is necessary that the person arraigned should execute a bond. Where more persons than one are called upon to show cause why they should not execute bonds for good behaviour, each person arraigned should be tried separately. GAIBA... ... ... 585.

———**S. 118** (*X of* 1882),—*Security for good behaviour—Order of imprisonment in anticipation.* An order for the imprisonment of an accused person, made in anticipation of his failing to give security under section 118 of the Criminal Procedure Code, is illegal, being opposed to section 123 of the Code. SHIVRAYA. 395

———*Magistrate—Security for good behaviour —Imprisonment in anticipation of default.* An order for the imprisonment of an accused person made in anticipation of his failing to give security under section 118 of the Code of Criminal Procedure is illegal, being opposed to section 123 of the Code. LALU 408

———*Security—Order—Imprisonment in anticipation of default.* It is not competent to a Magistrate to pass an order for the imprisonment of the accused made in anticipation of his default to give security under section 118 of the Code of Criminal Procedure. HIRALAL. 408

———*Magistrate—Order.* An order, under section 118 of the Code of Criminal Procedure, can only be passed by a Magistrate after the procedure defined in sections 107, 112, and the following sections of the Code has been followed. ADAM 421

———*Security.* It is not competent to a Magistrate to require, under section 118 of the Criminal Procedure Code, a person to give security of *respectable land-holders*; all he can do is to require the security of *persons of respectability and substance.* JAMAL LAKHAN 876

CR. P. C., S. 123,—*Concurrent sentences.* The accused, while undergoing six months' rigorous imprisonment under section 123 Criminal Procedure Code, in default of giving security for good behaviour, was convicted of an offence under section 224, Indian Penal Code and sentenced to two months' rigorous imprisonment. The Magistrate directed the latter sentence to commence after the termination of the first sentence. *Held*, that the sentence for the substantive offence must commence at once and could not be postponed to take effect at the expiration of the sentence of imprisonment which the accused was at the date of the conviction undergoing in default of giving security for good behaviour. TULSHYA BAHIRU. 970

———(X *of* 1882) *See* LALLU HIRALAL.408

———*Security bond—Commencement of the period.* A warrant for detention of the accused in prison, under section 123 of the Code of Criminal Procedure, can only be issued on the commencement of the period for which the security bond is required, and on default the part of the accused in then giving the required security. An order for the imprisonment of the accused, made in anticipation of his default to give security under section 118 of the Code of Criminal Procedure, is illegal as being opposed to section 123 of the Code. HARILAL. 432

———*Security — Imprisonment— Order.* Under section 123 of the Code of Criminal Procedure, a Magistrate cannot make an order for imprisonment in anticipation of default to give security under section 118; but, as, in cases where a prisoner is required to furnish security for good behaviour for a certain period on the expiration of his sentence of imprisonment, the period for which such security is required commences on the expiration of the sentence, if, when it commences, the prisoner does not furnish security, he is at once liable under section 123, to be detained in prison till he does furnish it, no warrant for his detention is necessary. LETTER FROM THE REGISTRAR, HIGH COURT No. 1301. ...511

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Cr. P. C. S. 123—*Security—Term—Magistrate.* Under section 123, Criminal Procedure Code, it is not competent to a Magistrate to award a shorter term of imprisonment in default of security than that for which security is required, but if he thinks that the term ought to be shortened, his proper course is to report the matter to the District Magistrate with a view to his taking action under section 124 of the Code. MOTI. 668

———*Security for good behaviour—Convict undergoing sentence.* Under sections 120 and 123 of the Code of Criminal Procedure, a convict undergoing a sentence of imprisonment cannot be obliged to give security for good behaviour until the period of that imprisonment ends; nor can the order for imprisonment in default be made till then. APPA ... 765

———*Security for good behaviour—Person undergoing imprisonment—Magistrate—Term of the security to begin when.* If a person, undergoing a sentence of imprisonment, is ordered, under section 118, Criminal Procedure Code, to give security for good behaviour, it is premature and illegal to pass against him an order under section 123 of the Code whilst the imprisonment lasts. If, in the meantime, he is convicted of another offence and sentenced to a fresh term of imprisonment, the order should not be passed, until the expiry of both imprisonments. If, before such expiry, the prisoner gives the required security, the Magistrate cannot pass an order of imprisonment under section 123 of the Code. The order of imprisonment under section 123, Criminal Procedure Code, is one to which the word "sentence," as used in section 396 of the Code, applies. PANDU KHANDU... 774

———**S. 133** (*X of* 1882)—*Magistrate—Order—Bona fide dispute.* Where there is a *bona fide* dispute between a private individual and Government as to the right to the ground on which an encroachment is alleged to have been made by the former by building a wall, a Magistrate should not proceed under section 133 until that dispute is settled. JEYSANG 178

———*General order—Disobedience—Penal Code* (*Act XLV of* 1860), *Sec.* 188. Where a Magistrate issues, under section 133 of the Code of Criminal Procedure, a general order prohibiting the establishment of cotton ginning yards in certain villages, a person establishing a cotton gin in contravention of the above order cannot be proceeded with under section 188 of the Indian Penal Code. MANEKCHAND 324

Cr. P. C. S. 133—*Conditional order—Magistrate—Jurisdiction.* Section 133, Criminal Procedure Code, does not apply to an alleged user by one man of his own property so as to cause injury to the property of another. All that a Magistrate can do under section 137, Criminal Procedure Code, is to make absolute the conditional order passed under section 133 of the Code. Where, therefore, the conditional order passed under section 133 of the Code is one which the Magistrate had no jurisdiction to make under that section, the subsequent order under section 137 of the Code is also illegal. JASVANTSINGJI. ... 516

———*Forge — Sparks — Magistrate—Order.* Where a Sub-Divisional Magistrate purporting to act under section 133, Criminal Procedure Code, ordered a forge set up by the applicant to be removed on the ground that the sparks from it might set fire to cotton stored in an adjoining building belonging to a third person, the High Court, holding that the Magistrate was not justified in ordering the summary removal of the forge, directed that the applicant should not be required to remove the forge, but only to alter its construction so that sparks shall not issue out of it into the open air when it is worked. LAHANU. 872

———(*Act XXV of* 1861), *Ch.* XX, *Secs.* 308, 315) — *Magistrate — Reference.* The Magistrate of the District had no power, under the Code of Criminal Procedure before it was amended by Act VIII of 1869, to refer an inquiry under Chapter XX of the Code to a Magistrate Full Power, nor had the latter any power to refer it to a Subordinate Magistrate. AKBAR ALI. 18

———**S. 137** (*X of* 1882)—*Magistrate—Temporary orders — Nuisance — Evidence.* Where a Magistrate issues, a notice to a person to remove a nuisance or to show cause against the order, and the person appear to show cause it becomes the duty of the Magistrate under section 137 of the Code of Criminal

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Procedure to take evidence as a basis for the order he is to make. MAHADAJI. ... 320

———*See* JASWANTSINJEE. 516

CR. P. C. S. 138 (*X of* 1882)—*Magistrate— Jury.* Under section 138 of the Code of Criminal Procedure, the Magistrate must himself nominate the Jury; he cannot delegate this duty to another Magistrate. VITHU. 461

———*Notice under S.* 133—*Jury under S.* 138—*Decision of the Jury—District Magistrate—Reference—High Court.* The decision of a Jury, appointed under section 138 of the Code of Criminal Procedure, is not a proceeding in a Criminal Court which the District Magistrate can call for and examine and refer to the High Court under the provisions of section 435 of the Code of Criminal Procedure. REFERENCE No. 81 OF 1887. 336

———**S. 144**—*Magistrate — Inquiry.* A Magistrate should, before passing an order under section 144 of the Code of Criminal Procedure, always hold an inquiry and determine which party has the legal right contended for by both the parties, and then protect the party he finds entitled in the exercise of that right, KAZI FAJLODDIN 968

———(*X of* 1882)—*High Court—Revision —District Magistrate.* The High Court has no revisonal jurisdiction to interfere with an order under section 144, Criminal Procedure Code; the aggrieved person has his remedy by an application to the District Magistrate under the last para but one to section 144, Criminal Procedure Code. VITHAL ANNAJI... 516

———(*X of* 1872, *Secs.* 518, 520, 527)—*First Class Magistrate—Order under section* 516—*Judicial proceeding—District Magistrate—Interference— Reference.* An order passed by a First Class Magistrate under section 518 of the Code of Criminal Procedure being under section 520 of the Code not a judicial proceeding, the District Magistrate cannot refer it to the High Court, but he is at liberty to deal with it in his executive capacity. REFERENCE No. 62 OF 1877. ... 129

———(*XXV of* 1861, *Sec.* 62),—*Order—Written order—Addressed to a person.* An order, under section 62 of the Criminal Procedure Code, must be a written order addressed to a particular individual. MARDAN HUSEN. 30

CR. P. C. S. 145—(*X of* 1882)—*Attachment—Moveable—Jurisdiction.* Section 145, Criminal Procedure Code, does not confer upon a Magistrate the same powers of attachment of movables as of immovable property. RAMCHANDRA SHIVJIRAM. 891

———(*Act XXV of* 1861, *Sec.* 318)—*Possession—Party in possession—Magistrate.* When a party in possession has been ousted by an arrest upon even a false charge and the opponent enters into possession in the meanwhile, the Magistrate cannot under section 318 of the Code of Criminal Procedure restore possession to the party so dispossessed, for he is strictly required to see who is in actual possession at the time of inquiry. GIRDHAR DHANJEE. 27

———(*Act XXV of* 1861, *Sec.* 318)—*Magistrate—Possession—Absence of record of proceedings.* Where a Magistrate, F. P., without having recorded a proceeding, stating the grounds of his being statisfied that a breach of the peace was likely to result from a dispute regarding a piece of land, decided a question of possession under section 318 of the Criminal Procedure Code the High Court annulled his proceedings. AMIRCHUND.... 39

———(*Act XXV of* 1861, *Sec.* 318—*Breach of the peace—Magistrate—Omission to record proceedings.* Where the Magistrate F. P., omits to conform to the provisions of section 318, Criminal Procedure Code, by recording a proceeding stating the grounds of his being satisfied as to a dispute likely to lead to a breach of the peace; his proceedings are null and void. NATHU. 51

———**S. 147** (*X of* 1882)—*Tangible immovable property —Magistrate— Privacy— Right of entry upon the land of another.* The right to privacy is not a right in the assertion of which a person can be justified in entering upon the premises of another and closing the windows and doors; nor is it a right to prevent the doing of anything in or upon any tangible immovable property" within the meaning of section 147 of the Code of Criminal Procedure. GORDHANDAS.... 357

———*Magistrate — Jurisdiction — Civil Court.* Where a competent Civil Court has decided as to the rights of the parties to the property in dispute, a Magistrate ought not to

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proceed under section 147, but under Chapter VIII of the Code of Criminal Procedure. MOTILAL. 462

Cr. P. C. S. 145. *Magistrate—Religious procession.* A Magistrate is not authorized, under section 147 of the Code of Criminal Procedure, to pass an order prohibiting a religious procession where the right to prevent the procession is not found to exist. MADHAVDAS 548

——— **S. 155** (X *of* 1872, *Secs.* 110, 146) —*Magistrate, third class—Powers—Police—Investigation — Non-cognizable offence.* A Magistrate third class can order the Police to investigate a non-cognizable offence when there is a complaint pending before him (section 146 of the Code of Procedure); but not otherwise (section 110 of the Code). KHANDESH MAGISTRATE'S LETTER No. 319. ... 77

——— **S. 161** (X *of* 1882)—*Police investigation—Accused—Truth—False evidence—Indian Penal Code* (*Act* XLV *of* 1860), *Sec.* 193. A person examined under section 161, Criminal Procedure Code, 1882, by the Police with respect to an offence with which such person may himself be charged and convicted is not bound to speak the truth and in such a case he cannot be convicted for giving false evidence, under section 193, Indian Penal Code. USUPHKHAN. 619

——— **S. 162** (X *of* 1882)—*Chief Constable—Admissions—Evidence.* It is contrary to the provisions of section 162, Criminal Procedure Code, 1882, to allow the admission in evidence against the accused of a statement made by the Chief Constable of what the alleged complainant and his wife had said to him. HARIBAI. 936

——— **S. 164** (X *of* 1882)—*Magistrate—Police officer—Witness—Penal Code* (*Act* XLV *of* 1860), *Sec.* 193—*False evidence—Judicial proceeding.* There is no provision of law which empowers a Police officer to require a witness to go before a Magistrate, not having jurisdiction over the offence, to have his statement taken under section 164, Criminal Procedure Code. Such a statement cannot be used as evidence at the trial nor, if false, be treated as false evidence in a judicial proceeding. NANA RAJU... 468

Cr. P. C. S. 145. *Confession—Police custody—Sessions Judge—Charge—Jury.* A confession under section 164, Criminal Procedure Code, made to a Magistrate other than the committing Magistrate, if tendered on the part of the Crown, cannot be rejected on the sole ground that the accused had been a long time in the hands of the Police. It is necessary for the Court to examine an accused at the close of the case for the prosecution, section 342 of the Code of Criminal Procedure being imperative, as it is a means of enabling the accused to explain what appears against him. Under section 297 of the Code, the Sessions Judge is bound to sum up the evidence for the defence as well as for the prosecution, this being essential to a proper charge to the jury. MAHADHU 420

———(X *of* 1872, *Sec.* 122)—*Confession—Accused—Magistrate.* A Magistrate is not debarred from recording the confession of an accused person under section 122 of the Code of Criminal Procedure by the circumstance that it may afterwards be that Magistrate's duty to hold a preliminary inquiry under Chapter XV of the Code. THANA MAGISTRATE'S LETTER No. 767 121

——— **S. 169** (X *of* 1872, *Secs.* 125, 188, 210)—*Complaint—Withdrawal—Magistrate—Police officer.* Section 125 of the Code of Criminal Procedure does not empower any Police Officer to entertain an application for withdrawal of a complaint. The permitting a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate by sections 188 and 210 of the Code of Criminal Procedure, and the Police have no authority to interfere in such matters. SURAT DISTRICT MAGISTRATE'S LETTER No. 306.... 91

———(*Act* X *of* 1872, *Sec.* 125)—*Police officer—Bail—Magistrate—Prima facie case—Committal—Re-arrest.* A Police officer reports for the orders of a Magistrate a non-bailable case under section 125 of the Code of Criminal Procedure, admitting the accused to bail, there not being in the Police officer's opinion sufficient evidence to justify the immediate transmission of the accused to the Magistrate. The Magistrate, however, considers that the evidence does establish a *prima facie* case, and

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he, accordingly, orders its committal to him :—*Resolved*, that the admission to bail by the Police under section 125 of the Code being a purely provisional arrangement, when the Magistrate determines that there is a *prima facie* case of a non-bailable offence, he should be re-arrested and forwarded to the Magistrate in custody. RATNAGIRI MAGISTRATE'S LETTER No. 675. 121

CR. P. C. S. 170 (X *of* 1882)—*Magistrate—Cognizance of an offence—Jurisdiction—Robbery—Dacoity—Commitment.* The Police acting under section 170, Criminal Procedure Code, sent up to the Magistrate only one man charged with the offence of robbery. The Magistrate in the inquiry that ensued issued warrants for the arrest of four more persons because of certain statements which appeared in the diary of the Chief Constable and of the evidence of two witnesses examined by him. The four persons applied that their case might be committed to the Court of Sessions :—*Held*, (1) that the Magistrate could not be said to have taken cognizance of an offence against the four applicants upon a police report; (2) that, under the circumstances, the Magistrate must be held to have taken cognizance of the offence against the applicants in the manner contemplated in section 191 (*c*), that the provisions of the last paragraph of that section applied to the case and that, therefore, the applicants were entitled to ask that the case should be committed to the Court of Session. (3) that the four applicants having been charged with having committed robbery in the company of the first accused, the offence was magnified into a dacoity for which offence a commitment was obligatory. HIRASHANKER UDAYSHANKER. 951

——**S. 182** (X *of* 1872, *Sec.* 67)—*Mischief during a voyage—Jurisdiction—Magistrate.* The complainant and the accused sailed from Bombay at Honawar in a boat. The latter threw overboard a box belonging to the former during the voyage within 9 miles of the Janjira State. On arrival at Honawar, the complainant charged the accused with having committed mischief before the Magistrate at that place :—*Held*, that under section 67, ill, (*a*) of the Criminal Procedure Code, 1872, the Magistrate at Honawar, through whose jurisdiction the accused passed on the voyage, had jurisdiction to try the offence. ISMAL 181

CR. P. C. S. 185 (X *of* 1882)—*District Magistrate—Transfer of Case—Cantonement Magistrate—Jurisdiction.* Where a District Magistrate made a reference to the High Court for the transfer of a case before a Cantonement Magistrate in which the accused were alleged to have committed an offence under section 498, Indian Penal Code, to another District in which the offence was alleged to have occurred, the High Court declined to pass any order holding that if the facts relevant to section 498 occurred in the other District and if the Cantonement Magistrate was empowered under section 186, Criminal Procedure Code, he could deal with the matter under that section; and if he was not so empowered and he found that he was without jurisdiction under Chapter XV, he could decline to exercise jurisdiction; and also that the District Magistrate could himself make the enquiry requisite under section 528 and could transfer the case to his Court under section 528, the Cantonement Magistrate being expressly made subordinate to him by Act XIII of 1889, section 7. RAMJI BAPUJI... ... 849

——**S. 188** (X *of* 1882)—*Political Agent—Certificate—Recalling the certificate.* When a District Magistrate, in the capacity of Political Agent, once grants a certificate, under section 188 of the Code of Criminal Procedure, for the trial of a case by a Second Class Magistrate of the District, the latter is legally seized of the case, and the Political Agent has no authority, thereafter, to recall his certificate or to issue, as District Magistrate, a warrant for the arrest of the accused on the requisition of the State Authorities and to order his removal to the Native State. HORMUSJEE NASARWANJI. 253

——*Certificate—Political Agent—Siam.* The being no Political Agent in Siam, within the meaning of sections 188 to 190 of the Code of Criminal Procedure, a Sessions Court in British India, otherwise competent, has jurisdiction to try a Native Indian Subject of Her Majesty, for an offence committed within that territory, without a certificate under the

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proviso to section 188 of the Code. ABDUL HUSEIN. 773

CR. P. C. S. 188. *Offence in a Native State—Penal Code (Act XLV of 1860), Secs. 4, 224—Escape—Custody—Jurisdiction—British Courts.* The accused, was arrested in the Mysore State by the State Police on suspicion of having committed a theft in British India. While in the State lock-up, he effected his escape, for which a Magistrate in British India tried him, and, in the absence of a certificate by the Political Agent for the Mysore State that, in his opinion the charge should be enquired into in British India, convicted him under section 224, Penal Code:—*Held*, that as the offence of escape from lawful custody was committed out of British India, the Magistrate had no jurisdiction to try the accused for it. JUER. 870

———S. 190 (X of 1882, s. 191)... 355

———*Opium Act (I of 1878), Sec. 3—Magistrate—Jurisdiction.* A Second Class Magistrate cannot refuse to take up a case of importing opium into British India without a license, although empowered, under section 191, Criminal Procedure Code, and section 3 of the Opium Act, to take cognizance of the offence and try the case, merely on the ground that the gravity of the offence required severer punishment than he was competent to inflict. GEMA. 375

———*Process-fees—Non-payment —Dismissal of complaint.* Where a complainant being liable, under Rule 11 at page 7 of the High Court Circulars (Criminal), to pay process-fees, neglects or refuses to pay the same, the Magistrate should dismiss the complaint, unless he considers that there should be a prosecution in the public interest, to which section 191 of Code of Criminal Procedure applies. BHIKA. 491

———S. 192 (X of 1882). *See* KHANDU. 838

———S. 193 (X of 1882)—*Assistant Sessions Judge—Sessions Judge.* An Assistant Sessions Judge, who has been directed by Government to *take over charge* of the duties of Judge and Sessions Judge during the temporary vacancy in the office, is not an officer appointed to act as a Sessions Judge and has no jurisdiction to try any case, even as an Assistant Sessions Judge, unless it was made over to him by general or special order under the last para of section 193 of the Code of Criminal Procedure. MAHADHU. ... 500

CR. P. C., S. 193. *Magistrate—References under section 123—"Case committed for trial."* A reference by a Magistrate under section 123, Criminal Procedure Code, is not a "case committed for trial," and the Court of Session disposing of such reference does not "try a case" within the meaning of those words as used in section 193 of the Code. The jurisdiction conferred by section 123 is concerned rather with the exercise of a power for the prevention of an offence. A Joint Sessions Judge, appointed to try "all cases which may be committed for trial by the Magistrates" of the District, has no jurisdiction to pass orders on a reference under section 123, Criminal Procedure Code. DAYARAM RANCHHOD... 830

———S. 193(2) (X of 1882), *Sessions Judge—Revisional Jurisdiction—Joint Sessions Judge.* Applications under Chapter XXXII, Criminal Procedure Code, for the exercise of the Sessions Judge's revisional jurisdiction cannot be made over by the Sessions Judge to a Joint Sessions Judge for disposal. Section 193 (2) of the Code of Criminal Procedure refers only to cases which are to be made over to the Joint Sessions Judge for trial. SURAT SESSIONS JUDGE'S LETTER No. 187. 210

———S. 195 (X of 1882)—*Document—Evidence.* A document is given in evidence within the meaning of section 195 of the Code of Criminal Procedure, when it is handed over by the person tendering it to the Court though the Court may reject it as evidence for insufficiency of stamp or want of registration. NAGINDAS. 242

———*Sanction—First Class Magistrate—District Magistrate.* The District Magistrate has no jurisdiction to grant the sanction for prosecution under section 193 of the Indian Penal Code, refused by a First Class Magistrate who is not subordinate to the former, as ordinarily no appeal lies from his decision to the former. BHIKAJIRAO. ... 511

———*See* VENKATRAMANA.... ... 515

———*Criminal Proceedings—Civil litigation.* In cases arising under section 195,

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Criminal Procedure Code, it is advisable to postpone criminal proceedings until the civil litigation, out of which the sanction came into existence, has come to an end. EBRAHIM. 587

CP. P. C. S. 195. *Sanction—Magistrate—Supplementary evidence—Record of evidence.* A Magistrate can take supplementary evidence after an application has been made to him for sanctioning the prosecution for making a false complaint but in such cases such evidence must be duly recorded. KADARBHAI 629

———*Indian Penal Code (Act XLV of 1860), Sec. 193—Sanction—Magistrate—District Magistrate.* A District Magistrate is not precluded from taking cognizance of offences under section 193, Indian Penal Code, merely because a Subordinate Magistrate in whose Court the evidence had been given had refused to give sanction to prosecute under section 195, Criminal Procedure Code. KHEMCHAND. 683

———*False evidence—Sanction.* Where the sanction for the prosecution of the accused, under section 195 of the Indian Penal Code, related to the giving of false evidence in a long deposition, but not the very slightest indication was given in the proceeding, as to what story or statement was, in the opinion of the Judge issuing the sanction, false:—*Held*, reversing the sanction, that section 195 of the Code of Criminal Procedure ought to be used in such a way as to give the person, against whom the sanction, for prosecution is granted, some means of knowing definitely in what the criminal act consists and that the Judge issuing sanction ought to apply his mind closely to the facts with a view to ascertain whether they really constitute an offence, and also to prevent a sanction issued with one purpose or design being abused to the furtherance of some other. JIVAN. 693

———*Sanction.* In granting a sanction for prosecution for forging a document produced in his Court, it is competent to the Subordinate Judge to rely upon the opinions expressed by his predecessor-in-office. BAI JADAV. 705

———*Sanction to prosecute—Date of grant—Period.* On an application by one of the parties to a suit for sanction to prosecute the other, the Judge, on 12th December, 1894, recorded a judgment according the sanction as applied for under section 209, Penal Code; the formal sanction was drawn up and issued on 25th January 1895:—*Held*, that considering the protective intention of section 195, Criminal Procedure Code, the sanction was given on the 12th December 1894 in written words, and that the six months' term mentioned in that section began on that date. LALA BAHRUMAL.... 803

CP. P. C. S. 195. *Sanction—Appeal—Lapse of time—District Magistrate.* It is not competent to a District Magistrate on appeal to revoke a sanction, duly granted on the ground of lapse of time. FRAMJI ARDESHIR. ... 895

———*Sanction — Subordinate Judge — Sessions Judge.* Where a Sessions Judge set aside an order, passed by a Subordinate Judge granting sanction to prosecute certain persons for perjury, on the ground that after an interval of three-and-a-half months, no formal and legal sanction had been recorded by the Subordinate Judge, the High Court set aside the order of the Sessions Judges as illegal, because the time allowed by the Code of Criminal Procedure, within which a sanction could remain in force was six months. BHIMANGAUDA *v.* MALLANGAUDA. 859

———**S. 195 (a)** (*Act XXV of 1861, s. 168*—*Disobedience—Order—Sanction—Withdrawal—Magistrate.* Section 168, of the Code of Criminal Procedure provides that a Court or public servant, may, in cases in which there has been a contempt of its or his authority, either institute a complaint or give its sanction to a complaint being instituted by any person injured. In the present case, the person who had been injured by the disobedience of the order and who had been allowed to prosecute the accused was the complainant and might withdraw his complaint in cases falling within Chapter XV of the Code of Criminal Procedure. JEBJIBHAI NATHUBHAI 45

———**S. 195 (b)** (*X of 1882*) *Sanction—Private person—Court's Power to prosecute.* The granting of a sanction, under clause (*b*) of section 195 of the Code of Criminal Procedure, to a private person does not bar a Civil Court from proceeding under section 478 of the

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Code; nor can the dismissal by a Magistrate of a complaint made by a private person be a bar, till set aside, to a proceeding under that section. SHANKER. 422

Cr. P. C. S. 193. *False charge—Police—Sanction.* A complaint made to the Police by G, accusing some persons of robbery, was reported to the Magistrate to be false on investigation. G was thereupon charged by the Police under section 211 of the Indian Penal Code with having made a false charge to the Police, on which the Magistrate issued process. On the application of G, who appeared before the Magistrate in consequence of the process, the Magistrate enquired judicially into his complaint of robbery and discharged the accused:—*Held*, that no sanction was necessary for the prosecution of G under section 211 of the Indian Penal Code, as at the time the Police made the complaint against G there was not in existence any proceeding in any Court. GANPAT. 704

———(*Act X of* 1872, *S.* 468)—*Bombay Act II of* 1866—*Mamlatdar's Court—Collector's Court—Sanction.* The Collector's Court having been abolished since the passing of Bombay Act II of 1866, and the Mamlatdars having thereby, for the purposes of Bombay Act V of 1864, ceased to be subordinate to the Collector, the sanction of the Collector is not sufficient to authorize the prosecution of a person for having intentionally given false evidence before a Mamlatdar in a suit under Bombay Act V of 1864. DHONDI. ... 118

———*Penal Code, Sec.* 193—Prima facie *case—Sanction—Preliminary investigation.* If in the course of a criminal trial, the evidence recorded by the trying Magistrate discloses a *prima facie* case of an offence under section 193 of the Indian Penal Code, the sanction for the trial of the accused person may be given by that Magistrate without independent preliminary investigation. NABI NATHA. 132

———(*Act X of* 1872, *Sec.* 468)—*Mamlatdar's Court Act—Mamlatdar—Sanction.* The Mamlatdars' Court constituted by the Bombay Mamlatdar's Courts Act is a civil Court within the meaning of section 468 of the Code of Criminal Procedure: hence, a complaint of an offence mentioned in that section when such offence has been committed before or against a Mamlatdar's Court shall not be entertained in the Criminal Courts, except with the sanction of the Mamlatdar's Court before or against whom the offence was committed or with the sanction of the High Court. SAVANTA *v.* BHIMAJI. 149

Cr.P.C. S. 195. (*Act X of* 1872, *S.* 469)—*Indian Penal Code, Sec.* 466—*Forgery—Evidence—Sanction.* A complaint of an offence under section 466 of the Indian Penal Code, *viz.*, forging a register kept by a public servant which forged document was given as evidence, cannot be entertained without the sanction of the Court in which it was given in evidence, or of some other Court to which such Court is subordinate, as that offence falls within the wider description of offences under section 463 of the Indian Penal Code, to which section 469 of the Criminal Procedure Code applies. POONA MAGISTRATE'S LETTER No. 1431. 83

———**S. 197** (*Act X of* 1872, *Sec.* 466)—*Public servants—Sanction—Police Patel—Village Police Act* (*Bom. Act III of* 1874), *Sec.* 85. Section 466 of the Code of Criminal Procedure contemplates sanction in the case of those public servants only who are not removable from their office without the sanction of Government. A Police Patel, hereditary or otherwise, is not such a public servant under section 9 of the Bombay Village Police Act, as he is liable to dismissal on proof of misconduct by a Magistrate First Class subject to the sanction of the Police Commissioner. VIRBUSAPA. 147

———**S. 198** (*X of* 1882)—*Defamation—Female.* In a case of defamation of a female, it is she herself, and not a mere male relative, who should make a complaint under section 198 of the Criminal Procedure Code. KUSTANTIN. 327

———**S. 198(c).** *See* HIRASHANKER UDAYSHANKER. 951

———**Ss. 199,200** (*X of* 1882)—*Complaint—Examination of complainant.* The word 'complaint' as used in section 199 of the Code of Criminal Procedure must be taken as including not only a written complaint, but also the examination of the complainant at any rate prior to the issue of process. GOVERNMENT OF BOMBAY *v.* SHEIKH MAHOMED... 534

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Cr. P. C. S. 199,200. *Magistrate.* An accused was charged by the husband of a woman with offences under sections 494 and 498 of the Indian Penal Code:—*Held*, that the complaint under sections 494 and 498, Penal Code, did not involve a complaint under section 497 of the Code, and that the Magistrate, therefore, is not at liberty under section 199 of the Code of Criminal Procedure, to try the accused for an offence under section 497 of the Indian Penal Code. NALYA. 531

———**S. 200** (X *of* 1882)—*Complaint—Presentation—Mukhtyar.* Where a complaint under sections 408 and 409, Indian Penal Code, is presented by the complainant's *mukhtyar* instead of by the complainant herself who is not present in Court, the Magistrate is justified in dismissing the complaint as he has no opportunity of examining the complainant as required by section 200, Criminal Procedure Code. JANAKI. 625

———*Magistrate—Complainant—Practice.* Where a complaint is made before a Magistrate, the Magistrate is bound to examine the complainant on oath and then to proceed according to law. Where a complaint was filed regarding the conduct of a Government officer, the Magistrate called for a report from the officer concerned, and feeling himself satisfied with it, rejected the complaint:—*Held*, that the action of the Magistrate in calling for a report was not proper, and that in any case he ought to have heard the complainant and his witnesses before acting upon any statement made by the person complained against. SUBRAO RAMCHANDRA. ... 954

———**S. 202** (X *of* 1882)—*Complaint—Magistrate.* It is the duty of a Magistrate, on a complaint being presented to him, to examine the complainant and then either to issue process or make an order under section 202 of the Criminal Procedure Code. BAI KASHI. 368

———*Complainant—Personal knowledge—Dismissal of complaint.* The provisions of section 202, Criminal Procedure Code, do not confine the evidence in the inquiry under that section to that of the complainant, but leave it to the discretion of the Magistrate to examine such witnesses and make such inquiry as he thinks fit. A Presidency Magistrate dismissed a complaint under section 203, Criminal Procedure Code, on the ground of want of personal knowledge on the part of the complainant of the circumstances alleged by him:—*Held*, that the reasons given were not sufficient, and that the complainant should have been allowed to bring forward evidence to prove them. KANKUCHAND. 669

Cr. P.C.S. 203 (X *of* 1882)—*Magistrate—Complaint—Dismissal.* Where an accused has been summoned to appear before a Magistrate, proceedings have commenced under Chapter XVII of the Code of Criminal Procedure; and the Magistrate cannot dismiss the complaint under section 203 of the Code which applies only to cases falling under Chapter XVI where there has been no issue of process. BUDHUNBHAI. 544

———*Complaint—Dismissal—Hearing.* A complainant should be afforded an opportunity of being heard before any final order is passed on his complaint. HARI PURUSHOTAM. 365

———**S. 205** (X *of* 1882) *See* VITHL 205

———**S. 208** (X *of* 1882) *Committing Magistrate—Evidence record of.* As all the evidence, and not merely a part, should be ready at the trial, it is the duty of a committing Magistrate to make full and careful inquiry into the alleged offence, and to record the testimony of witnesses. He ought to do this even when the confession of the accused has been recorded, as there are many cases to show that confessions are often retracted at the trial. MAHADU VITHOBA. 842

———**S. 209** (X *of* 1882)—*District Magistrate—Sessions Judge—Concurrent jurisdiction.* Where the accused is discharged by a First Class Magistrate under section 209, Criminal Procedure Code, and the District Magistrate has him re-arrested, but on his showing cause why the commitment should not be made, orders his discharge, the Sessions Judge, if he is of opinion that the evidence warrants a commitment, has concurrent jurisdiction, which he can exercise under sections 436 and 437, Criminal Procedure Code. KALU SANDU. 837

———Section 209, Criminal Procedure Code, 1882, commented on. VAJA RAIJI 746

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Cr. P. C. S. 209(2)(*X of* 1882)—*Magistrate—Inquiry—Practice.* Section 209(2) and section 253 (2) of the Code of Criminal Procedure relieve a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has already been deposed to that a criminal charge cannot be sustained. DHANJIBHAI v. PYARJI. 201

———(*Act XXV of* 1861, *Sec.* 163)—*Complaint—Dismissal—Examination of witnesses.* Before dismissing a complaint a Magistrate is bound under section 198 of the Criminal Procedure Code to examine every one of the witnesses called by the complainant. DAKA KESUR. 21

———**S. 210**(*Act X of* 1872, *Ss.* 193, 248, 342, 357)—*Commitment— Preliminary inquiry—Magistrate—Accused—Examination.* A commitment made without taking any evidence on a preliminary inquiry held to be illegal, and as such, annulled. SITA. ... 100

———(*Act X of* 1872, *S.* 196)—*Commitment—Charge—Committing Magistrate.* The drawing up of a charge must always follow the determination of a Magistrate to commit a case to the Court of Session, which determination duly expressed the Magistrate becomes *functus officio* as to that matter. Where, therefore, a Magistrate first drew up a charge, directing the commitment of the accused, and afterwards taking further evidence, discharged them, the High Court held that the order of discharge was illegal and that the case should be committed for trial by the Court of Session. MABI.... 161

———**S. 215**(*X of* 1882)—*Sessions Judge—Commitment—Offenders.* If a Magistrate commits a case to a Court of Session without having any jurisdiction over the offence or the offenders the commitment is clearly invalid, and the Sessions Judge, if satisfied by the evidence before him, on these points could, notwithstanding the commitment, discharge the accused. If, however, the illegality affects the procedure of the Magistrate and does not affect the jurisdiction of the Sessions Judges, a reference to the High Court under section 215, Criminal Procedure Code, is the only way to set aside a duly made commitment. LAGMA LAXAMANA. 922

Cr. P. C. S. 269. *Sanction—Magistrate—Committal to Sessions.* A sanction was given by a Sessions Judge for the prosecution of A, B and C under section 193, Indian Penal Code. The sanction for the prosecution of A was, on his application, revoked by the High Court. B was discharged after trial by a Magistrate but C was committed to the Court of Session for trial. On a reference by the Sessions Judge, that the sanction which was the same for all the accused having been found to be bad in law in the case of accused A, the committal of C be quashed by the High Court under section 215 of the Criminal Procedure Code:—*Held*, that "as a Magistrate after inquiry had found reasons for committing for trial on the merits the Court declines to quash the committal". KILA.... 718

———*Commitment — Joinder of charges—Sessions Court.* The commitment for trial in one and the same case of accused, some for the offence of robbery and the rest for the offence of receiving property stolen in that robbery cannot be said to be illegal, and cannot, therefore, be quashed by the High Court under section 215, Criminal Procedure Code. The Sessions Judge, however, can, in such a case, if it seems to him to be advisable, separate the charges and try the accused separately. RAGHU HARI. 915

———*Joint investigation — Illegality.* Where a Magistrate held a joint investigation in the cases of four accused persons and committed them for trial on charges under sections 211, 114, 465 and 193, Indian Penal Code, the High Court held the procedure illegal and prejudicial to the accused; and quashing his proceedings and the commitment directed him to enquire afresh into the offences. DAULATA DHONDI. 925

———(*Act X of* 1872, *Sec.* 197)—*Magistrate—Leave— Committal— Illegality— Hig Court.* A Magistrate about to go on leave exercises an improper discretion in committing to the Court of Session, a case properly triable by the Magistrate, merely on the ground that the witnesses for the defence are not in attendance, and that it would be inconvenient for his successor to commence the trial anew: but in so doing he does not commit any such illegality as will justify the High

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Court in quashing the commitment. SHOLAPUR SESSIONS JUDGE'S LETTER No. 838. ... 170

CR. P. C. S. 221(*XXV of* 1861, *s.* 234)—*Previous conviction—Proof.* In cases wherein a previous conviction subjects an accused person, if found guilty, to an additional or different punishment, the previous conviction should form the subject of a separate head of the charge and to this the accused person should be required to plead only, if he is convicted of the offence for which he has been under trial. If he admits the previous conviction that will suffice; but if he denies it, it should be proved by recording the finding in the previous case and the evidence of the jailor or other person to the identity of the accused person with the person previously convicted. TUKARAM. 52

———*Charge—Aggravating circumstances.* When an offence falls within the provisions of such a section as section 397 of the Indian Penal Code, which, on account of the existence of aggravating circumstances, provides a minimum punishment for the offence, the existence of such aggravating circumstances should be set forth in the charge, so that the accused person may know what it his to which he pleads guilty and the full effect of such plea; or in the event of his pleading not guilty, may know, what the material facts are, which he is called upon to rebut. MUKTA MANKA. 56

———**S. 227**(*XXV of* 1861, *s.* 244)—*Sessions Judge—Offence—Foreign territory—Act I of* 1849, *Secs.* 34. It appeared to a Sessions Judge on the trial of a case that the witnesses deposed that the offence had been committed in a foreign territory. He directed the committing Magistrate to obtain the orders of Government under Act I of 1849, section 3, and proposed on the receipt of an order under section 4 to amend the charge and continue the trial, reading over the proceedings already held to the accused, or at their option re-examining the witnesses :—*Held*, that the Sessions Judge's procedure was correct. POONJA KALA. 44

———**S. 233**(*X of* 1882)—*Appeal—Alternative conviction—Penal Code* (*Act XLV of* 1860), *Secs.* 379, 411. The accused was convicted of the offence of dishonestly receiving stolen property knowing it to be stolen, under section 411 of the Indian Penal Code; and the Appellate Court altered the conviction to one under either section 379 or section 411 of the Code :—*Held*, that the alternative conviction in appeal was illegal, the accused not having been charged with theft, and having had no opportunity of meeting such a charge. KRISHNA. 368

CR. P. C. S. 221. *Charge of one offence—Conviction of another.* The accused, having been summoned to answer a charge of storing wool, was convicted of storing cotton: —*Held*, that the conviction could not be upheld as the accused had no proper notice and no proper opportunity of answering the charge of storing cotton. NATHOO LALJI 529

———**S. 234** (*X of* 1882)—*Four offences.* Where the accused was tried, in contravention of section 234, Criminal Procedure Code, for four offences instead of three and convicted of all of them, the conviction and sentence for the fourth offence were reversed as illegal. J. I. ALMEIDA 212

———*Offence against different persons —Same trial.* A person charged with two offences of the same kind within the definition of the second paragraph of section 234 of the Code of Criminal Procedure can be tried for both the offences at one trial, although the offences are committed against different persons. DHONDI 331

———*Joint Sessions Judge—Joint trial —Practice.* The accused were tried at one trial by the Joint Sessions Judge of Ahmedabad on the following charges :—all the accused on a charge under section 401, Indian Penal Code; accused Nos. 3 and 4 on joint charges under sections 328 and 380, Indian Penal Code, accused No. 4 on two separate charges under section 411, Indian Penal Code: accused No. 1 on charges under sections 328 and 380 Indian Penal Code accused Nos. 1 and 2 on two joint charges under sections 328 and 380, Indian Penal Code. The Joint Sessions Judge tried all these charges together, as section 235, Criminal Procedure Code, seemed to him to favour such a procedure and as the accused did not object to his so doing :—*Held* (1) That the trial of all the accused on all the heads of

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the charge was opposed to section 234, Criminal Procedure Code; (2) But that though it was unnecessary for the Joint Sessions Judge to try the accused on the separate heads of charges under sections 328, 380 and 411, Indian Penal Code, it was not only permissible, but even necessary to record evidence under those heads in order to prove the charge, under section 401, Indian Penal Code. JIVA JETHA 509

Cr.P.C. S. 235(X *of* 1882),—*Separate charges—Distinct offences—Separate sentences.* When the accused is tried at one trial on two separate charges for two distinct offences, and convictions are recorded on both charges, separate sentences ought to be passed. PHAKEERA. 369

———*See* MUSE, BAGAS, DAULATA. 493, 925

———(*Act X of* 1872, *s.* 454 (3)—*Penal Code* (*Act XLV of* 1860), *Secs.* 457, 380—*House-broaking by night to commit theft and theft constitute one offence for the purpose of punishment—Separate sentences — Practice.* Under section 454, para 3, of the Code of Criminal Procedure, the offences of house-breaking by night in order to commit theft and theft in a dwelling house are, for the purpose of punishment, to be regarded as one; and therefore upon conviction of those offences a double sentence of imprisonment for one offence, and whipping for the other, cannot legally be inflicted. GOVINDA. 79

———(X *of* 1872, *Sec.*454)—*House-breaking by night in order to commit theft and theft Penal Code* (*Act XLV of* 1860), *Secs.* 379, 380, 457.—*Sentence.* There should either be one sentence for both offences, in a case of conviction of house-breaking by night in order to commit theft, and theft, not exceeding that which may be given by law for the graver offence; or separate sentences for each offence, provided that in the aggregate the punishment awarded does not exceed that which may be given for the graver offence. TUKAYA... 95

———(*Act X of* 1872, *Sec.* 454)—*Abduction—Theft—Double sentence.* The accused, with intent to steal, induced a boy, under twelve years of age, to go with him to a place where he dishonestly removed certain ornaments from off the boy's person. The Lower Court convicted him 1stly of abduction with intent to steal, and 2ndly of theft, and sentenced him, on the first head, to one year's rigorous imprisonment, and, on the second, to seventy-five stripes :—*Held*, that under section 454 of the Criminal Procedure Code, the double sentence of imprisoment and whipping was illegal. DADA. 135

Cr. P. C. S. 235(X *of* 1872, *S.* 454)—*Penal Code* (*Act XLV of* 1860) *Sec.* 71—*Sentence.* A man who rode a horse furiously and knocked down another man and his child, was convicted under sections 279 and 336 of the Indian Penal Code, and sentenced under the former to one month's rigorous imprisonment and under the latter to a fine of Rs. 20:—*Held*, that though the combined sentence was within the limit fixed by section 71 of the Penal Code, the case fell within section 454 (2) of the Code of Criminal Procedure which contemplated the passing of a single sentence only, and that the order in appeal substituting a single sentence equal in extent to the combined sentence was right. LALLU. 151

———(*XXV of* 1861)—*Joinder of charges—Adultery—Remarriage.* The charges of adultery and of marrying again during the life-time of her husband cannot be tried together at one trial. VITHALL. 4

———(*XXV of* 1861, *Ss.* 194, 467)—*Two accused—Joint trial—Separate trial.* The two accused were tried together and convicted of the offences under sections 467 and 193 of the Indian Penal Code. The High Court intimated to the trying Judge that in its opinion each of the accused should have been tried separately on the charge of giving false evidence, and it therefore annulled the conviction on that charge, but did not order a retrial as the punishment under the first head of the charge was sufficient to meet the requirement of the case. JEEVAJEE ABAJEE. ... 31

———**S. 235(1)** (X *of* 1882)—*Penal Code* (*Act XLV of* 1860) *Secs.* 71, 380, 457—*Convictions—Separate sentences.* An accused can, under section 235 (1) of the Code of Criminal Procedure, legally be tried at one trial for the offences of house breaking by night to commit theft and of theft and the separate convictions therefor are legal; inasmuch as though nothing contained in section 235, affects section 71 of the Indian Penal Code, still

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when the accused commits distinct offences which, when combined are not punishable under any single section of the Penal Code, section 71 does not apply to the case. KASHINATH. 228

Cr. P. C. S. 236(*X of* 1882) *Sch. V. No. XXVIII—Contradictory statements—Police officer—Alternative charge—Penal Code* (*Act XLV of* 1860) *Sec.* 72. An alternative charge framed according to Schedule V. No. XXVIII, section (2), clause (4) is not proper where a person is accused of making contradictory statements when examined by a Police officer under section 161, Criminal Procedure Code, and subsequently when examined by a Magistrate or a Court of Session. In such a case, if the two statements are regarded as so connected together as to form parts of one and the same transaction, section 235 of the Code should be applied to them. If they are regarded as unconnected, and it is doubtful whether the earlier or the later statement constituted the offence, section 236 should be applied. Separate heads of a charge should, therefore, be framed, imputing to the accused falsehood on each of the occasions on which he made the contradictory statements. If each of the statements is found to be false, conviction should follow on both heads of the charge. If a conviction is justified only on one or other of the heads, and it is uncertain on which of the two occasions falsehood was uttered, then section 72 of the Indian Penal Code directly applies. The judgment should, in that case, be framed in the alternative, and punishment inflicted for the less serious of the two offences. KARHAI 336

———(*XXV of* 1861, *s.* 382)—*Form* 11*th*—*Alternative findings—Practice and Procedure.* The Code of Criminal Procedure only contemplates an alternative finding when the facts are ascertained and it would follow beyond a doubt that the facts proved constitute one of two offences under one section of the Indian Penal Code; or when the evidence proves the commission of an offence falling within one of the sections of the Code and it is doubtful which of such section is applicable. Hence, where the accused was charged under two heads of charge with dacoity in each of two adjacent house and the Sessions Judge was unable to determine into which house he entered, it was held that he was wrong in finding him guilty upon an alternative finding. DEWJI 20

Cr.P.C. S. 237(*XXV of* 1861, *S.* 382)—*Alternative finding—False evidence.* An accused person was convicted of giving false evidence before the Session Court solely on the ground that his evidence before the Session Court differed from his evidence before the committing Magistrate. *Held*, that if the variance in his evidence was such as to justify a conviction, the finding should have been an alternative one under section 382 of the Code of Criminal Procedure. AMARIT SHAHAJI. 26

———**S. 237** (*XXV of* 1861, *Secs.* 56 *to* 59)—*Penal Code* (*Act XLV of* 1860), *Secs.* 395,412—*Charge—Conviction—Want of charge.* The accused was charged with committing dacoity under section 395 of the Indian Penal Code and found guilty under section 412 of the Code of receiving stolen property from the dacoits:—*Held*, that the convictions were bad as no charge under section 412 of the Indian Penal Code had been preferred by the Sessions Judge and the case did not fall within the provisions of sections 56 to 59 of the Code of Criminal Procedure. GOPALA PURSOO ... 34

———**S. 238** (*X of* 1882)—*Penal Code* (*Act XLV of* 1860), *Ss.* 380, 397, 456—*Judge—Jury—Charge of one offence—Verdict for another.* The accused were charged with and tried by the Sessions Court, under Section 397, Indian Penal Code, for committing robbery and using a deadly weapon (a sword) at the time of committing it and the jury returned a verdict of not guilty of the offence charged, but found accused No. 1 guilty of the offence of house breaking by night and theft in a dwelling house and accused No. 2 guilty of abetting those offences:—*Held*, that all the particulars constituting the minor offence of house-breaking by night and theft in a dwelling house and abetment of those offences were not included in the definition of robbery, the only offence with which the accused were charged. Therefore, under section 238, Criminal Procedure Code, the accused could not be convicted of those offences without a charge being framed. The verdict of the jury finding them guilty of those offences in the absence of

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such a charge was accordingly bad and should be reversed. DALA TALA ... 211

CR. P. C. S. 238. *See* BALU ... 293

——— *Penal Code, Ss.* 71, 380, 454—*Conviction—Sentence—Practice.* The accused were charged with the offence of house-breaking in order to the commission of an offence, and on a conviction by the Magistrate First Class, sentenced each to six months' rigorous imprisonment under section 454, Indian Penal Code, though the facts showed that they not only committed house-breaking in order to the commission of an offence, punishable with imprisonment but also committed theft in a dwelling house (section 380, Indian Penal Code).—*Held,* (1) that the law did not require more than a single conviction and sentence, the case being one of something done which fell under two penal sections and therefore one to which section 71, Indian Penal Code, applied. (2) that the accused could have been tried under two heads of charge; but this is not imperative only enabling. UGRA. 307

——— S. 239(*X of* 1882).—*Separate trials.* It is not legal to carry on a joint trial of two persons who are required to show cause why they should not execute bounds under section 109, Criminal Procedure Code. BAPU. 556

——— *See* GAIRA, DAULATA. 585,925

——— S. 240(*X of* 1882)—*Sessions Judge—Charges, more than one—Procedure.* Section 240 of the Code of Criminal Procedure applies to cases where more charges than one are made against an accused person. If he is convicted on one of these charges before the other charges are tried, such other charges may be withdrawn. But when the evidence bearing on all the charges has been recorded and the pleaders heard, it is the duty of the Sessions Judge under section 297 of the Code of Criminal Procedure, to sum up the whole of the evidence and the jury should then, under section 303, be required to return a verdict on all the charges. LENGO. ... 283

——— *Charge—Withdrawal—Concurrent sentences.* The accused were found guilty by the Jury of offences under sections 366, 380 and 323 of the Indian Penal Code, and the Judge passed sentence under section 366 only, the other charges being withdrawn:—*Held,* that the charges under sections 380 and 323 could not properly be withdrawn after the accused had been found guilty of them; and that concurrent sentences would have been proper in such a case. NADHARYA. ... 288

CR. P. C. S. 240. *Public Prosecutor—Withdrawal of charge.* The permission to withdraw one of several charges against an accused person, allowed by section 240 of the Code of Criminal Procedure, only applies to charges against the same accused in the same case and not to separate charges of distinct offences in different cases. SADIA. ... 362

——— *Charge—Separate cases.* Section 240, Criminal Procedure Code, only applies to charges in the same case and has no application to separate cases. GOVINDA. ... 977

——— S. 243(*Act XXV of* 1861, *s.* 269)—*Assault—Complainant—Absence—Dismissal of complaint—Complainant incarcerated in a criminal jail—Revival of proceedings—Good cause.* A person after preferring a complaint of criminal assault is incarcerated in a criminal jail for an offence and is then not able to appear on the day of hearing. The complaint is in consequence dismissed under the provisions of section 269 of the Code of Criminal Procedure. On a subsequent day the complainant appears and states the facts which in the opinion of the Magistrate constitutes a just and reasonable cause for his non-appearance on the appointed day:—*Held,* that under these circumstances, the case may be taken up and proceeded with again. VIRBHADRA. 95

——— S. 245 (*X of* 1882)—*Magistrate—Complainant and his witnesses—Examination—Acquittal.* When a Magistrate without examining the complainant and his witnesses, acquitted the accused, the High Court reversed the order of acquittal and directed the Magistrate to enquire into the case according to law. TOULMAN ... 539

——— S. 247 (*X of* 1872, *ss.* 205, 479)—*Complaint—Dismissal—Non-appearance.* The direction contained in section 205 of the Code of Criminal Procedure to dismiss a complaint on the non-appearance of the complainant is not applicable to cases falling under Chapter XXXV of the Code. Where, therefore, a

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sanction had been given by a Court to prosecute a person for resisting the authority of one of its bailiffs, it was held that the non-appearance of the bailiff did not justify a Magistrate in dismissing a complaint. RAMCHANDRA. 157

Cr.P.C. S.247 (*Act XXV of* 1861, *Sec.* 259)— *Complainant— Non-appearance —Dismissal of complaint.* The provisions of section 259 of the Code of Criminal Procedure do not apply to cases where an accused person is charged with an offence punishable with imprisonment exceeding six months and triable under Chapter XIV; a trying Magistrate therefore has no power to dismiss a complaint for an offence of voluntarily causing hurt in consequence of the non-appearance of a complainant. GOOLABCHAND 16

———(*Act XXV of* 1861, *Sec.* 259)— *Voluntarily causing grievous hurt—Want of prosecution—Dismissal of complaint—Subordinate Magistrate.* A Subordinate Magistrate has no power to dismiss a complaint for the offence of voluntarily causing grievous hurt on the ground that the complainant refused to proceed with the prosecution. JAGJIVAN... 23

———(*Act XXV of* 1861, *Sec.* 272)— *Acquittal—Assessors—Opinions.* When a judgment of acquittal is recorded under section 272 of the Code of Criminal Procedure it is not necessary to take and record the opinions of assessors. PARVATI. 35

———**S. 248** (*X of* 1882)—*Theft—Co-accused— Pardon— Magistrate.* A Magistrate having issued a warrant against on Manek Bai on a complaint of theft, on her appearance before him allowed the complaint to be withdrawn and made her a witness against Lilladhur, a co-accused in the same case:—*Held*, that the offence not being one in which a pardon could be tendered under section 337 of the Code of Criminal Procedure, or in which the Magistrate could permit the withdrawal of the complaint under section 248 of the Code, her evidence was not legally admissible. LILLADHUR. 461

———(*XXV of* 1861, *Sec.* 271)—*Complaint —Withdrawal.* Where an offence charged is punishable with imprisonment exceeding six months and triable under Chapter XIV, section 271 of the Code of Criminal Procedure does not apply, and a complaint alleging the commission of such an offence cannot be withdrawn. JEENKA. 17

Cr.P.C. S. 250 (*X of* 1882)—*False complaint — Municipal servant — Sanction of Municipality—Compensation.* The accused was charged, under the sanction of a District Municipality and on a complaint made by a Municipal peon, with the offence of easing herself within the Municipal limits in a prohibited place. The Magistrate who tried the case, acquitted the accused and ordered the complainant, under section 250 of the Code of Criminal Procedure, to pay to the accused Re. 1 only as compensation. The District Magistrate, on the authority of *Keshav Lakshman* referred the case to the High Court for reversal of the order of compensation:—*Held*, that the case differed from the one cited, as there the complaint was preferred by a Judge acting judicially. An executive body cannot authorize a servant to prefer a wrongful complaint and so screen the complainant from the legal penalty BHIMA. 309

———*Penal Code, s.* 147, 160—*Assault—Affray— Magistrate—Conviction— Complainant.* The complainant charged some persons with assault. The Magistrate, after taking the evidence, acting under section 250 of the Code of Criminal Procedure, and without altering the previous charge or framing a new one, convicted the accused and also the complainant under section 160 of the Indian Penal Code:—*Held*, that the conviction of the complainant was illegal and that separate proceedings ought to have been taken against him. KISSAN MALHARI. 403

———*Compensation — Order — Appeal.* The Code of Criminal Procedure makes no provision for an appeal against an order passed under section 250 of the Code. NAGYA 409

———*Withdrawal of complaint—Acquittal—Compensation.* As section 250 of the Code of Criminal Procedure applies only to acquittals under section 245 or section 247 of the Code, compensation cannot be awarded to an accused person acquitted under section 248 upon a withdrawal of the complaint. MORE KRISHANA *v.* YESHWANTRAO 462

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Cr. P. C. S. 250(*Act X of* 1872, *s.* 209) —*Compensation—Dismissal—Acquittal—Complaint.* The provisions of section 209 of the Code of Criminal Procedure, as to award of compensation on dismissal of a complaint, do not apply to an adjudication of an acquittal. JEKISON 83

——— **S. 251**(*X of* 1882)—*Warrant case —Right of reply—Public Prosecutor—Practice.* So far as the trial of warrant cases is concerned, there is no provision in the Criminal Procedure Code, under which the accused is asked if he means to call witnesses or not. After the charge is framed, the accused is called on to enter on his defence, and to produce his evidence, but he is not asked whether he means to call evidence. The right of reply would seem, therefore, to depend, not on what may be said but on what is done, and if no evidence is produced, there should be no right of reply by the Prosecutor. W. E. LAPPREY. 938

——— **S. 253**(*X of* 1882)—*Magistrate —Warrant case—Non-compoundable offence—Withdrawal of complaint—Discharge.* The order of a Magistrate in a warrant-case permitting the withdrawal of a complaint of a non-compoundable offence is equivalent to an order of discharge under section 253, Criminal Procedure Code. MOTIDAS 191

———*See* DHANJIBHAI *v.* PYARJI... 201

———*See* BALKRISHNA 328

———*Discharge—Acquittal— Magistrate.* There is nothing to prevent a Magistrate after he has once discharged an accused under section 253 of the Code of Criminal Procedure from inquiring again into the case against him. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous inquiry, just as before. But all Magistrates, and especially the one who formerly discharged the accused, are bound to exercise due discretion, to take that discharge into account, and to avoid any such oppressive proceedings as may either expose them to punishment under section 219 or section 220, Indian Penal Code, or to a civil action on the part of the accused. When proceedings are sent to a Magistrate under section 349 of the Code of Criminal Procedure, the whole case is opened up for him to deal with it according to his discretion. BAPUDA. 350

Cr. P. C. S. 253(*X of* 1872, *s.* 215)— *Illegal arrest—Police—Magistrate—Discharge—Magistrate cannot discharge an accused illegally arrested by the Police, without taking evidence against the accused.* A Magistrate is not justified in discharging an accused person, merely because he has been illegally arrested by the Police without a warrant issued on complaint for a non-cognizable offence. He cannot in disposing of the case pass an order of discharge, (section 215 of the Code of Criminal Procedure) until he has taken the evidence against the accused. SANGAPA. 13

———*Subordinate Magistrate—Accused —Discharge—Improper discharge—District Magistrate—Powers—Procedure.* When a Magistrate of the District finds that a Magistrate subordinate to him has improperly discharged an accused person under section 215 of the Code of Criminal Procedure, his proper course is, not to refer the proceedings to the High Court under section 296, but to take up the case under section 142, and, if need be, to refer it under section 44 for trial. SIDYA....76

———*Discharge—Further evidence—Prosecution, revival of.* A discharge under section 215, Criminal Procedure Code, does not bar the revival of a prosecution for the same offence when further evidence is available BUDHYA. 145

———(*Act X of* 1872, *Sec.* 215, *Exp.* 3.) —*Accused—Discharge.* Explanation 3 of section 215 of the Code of Criminal Procedure does not prevent the discharge of an accused person, if all the witnesses named for the prosecution, who are forthcoming and accessible, have been examined. KALADGI MAGISTRATE'S LETTER No. 597.... 121

——— **S. 254**. *See* FAKIRA. ... 499

——— **S. 256**(*X of* 1882)—*Warrant case—Summary trial—Accused, naming his witnesses—Charge, framing of.* To a warrant case tried summarily, the rules about warrant cases apply, under section 262 of the Code of Criminal Procedure. In such a case, though

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a *formal* charge need not be framed, the accused person cannot be called dilatory if he delays to name his witnesses until he has heard the evidence for the prosecution, and found that the Magistrate considers the evidence a substantial basis for charging him. KERU. 761

CR.P.C. S. 257(*X of* 1882)—*Witnesses—Processes unserved—Adjourn, refusal to—Magistrate—Discretion.* Processes against certain witnesses of the accused having remained unserved, the Magistrate refused to adjourn the case on the ground that the witnesses would give the same evidence as certain others upon whom he could not rely:—*Held*, reversing the conviction, that the Magistrate was bound to assist the accused in enforcing the attendance of his witnesses in the absence of any such reason as is mentioned in section 257, Criminal Procedure Code. SHAMSHERKHA. 894

———*Charge—Accused—Cross-examination—Prosecution witness—Magistrate.* A Magistrate, trying an offence under section 323, Indian Penal Code, refused an application to re-summon the complainant and his witnesses for cross-examination, made by the accused a day after the charge had been framed against them, on the ground that it was evidently made for delaying the case, and convicted and sentenced them:—*Held*, that the trying Magistrate should re-open the case from the stage where he made the formal charge and should allow the accused such opportunities of calling and recalling witnesses as the law gives them. PURSHOTUM... 723

———*Prosecution witnesses—Cross-examination—Accused—Magistrate.* Where prosecution witnesses are subjected on behalf of the accused to a very lengthy and strict cross-examination before the charge is framed, the Magistrate has a discretion to refuse an application by the accused, after the charge is framed, to recall them and further cross-examine them. GOVIND VINAYAK APTE 930

———**S. 258**(*X of* 1882)—*Magistrate—Warrant Case—Charge framing of—Sessions Court, Magistrate must treat with respect—Inspection of the place of offence.* Although a Magistrate has, in a warrant case, thought fit to frame a charge, he is not required to convict the accused person merely because the latter does not produce any rebutting evidence. He is bound to acquit if, at the time of giving judgment, he has reasonable doubt of the guilt of the accused. The Magistrate, being subordinate to the Court of Session, must treat its judgment with respect, and be guided by them, on such matters of procedure as arise on section 257 of the Code of Criminal Procedure, or as relate to the acts of the Magistrate himself. There is no objection to a Judge or Magistrate inspecting the place of an offence; but it is usually desirable that both the parties or their pleaders should have opportunity to be present, to draw his attention to facts if they choose, and thus prevent him drawing wrong inferences. CHANBASAPA MADIAPA ... 854

CR. P. C. S. 259(*X of* 1882)—*Magistrate—Warrant case—Charge framed—Day of hearing—Absence of complainant—Dismissal of complaint.* A Magistrate having framed a charge against an accused person in a warrant case and appointed a day for hearing, if the complainant does not appear on that day he should hear the evidence for the defence and then decide whether the accused is, or is not, guilty; but that he cannot acquit the accused under section 258 of the Criminal Procedure Code, or discharge him under section 259 of the Code, without hearing evidence for the defence, merely on the ground that the complainant did not appear to prosecute the charge on the day fixed. NANAJI. ... 524

———*Magistrate—Charge—Discharge.* Where in a warrant case, the Magistrate believes the evidence, it is his duty, on arrival at the stage to which section 254 of the Criminal Procedure Code applies, to frame a charge, it is not competent to him to discharge the accused under section 259 merely on the ground that the complainant did not appear on the day fixed. MHATARJI DARKU. ... 847

———**S. 260**—*Magistrate—Summary trial.* Where the offence charged in a complaint is one under section 325, Indian Penal Code, and all the surrounding circumstances go to show that grievous hurt is actually caused, the trying Magistrate is not justified in treating the case in a summary way for an offence under section 323, without recording any reason why he treated the offence as one under

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section 323 and tried it in a summary way or recording a statement that he discredited any of the allegations made in the complaint HUSSINSAHEB. 988

CR.P.C.S. 260. (*Act X of 1882*)—*Presidency Magistrate—Warrant Cases—Procedure.* The provisions of Chapter XXII of the Criminal Procedure Code do not apply to trials before Presidency Magistrates. A warrant case must be tried by a Presidency Magistrate in the manner provided by Chapter XXI of the Code, subject only to the special provisions of section 362 as to the method of taking down the evidence. ABDUL.... 539

——— *Construction.* In section 260, Criminal Procedure Code, clauses (*b*) to (*k*) being precisely expressed are not to be governed by clause (*a*), but they may be given their full effect. BHAVDYA. 600

———*Indian Penal Code, ss.* 182, 211—*Magistrate—False charge.* A First Class Magistrate cannot give himself jurisdiction to try an offence under section 211, Indian Penal Code, by treating it as an offence under section 182, of the Code. LAKSHMAN. ... 670

——— *Summary trial—Magistrate—Village Kulkarni—"Forthwith."* Where a Village Kulkarni is charged with an offence under section 176, Indian Penal Code, the Magistrate would use a right discretion in not trying the case by summary procedure. The word "forthwith" in the first clause of section 45 must be construed with reference to the object of the enactment. WAMAN DHONDDEV.... 784

———**S. 262**—*Summary trial—Judgment—Appeal cases.* In summary trials, the procedure for summons-cases and warrant-cases provided by section 262, Criminal Procedure Code, should be followed, and in a case in which an appeal lies a judgment should be recorded, containing what section 264 of the Code requires. HUSSEIN. 725

———*Summary trial—Magistrate*—Watandar Kulkarni—*Record of summary trial—High Court—Revision.* Where a case is complicated and a conviction may entail further serious consequences, as for instance, where the charge is under section 202, Indian Penal Code, against a person who is a *Vatandar Kulkarni*, a summary trial is not the procedure which a Magistrate, in his discretion, should use. The record of a summary trial should not be so meagre as to deprive the High Court of the power of judging whether the finding is correct, legal or proper, when the case comes before it in revision. HIRA GOPAL 778

CR. P. C. S. 263. *See* ABDUL, HARI GOPAL 539,778

———**S. 264.** *See* HARI GOPAL... 778

———**S. 269**—*Complaint—Dismissa Application—Revival—Magistrate.* A complaint once dismissed under section 269 of the Code of Criminal Procedure should not as a rule be revived. It may however be revived, if the complainant can give satisfactory reasons for his absence, in which case he should make his application to the Magistrate by whom his complaint was dismissed and not to another Magistrate. DAYA RAGH... 56

———*Sessions Judge—Jury—Assessors.* A Sessions Judge tried by Jury an accused on two charges—one of which was triable and the other was not triable by Jury, and dissenting from the verdict of the Jury referred the whole case to the High Court:—*Held*, that he should have first recorded the opinion of the Jury as assessors regarding the charge not triable by Jury, and that the High Court could treat the verdict on the latter charge as valid. DEVU 600

———(*Act XXV of* 1869, *Sec.* 360)—*Session Judge—Evidence—Truth.* In every case it is the duty of the Session Judge not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the truth of the matter before him. TUKARAM BHAWANI 53

———**S. 271** (X of 1882)—*Offence charged not proved—Conviction—Practice of.* A charge of murder on which the accused was tried, was not proved, but the Court convicted her of the offence of concealment of birth which it considered was admitted by her in her examination by the Court:—*Held*, that such conviction was illegal, and that a charge of concealment of birth should have been framed and the accused tried thereon. SARWEL... 386

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Cr. P. C. S. 271. *Sessions Judge—Accused's statement—Plea of guilty.* When there is a clear *prima facie* case of murder, a Sessions Judge cannot legally, without trying the case, accept a statement made by the accused, who is charged with the offence of murder, as sufficient to establish his plea of guilty of the offence of culpable homicide not amounting to murder on the ground of grave and sudden provocation, and convict and sentence him accordingly for such offence on his own plea. MALHARI 410

——S. 271 (2) (X *of* 1882)—*Sessions Judge—Alternative plea.* An accused should never be called on to plead in the alternative, but separately to each of the heads of a charge. LAKSHMAN. 327

——S. 273 – *District Magistrate—Reference.* A Magistrate of the District has no authority under 273 of the Code of Criminal Procedure to refer a case for trial to a Magistrate Full Power. BABON ANTONE. ... 32

——S. 274 (*Act XXV of* 1869, *Sec.* 363 — *Accused — Plea — Silence of accused.* When an accused person makes no answer to the inquiry whether he is guilty or has any defence to make, an inquiry should be made whether that person is obstinately mute or dumb or *ex visitatione Dei.* If he be found to be obstinately mute, a plea of 'not guilty' should be recorded and the trial proceeded with. If found to be dumb *ex visitatione Dei*, an inquiry should be made as to whether he is sane or insane and capable of being tried; if found sane, a plea of 'not guilty' should be recorded and the trial proceeded with; but if found to be insane, the procedure laid down in Chapter XXVII of the Code of Criminal Procedure, should be followed. SATTYA. 19

——S. 285 (X *of* 1882)—*Sessions Judge—Assessors.* A Sessions Judge in a trial with the aid of assessors allowed one of the two assessors to absent himself for one of the days on which the trial proceeded, and to return on the following day:—*Held*, that the procedure adopted by the Sessions Judge was contrary to the intentions of sections 285 and 295 of the Code of Criminal Procedure, and the Judge ought either not to have given leave of absence, or should have adjourned till a day when both the assessors could attend. PISO.... 695

Cr.P.C.S. 286—*Evidence—All persons present at the commission of the offence should be examined.* Every witness who was present at the commission of the offence ought to be called; even if the witnesses give different accounts it is fit that the jury should hear their evidence so as to enable them to draw their own conclusions as to the real truth of the matter. The duty of producing the evidence *prima facie* devolves on the Public Prosecutor; and though this burden of the prosecution is not to be thrown on the Judge there is an obligation upon the Judge not merely to receive and adjudicate upon the evidence submitted to him by the parties, but also to inquire to the utmost into the truth of the matter before him. DHAMBA. ... 581

——S. 288—*Evidence— Committing Magistrate.* Although, section 288, Criminal Procedure Code, allows the evidence of a witness taken before a committing Magistrate to be treated as evidence in the case in the Sessions Court, yet, when that evidence has been retracted in the latter Court, it would be very unsafe to act upon it, unless it is clearly proved to be true by some independent evidence. MALLAYA. 966

——(X *of* 1882)—*Witness—Deposition before committing Magistrate—Sessions trials—Admissibility — Cross examination of the deposition—Evidence Act* (*I of* 1872), *Secs.* 145, 155—*Contradicting a witness—Statement in writing — Cross-examination.* When a Sessions Judge admits a deposition of a witness taken before the Committing Magistrate as evidence in the trial before a Sessions Court, under section 288, Criminal Procedure Code, he should, in his proceedings, distinctly note that he has done so and give the deposition a number in his proceedings and translate it, or the material portions of it, in his English minute of the proceedings. When a counsel or pleader cross-examines a witness, with reference to a previous deposition, the parts thereof to which the cross-examination is directed should be set out in the Judge's minute of the proceedings. The deposition itself need not, in such a case, be made a portion of the evidence in the Sessions Court.

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unless the Government Pleader desires that it should be so recorded or the Sessions Judge adopts it under section 288, Criminal Procedure Code. The pleader or counsel for the defence of the accused may introduce, as part of his own evidence, a previous deposition made by a witness, and in this case, the deposition must be numbered and translated in the minute of proceedings. The prosecuting counsel or pleader has a right in such a case to question the witness as to apparent contradictions and discrepancies between the two statements. As to a contradictory statement in writing, the old rule was that the cross-examining counsel must produce the document as his evidence and have it read to found questions on it. But now a witness may be cross-examined on evidence, previously given by him without the introduction of the previous deposition as evidence by the cross-examining counsel. But before contradicting the witness in this way, his attention is to be called to the part of the writing that is to be used for this purpose. The Judge may require production of the document and then use it at his discretion. A cross-examination is necessary in order to *introduce* the alleged contradictory writing. GOVERDHAN.... 343

CR. P. C. S. 288. *Evidence—Conviction.* Section 288, Criminal Procedure Code, allows evidence taken before committing Magistrate to be treated as evidence at the trial in the Sessions Court, but a conviction based on such evidence alone, specially when it was retracted before the Sessions Court, would not be justified. SUBBAYA 894

———*Accused—Statement—Cross examination—Evidence Act (I of 1872), Sec.* 145. Section 288 of the Code of Criminal Procedure does not extend to Courts of Magistrates nor to despositions not taken in presence of the accused: it is a section requiring very careful use by Courts of Session, and its real scope is explained in *Reg* v *Arjun*. Such statements may be recoded after cross-examination upon them of the witnesses who made them, which would reveal discrepancies, or used, under section 145 of the Indian Evidence Act, as a basis of cross-examination. RAMDIN 928

———**S. 295.** *See* PISO 695

CR. P. C. S. 297(*X of* 1882)—*Evidence Act (I of* 1872), *Sec.* 114, *Ill.* (*b*)—*Evidence—Accomplice—Corroboration—Jury—Sessions Judge.* In a trial by Jury, the Sessions Judge should in his direction add to what section 114, Illustration B. of the Indian Evidence Act says of an accomplice, the direction about corroboration, as to each prisoner, as laid down long ago in *Reg.* v. *Imam.* DHONDI RAOJI 848

———*See* MAHADHU 720

———*Evidence Act (I of* 1872), *Secs.* 24-29—*Sessions Judge—Charge to Jury.* In trials by Jury, the Judge, in his charge, should not state his own view of important matters of fact so positively as to leave the jury no loop-hole for taking any other view. Section 297, Criminal Procedure Code, requires the Judge to sum up the evidence for the prosecution and the defence, but section 299 leaves it to the jury to decide which view of the fact is true. The duty of the Judge is to lay down the law authoritatively to the Jury and to decide on the admissibility of evidence, MENGA BUDHIA. 748

———(*Act XXV of* 1861, *s.* 379) *Maturity of understanding—Question of fact—Jury—Judge.* The question whether an accused person (a child above seven years of age and under twelve) has sufficient maturity of understanding to judge of the nature and consequences of his conduct is a question of fact upon which, in cases tried by a jury, the accused is entitled to the verdict of the jury. The omission of the Sessions Judge to refer this question to the Jury is a ground for setting aside the conviction, and for ordering a new trial. IMMAM. 27

———**S. 298** (*X of* 1882)—*Retracted confession—Sessions Judge—Charge—Jury—Indian Evidence Act (I of* 1872), *Sec.* 24. When a retracted confession of an accused is tendered in evidence at the trial of a case tried by a jury, it is the duty of a Judge to determine the question of its admissibility, under section 298 of the Criminal Procedure Code and section 24 of the Indian Evidence Act. Where a confession is retracted by the accused on the ground that it was induced by torture, and especially the confession, after admission, is to be taken into consideration

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against his co-accused under section 30 of the Indian Evidence Act, and the accused has marks of violence on his body, it may be the proper course for the Judge to take evidence about the circumstances before admitting the confession in evidence. In case of a retracted confession, if the committing Magistrate finds marks of violence on the body of the accused, he should ascertain from the Medical Officer in charge of the Jail whether, on arrival of the accused there, the marks of violence on the body of the accused were then visible. Section 418, Criminal Procedure Code, gives finality to the verdict of a jury when there has been no error of law nor misdirection and when the Judge has concurred with the majority of the Jury. BALAPPA. 730

CR. P. C. S. 298. *Evidence Act (I of 1872), Sec. 114—Accomplice witnesses—Corroboration—Practice.* In a trial by Jury, the Judge ought, in his charge, to direct them that the corroboration of an accomplice or accomplices ought to be that which is derived from unimpeachable or independent evidence, as distinguished from that derived from the earlier statements of the same accomplice or the statements of other accomplices; and to point out the danger of convicting any one of several prisoners charged at the trial, about whose *identity*, as one of the persons committing the crime, the accomplice testimony is not corroborated. The accomplice often knows all the circumstances, and may speak truly about them, and yet may put some innocent man in his own place or that of some other guilty person. GENU GOPAL. 840

——— *Evidence Act (I of 1872), Sec. 24—Confessions—Sessions Judge—Jury.* In trial by Jury, it is the duty of the Sessions Judge to determine whether confessions retracted at the trial are admissible. If he finds them to be irrelevant under Section 24 of the Indian Evidence Act, he should so direct the Jury. If there is no evidence on the record showing that they are invalid by reason of any improper inducement or threat, they should go to the jury with a direction that in the absence of evidence it is not to be presumed that they are inadmissible. GANU MATHAJI. ... 842

——— *See* RUPYA, TULSAJI.... 245,491

CR. P. C. S. 299 (X *of* 1882)—*Sessions Judge—Jury—Law to be taken from the Judge and the jury cannot consult commentary on the Act—Questioning the Jury.* The jury are not entitled to resort to a commentary on the law during their consultation about the verdict. The different duties of the Judge and the jury are made clear in sections 298 and 299 of the Code of Criminal Procedure: the jury should take the law from the Judge. Questions put to a Jury by the Sessions Judge demanding their reasons for acquitting the accused on the charge on which the jury have delivered an unanimous verdict, without any uncertain sound, exceed the limits of questioning which the law contemplates: as to the charge where the jury were not unanimous it was open to the Judge to require them, under section 302 of the Code of Criminal Procedure, to retire for further consideration, the Judge giving at the same time further directions on matters of law. BHARMIA.... 736

——— *See* MENGA BUDHIA. 748

——— S. 301 (X *of* 1882)—*Judge—Jury—Verdict—Summing up.* In cases tried by jury, the Code of Criminal Procedure does not contemplate the reception of a verdict from the jury without their having the assistance of a summing up by the Sessions Judge since a careful summing up may often change the hasty and superficial impressions of a jury and the parties are entitled to this service. ABDUL KARIM. 288

——— S. 302 — *Jury—Verdict—Sessions Judge—Second verdict.* The accused was tried before a Court of Sessions on charges of murder and of theft in a dwelling house. At the conclusion of the trial the jury by a majority of 4 to 1 returned a verdict of not guilty of murder but guilty of culpable homicide not amounting to murder. The jury were then asked by the Sessions Judge to consider whether the accused intended to cause death for the purposes of section 304, Indian Penal Code, and the jury after this became unanimously of opinion that the accused was guilty of murder and the Sessions Judge accepted this verdict, convicted the accused of murder and sentenced him to transportation for life:—*Held*, (1) that the second verdict was merely a reply to the point which the jury were asked to consider:

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2), that the offence proved fell under the first clause of section 304. (3), that the second verdict could not stand, as all that the Judge had wished the Jury to consider was, which of the two classes of offences under section 304, Indian Penal Code, the majority of the jury had found the accused guilty of, and they had, therefore, no power to reconsider the whole case, and bring in an unanimous verdict of guilty of murder, an erroneous verdict not having been delivered by accident or mistake such as would entitle them to amend under section 304, Criminal Procedure Code, and the Judge not having asked them to reconsider this first verdict under section 302 of the Code. CHUNILAL VITHAL... 983

Cr. P. C. S. 303 (*X of* 1882)—*Judge—Jury—Questions.* In cases tried by jury it is inexpedient to put a series of questions to the jury unless when called on for their verdict on the different heads of charge, they find themselves in difficulties which have to be resolved in that way. SIDA. 289

———*See* ABDUL RAZAK. 710

———*Sessions Judge — Charge—Jury—Verdict.* In a trial by the Jury, the Sessions Judge ought to call on the Jury under section 303 of the Code of Criminal Procedure, to return a verdict on each one of the heads of charge. If the trial is for murder of two persons, and the jury return a verdict of guilty, the Sessions Judge ought to ascertain whether the verdict relates to the killing of one or the other, or both. BERKIA MANKIA... ... 746

———**S. 307** (*X of* 1882)—*Sessions Judge—Jury—Verdict—Acquittal— Reference —High Court.* Where the Sessions Judge refers a case to the High Court under section 307, Criminal Procedure Code, in which the jury has returned a verdict of acquittal, the High Court has to consider whether from the evidence it is so convinced that the jury ought to have convicted the accused as to take upon itself the responsibility of deciding differently from those to whom the decision was primarily entrusted by law and without any appeal in ordinary cases. VITHAL. 626

———**S. 307** — *Appeal— Judgment — High Court.* No appeal lies to the High Court from its own Judgment passed under section 307, Criminal Procedure Code. ADVEPPA. 691

Cr. P. C. S. 307. *Evidence Act* (*I of* 1872), *Sec.* 145—*Judge—Jury—High Court—Sessions Judge.* In a reference under section 307, Criminal Procedure Code, the High Court is bound to accept the opinions of the Judge and the Jury where they agree but it is not open to it to believe evidence which both have disbelieved. Where a Sessions Judge read to the Jury the evidence of witnesses taken before the committing Magistrate, and it did not appear that that evidence was ever read over to the witnesses, and the depositions were not recorded in the trial before the Sessions Court, the High Court drew the Judge's attention to the provisions of section 145 of the Evidence Act and asked him to note for his future guidance that, when he admits such statements in evidence, he should record them as exhibits in his own proceedings. SOMA DALJI... 924

———**S. 309**—*Sessions Judge—Several offences, some triable by Jury and some by assessors—One trial—Jurors as assessors.* When an accused person is charged at the same trial with several offences, of which some are and some are not triable by jury, and, with respect to the heads of charge on which the Sessions Judge convicts, the jury became assessors, it is the duty of the Judge, under section 309 of the Code of Criminal Procedure, to pronounce a judgment containing the particulars specified in section 367 of the Code. A reference to the heads of charge to the jury is not a sufficient compliance with the requirements of the section. DATTU. 426

———**S. 321** (X *of* 1882)-*Sessions Judge —Holding the Session at another place.* The Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi, instead of at Karwar, for the Sessions of September 1886. *Held* :—Assessors can only be chosen from the list prepared under section 321, Criminal Procedure Code, which can only be revised once a year (section 325, Criminal Procedure Code). The Court therefore, declined to grant the permission asked for, there being no Assessors available for Sessions at Sirsi. KARWAR SESSIONS JUDGE'S LETTER. 304

———**S. 326** (*Act X of* 1872, *Sec.* 407) —*Sessions Judge—Sub-Judge in charge—Precept.* The duty of issuing a precept,

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which is imposed on the Court of Sessions by section 407 of the Code of Criminal Procedure, cannot legally be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Sessions. KARWAR SUB-JUDGE'S LETTER No. 646. 148

Cr. P. C. S. 335. *See* BHAGYA. ... 750

——— **S. 337**—*Penal Code, Sec.* 193—*Contradictory statements—Sanction to prosecute—Tender of pardon.* The accused was charged, under section 193 of the Indian Penal Code, before the Assistant Sessions Judge of Ahmedabad, with intentionally giving false evidence in respect of two contradictory statements, one of which was made in 1883 in the case against Bhaga, who were charged with house-breaking by night, and the other in 1885, in the course of the trial of Bhopta and Lila for house-breaking by night. The Magistrate acquitted the accused for want of the necessary sanction:—*Held*, (1) that if the case was not of the kind contemplated in section 337 of the Code of Criminal Procedure, then it was not competent to the Magistrate who made the preliminary inquiry in 1883, to tender a pardon to the accused in the present case, who was one of the accused in the former case, or to examine him as a witness; and the deposition of the present accused, recorded in that case, could not be used against him in a manner in which it was now sought to be used. He could only, in that event, be charged with giving false evidence in the case of 1885: (2) that, if, on the other hand, a pardon was legally tendered to the accused in 1883, then proper sanction would be necessary for the present prosecution on each branch of the alternative charges; and in respect of the statement made in 1885, the sanction of the High Court would be necessary under section 339 of the Code of Criminal Procedure. GOVERNMENT OF BOMBAY *v.* DALA JIVA. ... 224

——— *Pardon—Conditional pardon.* One of the accused was tendered a pardon on condition that he should profess to have been present when the death occurred and to have personal knowledge of the circumstances under which the offence occurred:—*Held*, that such a condition could not be attached to a tender of pardon as the only condition which the law allows is stated in section 337, Criminal Procedure Code; and that the law should be so worked that the temptation to the accomplice to strain the truth should be as slight as possible. YAKUB... ... 612

Cr. P. C. S. 337 *See* LILLADHUR. 461

——— **S. 338.** *See* BHAGYA. ... 750

——— **S. 339** (*X of* 1872, *s.* 349) *Tender of pardon—Breach of conditions—Trial.* The accused accepted the tender of a pardon from the committing Magistrate, and gave evidence before the Sessions Court; but as the Sessions Judge and assessors considered that he had wilfully concealed essential facts, the Sessions Judge at once ordered him to be placed in the dock and convicted him on his own plea of guilty:—*Held*, that the conviction was illegal and must be quashed, as the Sessions Judge was not competent to take cognizance of the offence without a commitment as directed under section 349 of the Criminal Procedure Code. KUSHYA. 119

——— **S. 340**—*Magistrate—Mukhtyar—Accused—Appearance.* The applicant applied to the High Court to set aside an order of a First Class Magistrate refusing to allow him to defend an accused in a case before him as a Mukhtyar:—*Held*:—To refuse or allow the appearance of a Mukhtyar for an accused person is entirely within the discretion of the Magistrate concerned. VANKATESH. ... 314

——— (*XXV of* 1861, *S.* 432)—*Accused—Agent—Choice of agent—Criminal Courts.* Section 432, Criminal Procedure Code, entitles a prisoner to authorise any person to be his agent in any criminal Court. RAMCHANDRA. 1

——— (*XXV of* 1861, *Sec.* 432—*Vakil—Accused—Appearance—Magistrate.* A Magistrate has no power under section 432 of the Code of Criminal Procedure to forbid a duly qualified pleader to appear for the accused. DAJEE MANSUKHRAM 25

——— (*XXV of* 1861, *Sec.* 432)—*Appellant—Agent—Appeal Court.* The provisions of section 432 of the Criminal Procedure Code do not apply to an Appellant. The Appellate Court is bound under sections 417 and 419 of the Code to hear an agent on behalf of an appellant. BECHAR PITAMBER ... 29

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Cr. P. C. S. 340. (*X of* 1872, *Sec.* 186) —*Deaf and dumb—Practice.* Section 186 of the Code of Criminal Procedure is intended to provide for cases in which the accused person is deaf and dumb, or from ignorance of the language of the country and the want of an interpreter is unable to understand, or make himself understood: and in such cases the High Court would order the prisoner to be detained during Her Majesty's pleasure. HUSSEIN. 151

———(*X of* 1872, *Sec.* 186)—*High Court—Reference—Committal—Conviction.* Under section 186 of the Code of Criminal Procedure, 1872, it is necessary that there should have been a committal or conviction before a reference is made to the High Court. TEIKAM. 180

———**S. 341**(*X of* 1882)—*Dumb and deaf accused—Magistrate—Submission of the case to High Court.* In submitting a case to the High Court under section 341, Criminal Procedure Code, the Presidency Magistrate must state his view of the conduct of the accused and must take some evidence regarding the previous history and habits of the accused. REUBIN SAMUEL. ... 696

———*Reference--Dumb man—Conviction.* Section 341, Criminal Procedure Code, becomes applicable only after there is a conviction. DUMB MAN.... 836

———*Dumb man—Magistrate—Procedure.* Section 341, Criminal Procedure Code, does not apply until there is a conviction. To make the section applicable, the Magistrate must come to a definite opinion whether the accused can be made to understand the proceedings; and this opinion may be formed upon evidence. DUMB MAN. ... 897

———**S. 342**—*Trying Magistrate—Accused—Examination—Evidence Act* (*I of* 1872), *Secs.* 21, 25. A trying Magistrate examined the accused under section 342 of the Criminal Procedure Code, prematurely, at a time when no evidence, sufficient to connect them with the crime with the commission of which they were charged has been recorded against them:—*Held*, that although the Magistrate was wrong in examining the accused under section 342, when it was impossible that they could have been questioned for the purpose of enabling them to explain any circumstances appearing in evidence against them, nevertheless their statements actually made cannot, if apparently, freely and voluntarily given, be rejected as inadmissible in evidence on account of this irregularity of procedure; and that *prima facie*, as admissions, these statements are relevant under section 21 of the Indian Evidence Act, 1872, there being no other section to exclude them, section 29 of the Act going to show that the mere fact of a statement being made in answer to questions, is by itself no ground for its exclusion. NARAYEN 479

Cr. P. C. S. 343. *Accused—Examination.*—Section 342 of the Code of Criminal Procedure is imperative and not permissive on the point that the Court must question an accused generally on the case after the witnesses for the prosecution have been examined and before he has put on his defence. MANCHI. 625

———*Confirmation of sentence—Accused, questioning of—Special verdict—Judge—Questioning the jury—Practice and Procedure.* In cases sent up to the High Court for confirmation of sentence of death under section 374 of the Criminal Procedure Code, it is the practice of the Court to be satisfied, on the facts as well as the law of the case, that the conviction is right, before it proceeds to confirm the sentence. Section 342, Criminal Procedure Code, imposes on the trying Court an imperative duty of questioning an accused person for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Where, instead of the ordinary verdict in the form of guilty or not guilty, a special verdict stating facts found by them is returned by the jury, and this special verdict is ambiguous or defective in regard to matters forming part of the offence, *e. g.*, intention, knowledge, common design or abetment, it is the duty of the Judge to ascertain its meaning by questioning the jury under section 303, Criminal Procedure Code. In dealing with a special verdict, the Judge is confined to the facts positively stated in the verdict and cannot of himself supply by intendment on implication any defect in the statement. ABDUL RAZAK 710

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Cr. P. C. S. 343. *See* MAHADHU 720

——**S. 345**—*Compounding—Acquittal—Retrial.* An accused charged under section 324 of the Indian Penal Code cannot, if the offence has been compounded with the permission of the Court, be again tried on the same facts on a charge under section 323 of the Indian Penal Code, if the composition, which has the effect of an acquittal, is still in force. WALI AHMAL 519

——*See* RAOJI 700

——*Rash driving—Causing death by negligence—Compoundable offence.* The accused was charged with having driven a carriage furiously through a street and knocked down an old woman who died a few days afterwards from the injuries she had so received. During the enquiries before the Magistrate, a relative of the deceased came to a compromise with the accused and the Magistrate, treating the charge as that of an offence under section 338 of the Indian Penal Code allowed it to be compounded:—*Held*, that the offence was not compoundable, as it appeared from the evidence that the death of the woman was caused by her being run over, the offence would be brought under section 304A, Indian Penal Code, or under the definition of culpable homicide, neither of which is mentioned in section 345, Criminal Procedure Code. In cases of such a nature the Magistrate should find upon the evidence whether the accused should be discharged or charged with an offence, and should decide that only a compoundable offence had been proved before he allows a compounding. NARAN. 699

——*Compounding — Withdrawal of prosecution.* Although an offence under the latter portion of section 506 of the Indian Penal Code cannot be legally compounded under section 345 of the Code of Criminal Procedure, yet a withdrawal from the prosecution may be allowed in a proper case, and in such a case *Reg* v. *Devama* would apply. VITHOBA. 830

——**S. 346**—*Second Class Magistrate—Sub-Divisional Magistrate.* Where a Second Class Magistrate submits a case, under section 346 the Code of Criminal Procedure, to the Sub-Divisional Magistrate, the latter is not at liberty to return the papers to the former on the ground that the case is within the jurisdiction of the former, but is bound to dispose of the case in one of the ways prescribed by the section. PURSHOTAM. ... 554

Cr. P. C. S. 346. *Whipping—Magistrate—Powers.* When a case is reported to a District Magistrate by a Second Class Magistrate, because the latter thinks that it is one which he ought not to try as a sentence of whipping, which he is not competent to pass would be the appropriate punishment, the report should be treated as one under section 346 of the Code of Criminal Procedure and an order such as is contemplated by the second para of that section should be made. The District Magistrate should not in such cases send back the case to the Second Class Magistrate with special direction to frame a charge under a particular section nor ought the latter to frame a charge under section 254 of the Code if he is not of opinion that he can adequately punish the offence. FAKIRA....499

——*Magistrate — Commitment —Trial.* A Magistrate, to whom a case has been submitted under section 346 of the Code of Criminal Procedure, can commit for trial without taking the evidence afresh. He is competent to base his determination to commit or not on the evidence already recorded and the report sent with it. SHESHA. ... 472

——**S. 347**—*Power of commitment—Magistrate—Practice.* Section 347, Criminal Procedure Code, 1898, empowers a Magistrate to commit at any stage of the proceedings, if it appears to him that the case is one which ought to be tried by the Court of Session or High Court. CLIVE DURANT. 975

——(X *of* 1882) — *Magistrate — Committal—Sessions Court.* The accused threw his wife down and deliberately kicked her several times, thus inflicting injuries which caused her death. The Magistrate, First Class, convicted him of voluntarily causing hurt, and sentenced him to five minutes' simple imprisonment:—*Held*, that in such a case, where death is caused by violence, the accused ought not to have been finally dealt with by the Magistrate, but should have been committed to the Court of Sessions on charges of culpable homicide and voluntarily causing grievous hurt. RUPAYA 382

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Cr. P. C. S. 348 (*X of* 1872, *Sec.* 315)—*Penal Code, s.* 75—*Accused—Previous convictions—Magistrate—Jurisdiction.* The High Court, though agreeing with the Magistrate of the District as to the advisability of the accused being dealt with under section 315 of the Criminal Procedure Code by reason of the alleged previous convictions, held that looking to the discretion vested in the trying Magistrate by section 315, they were unable to say that the 2nd Class Magistrate had no jurisdiction and the Court could not, therefore, order a new trial. Where the previous convictions are not stated in the charge, as required by section 439 of the Code of Criminal Procedure, they cannot be used for the purpose of enhancing the sentence. ANNAJI KRISHNA. 71

———(*X of* 1872, *Sec.* 315)—*Habitual offender.* To constitute an "habitual offender" within the meaning of section 315 of the Code of Criminal Procedure, it is necessary that the subsequent offences charged should have been committed by the accused after the previous conviction. APPA ... 143

———**S. 349**(*X of* 1882)—*Magistrate—Practice.* A Sub-Divisional Magistrate, to whom a case is sent, under section 349 of the Code of Criminal Procedure for severer punishment, by a Second Class Magistrate, cannot return it to the latter for committal to the Court of Session, and the Second Class Magistrate's committal is also illegal. The Sub-Divisional Magistrate must deal with the case according to law. HAVIA.... ... 222

———*Magistrate—Submission—Conviction—Opinion.* A Magistrate of the Second or Third Class, in submitting his proceedings to another Magistrate for a severer punishment than he can himself inflict, is required to record his opinion only but cannot legally convict the accused. It is the duty of the Magistrate to whom a case is so referred to pass judgment according to law. MAHADU. 387

———*Sub-Divisional Magistrate—Disposal of the case.* A Sub-Divisional Magistrate, to whom the proceedings are submitted under section 349 of the Code of Criminal Procedure, cannot send the case back to such Magistrate for disposal by passing any sentence which he is competent to pass; but must himself pass such judgment, sentence, or order, in the case as he thinks fit and as is according to law. SITARAM. 479

Cr. P. C. S. 349. *Second Class Magistrate—Submitting a case—District Magistrate.* Where a Second or Third Class Magistrate after recording his opinion, submits a case under section 349, Criminal Procedure Code, to the District Magistrate, the District Magistrate should not confine himself to considering whether the decision of the Magistrate was plainly and manifestly opposed to the evidence, but he should find on the evidence the facts which he considers proved, and in passing judgment he should state the point or points for determination, his decision thereon and the reasons for decision. APPAJI. 636

———*See* BAPUDA. 350

———*Reference to a competent Magistrate—Magistrate—Commitment to Sessions—Jurisdiction.* A Second Class Magistrate found the accused guilty but referred the case to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code. The Sub-Divisional Magistrate sentenced accused 1, but regarding the other accused referred the case to the District Magistrate, as he was of opinion that they should be committed for trial to the Sessions Court. The District Magistrate having made a reference to the High Court:—*Held*, that the reference by the Second Class Magistrate to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code, would open up the whole case and leave the latter Magistrate free to deal with it according to his discretion and one of the powers he would have would be to order a commitment to the Court of Sessions. CHINNAPPA. 945

———*Reference—Magistrate.* Where a Second Class Magistrate refers a case to a District Magistrate under section 349, Criminal Procedure Code, the latter Magistrate is competent to deal with it in his discretion according to law. KONDI MALHARI.... 948

———(*X of* 1872, *Sec.* 46)—*Reference—District Magistrate—New trial.* When the proceedings of case are submitted, under section 46 of the Code of Criminal Procedure,

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to the Magistrate of the District, he is bound to pass such judgment, sentence, or order in the cases as he deems proper, and as is according to law. He has no power to order a new trial by the Court of Session, or any other Court; unless he considers that an offence has been committed which was not within the jurisdiction of the Magistrate before whom the trial is held. LAKSHMAN. 130

CR. P. C. S. 350. *See* SHESHA. ... 472

———(*X of* 1882)—*Magistrate.* A Magistrate who succeeds another Magistrate in his office has power under section 350 of the Criminal Procedure Code to try a case in which his predecessor has issued process and has granted a formal adjournment, but has recorded no evidence. In a case begun by a Magistrate and continued by his successor, the latter has power under section 191 (*a*) and (*b*) Criminal Procedure Code, to issue process for the arrest of an accused against whom a process was not issued by the Magistrate who began the trial. GOVINDA. 652

———**S. 353** (*XXV of* 1861, *Sec.* 194)— *Complainant— Examination—Presence of accused—Deposition of complainant read to the accused—Practice.* To satisfy the requirements of section 194 of the Code of Criminal Procedure, it is not enough to read over the deposition of a complainant to him in the presence of an accused person. The examination of the complainant must take place in his presence. BULDEV GOOMAJEE. ... 24

———**S. 362.** *See* ABDUL. ... 339

———(*XXV of* 1861, *Sec.* 198)— *Witness— Deposition— Contradictory statements—Opportunity of explanation and correction.* Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain: and the statement which the witness finally declares to be the true one—and that statement only—must be taken to be the statement which the witness intended to make. BALKRISHNA. 54

———**S. 364**(*X of* 1882)—*Magistrate — Accused— Statement — Signature.* The signature of an accused person to a statement recorded under section 364 of the Code of Criminal Procedure should be made in the immediate presence and under the careful control of the Magistrate himself. To take a signature of the accused, in an adjoining room before a clerk, and not in the immediate presence of the Magistrate, is not a proper compliance with the section. BHIKA. ... 687

CR. P. C. S. 364. *Statements of accused—Language, in which they should be recorded by a Magistrate—Irregularity.* A Bhil accused having been examined by a Magistrate in the Marathi language and the accused's answers having been given in Marathi with a very large sprinkling of Bhil terms, the Magistrate recorded the accused's statements in English:—*Held*, that the Magistrate procedure was irregular and that he should have recorded the accused's statements in Marathi. SUMAL.... 633

———**S. 367**—*Judgment—Appeal.* A judgment should state sufficient particulars to enable a Court of appeal to know what facts are found and how. DHURMYA... ... 833

———*Judgment—Signature.* The signature to a judgment should be appended at the time of pronouncing it in open Court. GANPAT. 429

———*Magistrate—Conviction— Sentence —Judgment cannot be written by a clerk.* A Magistrate should always write a judgment himself; he cannot get it written by a clerk. LAKSHMIBAI... 545

———(*XXV of* 1861, *Section* 429)— *Orders—Petitions—Final orders.* Section 429 of the Code of Criminal Procedure does not apply to all orders on petitions, but only to final orders made in the trial and investigation of offences. PANDURANG... 61

———**S. 369** (*X of* 1882)—*"Other than a High Court"—Review of its own Judgment —Government, application to.* The words "other than a High Court" in section 369, Criminal Procedure Code, do not give to a Division Bench of the High Court power to review its judgment in a criminal appeal. The words are to be accounted for by the power of review given to the High Court by section 434 of the Code. The remedy against any error in an order passed in an appeal by a Divisional Bench is afforded by petition to the Government, "the authority with whom rests

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the discretion either of executing the law or commuting the sentence." MOHUN ABHESING 791

CR. P. C. S. 369. (*X of* 1872, *Sec.* 464) —*Magistrate—Judgment—Alteration—Illegal order—Procedure.* When a judgment has been signed by a Magistrate, it cannot be altered by him according to section 464 of the Code of Criminal Procedure. But on finding that he has passed an illegal sentence, a Magistrate may, if the prisoner is suffering prejudice, direct the Jailor to suspend execution and merely keep the prisoner in detention, which should in no case be allowed to exceed the term of imprisonmen awarded, while the case is referred to the High Court. TUKARAM 137

——— (*X of* 1882 — *This Section is omitted in Act V of* 1898) — *Assistant Judge—Sentence—Confirmation—Sessions Judge.* When an Assistant Sessions Judge passes a sentence of more than four years' rigorous imprisonment the whole sentence is subject to confirmation by the Sessions Judge. MANSUKH 314

———**S. 386**—*Attachment—Sale—Claim by a third party—Procedure.* Where a claim by a third person is made to a property attached for the realization of fine, the Judge must stay the sale of the property and allow sufficient time to the claimant to establish her right to the property, unless by reason of the nature of the property an immediate sale enures for the benefit of the owner in which case the proceeds should be held over. CHHAGAN JAGANNATH. 976

———(*X of* 1872, *Sec.* 307)—*Penal Code, Sec.* 64—*District Municipal Act—General Clauses Act Sec.* 5—*Default of payment of fine —Imprisonment.* Award of imprisonment in default of payment of fines imposed under enactments passed after the General Clauses Act I of 1868 came into operation (such as the District Municipal Act VI of 1873 and the General Stamp Act XVIII of 1869) is quite legal. GULABCHAND. 91

——— (*XXV of* 1861, *Sec.* 61)—*Magistrate—Attachment—Sale.* Section 61 of the Criminal Procedure Code does not authorise the Magistrate to issue an order for attachment and subsequently an order for sale. When he has issued his warrant for levy of the fine he has no power to give directions as to the time of the sale. CANARA MAGISTRATE'S LETTER No. 43. ... 29

CR. P. C. S. 386 (*XXV of* 1861, *Sec.* 61)—*Act XXVI of* 1850—*Act II of* 1839—*Penalties—Levy of penalties.* Where a Magistrate convicted an accused of the breach of one of the Municipal Rules under section 7 of Act XXVI of 1850 and sentenced him to pay a fine of Rs. 8 to be recovered in the terms of section 61 of the Code of Criminal Procedure or to suffer 4 days' simple imprisonment, it was pointed out that penalties imposed under Act XXVI of 1850 were to be levied under Act II of 1839 and that it was illegal to pass a sentence of imprisonment in default of payment of fine, until a warrant for distress and sale has been issued and returned unsatisfied. TUKARAM KALU. 58

———**S. 390.** *See* ABDULLA. ... 906

———**S. 391** (*X of* 1882)—*Whipping — Double sentence.* An accused cannot be sentenced to a double set of whipping, where he is convicted of two offences. DAGDU JANAJI. 955

———*Imprisonment—Whipping.* Where a person is convicted at one trial of two offences and sentenced to a separate term of imprisonment for each, and also the whipping for the second, the two sentences being directed to be consecutive, the sentence of whipping ought not to be delayed until the expiry of the first sentence but must be carried into execution in accordance with the provisions of section 391 of the Code of Criminal Procedure, as the word 'sentence' in the section means the total of punishment inflicted at one trial. HABLA SOLA. 803

———(*X of* 1872, *Section* 310)—*Officer —Whipping—Breach of duty—Bom. Act II of* 1874, *Sec.* 30—*Jailor—Warrant.* Section 310 of the Code of Criminal Procedure makes it a duty of the Officer responsible to inflict the punishment of whipping to inflict it immediately on the expiration of the times set forth in the enactment. But if, through accident, or neglect, or wilful breach of duty, this direction is not obeyed, the prisoner is not

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thereby in any way freed from the liability, of undergoing the sentence then subsisting. The Jailor is, under Bombay Act II of 1874, section 30, responsible for the execution of a warrant for punishment, unless it be one not within the competence of the Court. If anything prevents his executing a warrant, he should make a return or report to that effect to the Court whence the warrant issued. MAHADEU. 136

CP. P. C. S. 396—*Escaped convict, execution of sentence on.* The accused, who was a life convict under sentence of transportation for murder, was convicted under section 224, Indian Penal Code, of attempting to escape from lawful custody, and sentenced to four months' imprisonment which the convicting Magistrate directed to commence immediately:—*Held*, that such an order was contrary to the provisions of section 396 of the Criminal Procedure Code. MAHADU NAGU. ... 965

———*See* PANDU KHANDU. ... 774

———**S. 397**. *See* SAGRAM ... 300

———*Sessions Judge—Transportation—Convict undergoing imprisonment.* Where a Sessions Judge, in ignorance that the accused is already undergoing a sentence of imprisonment, sentences him to transportation of life, it is subsequently open to him to further order that the sentence of transportation shall take effect immediately. HARI... 391

———*Concurrent sentences—Distinct Offences.* Where an accused is sentenced to imprisonment and afterwards another sentence of imprisonment is passed upon him for a different offence, it is not legal to make the second sentence run concurrently with the first such an order being opposed to the section 397 Criminal Procedure Code. MAHOMED... 552

———(*XXV of* 1861, *Sec.* 48)—*Indian Penal Code—Accused sentenced while undergoing another sentence—Appeal—Practice.* When a sentence of imprisonment for an offence under the Indian Penal Code is passed upon an accused person who had just previously been convicted and sentenced for another offence, it appears to be contrary to the provisions of section 48, Criminal Procedure Code, to make the second sentence concurrent with the first. In such cases, although one of the sentences may be inoperative the accused has a right of appeal against either conviction. KHANDESH SESSION JUDGE'S LETTER No. 815 OF 1869. 18

CP. P. C. S. 398 (*X of* 1872, *Sec.* 317. A Magistrate First Class sentenced an accused to two years' rigorous imprisonment on the 6th February 1889 on conviction of theft. The Sessions Judge, a month afterwards, sentenced the accused in another case to three years' rigorous imprisonment, which he, under Criminal Procedure Code, section 317, directed should begin to take effect on the expiration of the sentence passed by the Magistrate. On appeal the conviction and sentence passed by the Magistrate were reversed:—*Held*, that the sentence by the Sessions Judge must be deemed to have commenced from the time it was ordered to commence, *viz.*, from the expiration of the sentence by the Magistrate whether by reversal or completion of the punishment. KHANDESH SESSIONS JUDGE'S LETTER No. 420. 139

———**S. 399** (*X of* 1882)—*Reformatory Schools Act* (*X of* 1876). Section 399, Criminal Procedure Code, was repealed at the introduction of the Reformatory Schools Act, 1876, into the Presidency of Bombay in 1889. TUKARAM. 864

———*Reformatory Schools Act, Secs.* 8, 11. Section 399, Criminal Procedure Code, 1882, was repealed when the provisions of the Reformatory Schools Act, 1876, were extended to the Presidency of Bombay. HARPRASAD LALTA. 929

———(*X of* 1872, *Sec.* 318)—*Juvenile offender—Theft in a dwelling house—Sentence—Confinement—Reformatory school.* A Magistrate finding a juvenile offender guilty of theft in a building sentenced him to three months' rigorous imprisonment and ordered that in place of this sentence the offender should be confined in a Reformatory for fourteen months:—*Held*, that the Magistrate having once passed a sentence of imprisonment for a particular term cannot direct that the offender shall be confined in a Reformatory for a longer term. GANPAYA 109

———(*X of* 1872, *Sec.* 318)—*Act V of* 1876, *Sec.* 1—*Notification—Local Government.* Pending the publication by the Local Govern-

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ment of the notification contemplated in section 1 of Act V 1876, section 318 of the Criminal Procedure Code, 1872, contains the provisions of the law for the confinement of youthful offenders in reformatories, but it is only when such an offender is sentenced to imprisonment that the latter section empowers a Magistrate to direct that he shall, instead of being imprisoned in a criminal jail, be confined in a Reformatory; and neither the said section nor the corresponding section 7 of Act V of 1876 gives jurisdiction to a Magistrate to pass a sentence of imprisonment in excess of the powers conferred by section 20 of the Code of Criminal Procedure. RAVJI 180

CR. P. C. S. 407 (*XXV of* 1861, *Sec.* 412)—*Sessions Judge—Appeal—Acquittal of accused—Re-arrest.* An accused person acquitted and discharged by a Sessions Judge on hearing an appeal which he was not entitled by law to hear, may be re-arrested even after the expiration of the period to which he was originally sentenced to be imprisoned and made to undergo the remaining portion of the sentence. GOPALA SHIRU. 17

——**S. 408 (a)** (X *of* 1882)—*Sessions Judge—Jurisdiction—Appeal—Indian Penal Code* (*XLV of* 1860), *Sec.* 395. When a Sessions Judge has confirmed the sentences passed by an Assistant Sessions Judge on some of the accused persons in a case, he has no jurisdiction to hear the appeals preferred by any of the prisoners in that case, as such appeals under section 408, proviso (*a*) of the Criminal Procedure Code, all lie to the High Court, irrespective of the length of sentence. ALIBAX. 655

——**S. 412** (*X of* 1882)—*Appeal—Practice and Procedure.* The mere fact that the appellant pleaded guilty before the trying Magistrate is not by itself a sufficient reason for a Sessions Judge to reject his appeal. It might be a ground for doing so in an appeal to the High Court where the conviction is by a Court of Session or a Presidency Magistrate, though even then the extent and legality of the sentence would have to be considered in appeal. But an appeal to the Court of Session lies on fact as well as on law, and the appeal should have been disposed of in a legal manner. GOVIND RAGHU. 954

CR. P. C. S. 412. *See* DAGDU GANGARAM 826

——**S. 418.** *See* BALLAPPA. ... 730

——*See* DAGDU GANGARAM. ... 826

——**S. 419**—*Appeal—Presentation—Post.*—An appeal transmitted through post cannot be considered as an appeal duly presented within the meaning of the Code of Criminal Procedure. BHAGWAN. 464

——(*X of* 1872, *Secs.* 275, 276, 464) *Appeal—Copy of Judgment—Judgment in the prisoner's language.* To comply with the requirements of section 275 of the Code of Criminal Procedure, which enacts that "every petition of appeal shall be accompanied by a copy of the judgment or order appealed against," a copy in the prisoner's own language is sufficient; as under section 464 of the Code, amended by section 41 of the amending Act XI of 1874, such a copy is what is required to be given to the accused person, or person affected by the judgment or order. A person desiring to obtain a copy of the judgment in the language of the Court may do so as a proceeding under the amended section 276 (see section 25 of Act XI of 1874). SURAT SESSION JUDGE'S LETTER No. 1120. ... 82

——**S. 421** (*X of* 1882)—*Appeal—Dismissal—Hearing.* A Magistrate having rejected an appeal under section 421, Criminal Procedure Code, without giving the appellant an opportunity of being heard, his order rejecting the appeal was set aside, and he was directed to rehear the appeal-petition, following the procedure laid down in the section. FAKIRA 703

——*Appeal Court—Rejecting appeal—Reducing sentence.* The accused was charged with voluntarily causing grievous hurt and convicted and sentenced to four months' rigorous imprisonment and a fine of Rs. 30 or in default further rigorous imprisonment for two months under section 325, Indian Penal Code. The District Magistrate rejected the appeal, but reduced the sentence of imprisonment in default of payment of fine to one month:—*Held*, that the Magistrate could not, after rejecting the appeal, diminish the sentence, but should either have reported the case to

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the High Court or have heard the appeal as directed by section 423 of the Code of Criminal Procedure. GOVINDRAO. ... 304

Cr. P. C. S. 421. *Appeal—Notice.* It is not competent to an Appellate Court to reject an appeal summarily, under section 421 of the Criminal Procedure Code, without giving the notices required by section 422. BANA. 384

———*Appeal— Dismissal—Non-appearance of appellant — District Magistrate.* It is not competent to a District Magistrate to dismiss an appeal under section 421 of the Code of Criminal Procedure on the ground that no one appeared to support the petition; in such a case the District Magistrate must consider whether there is sufficient ground for interfering which implies judicial consideration on the merits. DROSHANKER. 593

———*Appeal— Dismissal— Non-appearance of appellant.* It is not competent to a Sessions Judge to reject an appeal under section 421, Criminal Procedure Code, without perusing the record on the ground that there was no appearance for the appellant either by counsel or in person, because if the appellant is content to leave the question of admission or rejection to be determined by the Sessions Judge on the papers, the Sessions Judge is bound to peruse them, and the appellant is not bound to appear a second time, either by counsel or in person. VALI MAHOMED. ... 739

———(*X of* 1872, *Sec.* 278)—*Sessions Judge —Appeal—Rejection—Enhancement of sentence.* A Session Judge in rejecting an appeal under section 278 of the Code of Criminal Procedure has no power to enhance the sentence. MATHUR LALDAS. 74

———(*X of* 1872, *Sec.* 278), *Indian Limitation Act, Art* 152—*Appeal—Presentation after time—Hearing of appellant—Summary rejection.* An appeal, presented after the period of limitation, and in which the reason assigned for the delay in its presentation was insufficient, may be rejected as time barred, without hearing appellant. Section 278 of the Code of Criminal Procedure does not apply to such cases. GULAB KARIM. 90

———(*X of* 1872, *Secs.* 278, 294, 295)—*Proceedings—Copies—Originals.* No Court is at liberty to part with its judicial record except when called by an Appellant Court or on the demand of a superior Court under section 294 or section 295 of the Code of Criminal Procedure. They must be retained in order to meet the contingency of such legal requisitions being made. For the purposes of any reference or report to the executive Government copies of proceedings are sufficient, but for purpose of appeal to or revision by, superior Courts the originals are indispensable. PADMANABHA. 129

Cr. P. C. S. 421. (*X of* 1872, *Secs.* 278, 279)—*Penal Code, Sec.* 411—*Whipping Act Sec.* 2—*District Magistrate—Appeal—Sentence.* A Second Class Magistrate convicted an accused person of an offence punishable under section 411 of the Indian Penal Code, and sentenced him to a fine of Rs. 50 or in default to suffer 45 days' rigorous imprisonment. On appeal, the District Magistrate altered the sentence to one of 50 lashes in lieu of the term of imprisonment which the accused had yet to undergo in default of the payment of the fine:—*Held*, that it was competent to the Magistrate of the District to so alter the sentence notwithstanding that the appellant had, as a matter of fact, been some days in confinement; but in making the alteration, the sentence of whipping should have been substituted for that passed by the Second Class Magistrate and not for the remaining term of imprisonment. THAREKHAN. 131

———(*XXV of* 1861, *Secs.* 417, 419, 421)—*Sessions Judge—Appellant—Bringing before the Court—Appellant in jail.* No inference drawn from sections 417, 419 and 421 of the Criminal Procedure Code nor any specific provision of law appears to authorize a Session Judge in causing an appellant under sentence of imprisonment to be brought before the Sessions Court at the hearing of his appeal. ANTONE JOSE.. 22

———**S. 422**—*Appeal—Notice, service of.* Where it is impracticable to give to an appellant notice of the hearing of an appeal, as he cannot be found at the address given by him, the notice or a copy of it should be left at the address given. It is not competent to an Appellate Court to hear and decide an appeal in appellant's absence, simply because he cannot be found at the address given by him. HARI NARAYAN. 869

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Cr. P. C. S. 423 (X *of* 1882)—*Appeal Court—Conviction reversed—Retrial.* When an appellate Court reverses a conviction and sentence it can, under section 423 of the Code of Criminal Procedure, order the appellant to be retried by a specified Court of competent jurisdiction. KASTURBHAI 317

———*Conviction-Sentence—Appeal—Penal Code, Secs.* 323, 147. The accused were convicted by a Second Class Magistrate under section 323, Indian Penal Code. On appeal, the appellate Court confirmed the conviction under section 323, Indian Penal Code, and also convicted the accused of an offence under section 147, of the Code, for which they were not tried by the Second Class Magistrate:—*Held,* that as the accused were not tried for an offence under section 147 of the Indian Penal Code, the Appellate Court could not legally convict them of it. BASAPPA 353

———*District Magistrate—Appeal—Enhancement of sentence.* It is not competent to a District Magistrate to enhance a sentence in appeal. NATHA 618

———*Police investigation—Conviction.* A conviction, based on mere statements, made to the Police at the time of the Police investigation by witnesses who at the trial gave an entirely different story cannot be upheld. FULA DHANA... 333

———*Appellate Court—Retrial.*—Section 423, Criminal Procedure Code, 1882, authorises an appellate Court to order a retrial where necessary. SADASHIVE. ... 938

———It is not open to a Magistrate to affirm a conviction but to reverse the sentence: a conviction must always be followed by a sentence. LAKSHMIBAI. 545

———**S. 423(1)(b)**—*Appellate Court—Retrial—Competent Court.* Under the provisions of section 423 (1) (b), the retrial, if ordered, must be by a Court of competent jurisdiction, subordinate to the appellate Court; the appellate Court cannot order the retrial to proceed before itself. FAKIRA. 982

———**S. 423 (b)**(X *of* 1882)—*Conviction—Alteration.* The accused was convicted, by a Second Class Magistrate, of house-breaking by night, under section 457, Indian Penal Code. In appeal, the First Class Magistrate altered the conviction to one under section 414 Indian Penal Code:—*Held,* (1) that section 457, Indian Penal Code, applied to a composite offence, and, under section 238, Criminal Procedure Code, an accused may be convicted of any element of the composite offence; (2) that under section 423 (*b*) (2) of the Code of Criminal Procedure, it was competent to a Court of Appeal to record a new finding and sentence. BALU. 293

Cr.P.C. S.431 (X *of* 1882)—*Appellant—Death.* Two persons were tried and convicted by a Sessions Judge of criminal breach of trust and sentenced each to one year's rigorous imprisonment and a fine of Rs. 1,000. Both appealed to the High Court against the conviction and sentence, and one of them died pending the decision of the appeal. The High Court reversed the conviction and sentence passed on the appellant who was alive but passed no order as regards the appellant who had died since the admission of the appeal. The son of the sister of the appellant who had died applied to the High Court that the conviction and sentence passed on the deceased appellant be reversed:—*Held,* that the appeal of the deceased appellant abated on his death under section 431 of the Criminal Procedure Code. Under the circumstances the Court did not think it should take up the case under its revisional powers as it depended on appreciation of evidence and the judgment appealed against was not one of the kind about which the Court used that jurisdiction as a general rule. The representatives of the deceased appellant had their remedy by application to the Governor in Council. CHAND. 707

———**S. 432** (X *of* 1882)—*Chapter XXXII—Sessions Judge—Reference—District Magistrate.* Where an application is presented to a Court of Sessions under Chap. XXXII of the Code of Criminal Procedure, it has no power to refer the applicant to a District Magistrate, whose Court is one, not of inferior, but of concurrent jurisdiction, with the Court of Sessions, for the purposes of that Chapter. TAJBHAI. 525

———*Reference—Question of law.* A reference to the High Court under section 432, Criminal Procedure Code, must be on

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a question of law, as distinguished from one of fact. SHEIKH IBRAHIM. 838

CR.P.C.S. 433. *High Court—Appeal—Review.* The High Court sitting in appeal cannot review an order passed by it under section 433 of the Code of Criminal Procedure. CANJI. 638

———**S. 434.** *See* MOHUN. ... 791

———**S. 435.** *See* REFERENCE No 81. 336

———*District Magistrate—Cognizance—Reference—High Court.* A District Magistrate has no jurisdiction to take cognizance of the conviction and sentence passed on an accused person, who has not appealed to him, except by reporting it to the High Court. SHEIK MOHIDIN. 358

———*See* MANAJI. 494

———*Compensation—Death of the accused.* Where a Magistrate awarded compensation to an accused person, under section 560 of the Criminal Procedure Code, and the complainant applied to the High Court, under sections 435 and 439 of the Code, the High Court declined to pass any order as the accused had died, because no order could be passed to the prejudice of a person who could not be served with a notice. GOVINDA v. KESHAVRAO 634

———*See* HAIBATI. 692

———*Inquest proceedings—Revision—High Court.* It is not open to the High Court to revise under section 435, Criminal Procedure Code, the inquest proceedings held by a Magistrate under section 174 of the Code. BAYAJI LAXMAN. 843

———**S. 436** (X *of* 1882)—*Magistrate—Conviction for minor offence — Sessions Judge — Commitment.* Where an accused person appears to have committed culpable homicide, his conviction by a Magistrate for a minor offence does not prevent his trial for murder &c. The Sessions Judge, if he thinks there is a *prima facie* case, may call on the accused to show cause why a commitment should not be ordered, and may, thereafter order his commitment under section 436 of the Code of Criminal Procedure, if satisfied that there is sufficient cause for it. LADKIA. 337

CR. P. C. S. 436. *District Magistrate—Sessions Court—Reference to the High Court—Local Government—Public Prosecutor.* A District Magistrate is not warranted by section 438 of the Code of Criminal Procedure to refer to the High Court a case in which the Sessions Judge refuses to grant sanction for the prosecution of certain persons for giving false evidence. If, however, the District Magistrate is of opinion that a failure of justice has occurred he should communicate with the Local Government or with the Public Prosecutor. BAJIO. 623

———*See* KALLU SANDU. 837

———(XXV *of* 1861, *Sec.* 435)—*Penal Code* (*Act* XLV *of* 1860), *Sec.* 411—*Sessions Court—Commitment—Power to order commitment.* The addition of the words "Subordinate Magistrate of the First Class" in column 7 of the Schedule to the Code of Criminal Procedure, against section 411 of the Indian Penal Code, takes the offence triable under the latter section out of the operation of section 435 of the Code of Criminal Procedure, the intention of the Legislature being that the Court of Session should only interfere in serious cases. The Court of Session therefore cannot order the commitment of a person charged under section 411 of the Indian Penal Code who may have been discharged by a Magistrate, F. P. RAMCHAND. 42

———**S. 437.** *Absence of complainant—Dismissal of complaint—District Magistrate.* Where a complaint under section 323, Indian Penal Code, is dismissed by a Magistrate owing to the absence of the complainant. the District Magistrate is competent to deal with the case under section 437, Criminal Procedure Code. DAJIBA TOTARAM. 988

———(X *of* 1882)—*Discharge—Magistrate—Prima facie case—Conclusions of fact—High Court—Revision—Fresh complaint.* Where a trying Magistrate has arrived at the conclusion that no *prima facie* case had been made out against an accused person, the High Court cannot command him to arrive at a different conclusion on the facts. If the complainant has a good case, according to law, against the accused, he may make a complaint to another Magistrate who will not be prevented from inquiring and adjudging by a mere

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discharge of the accused in a warrant case. KRISHNA ... ... 209.

CR.P.C. S. 437. *Magistrate—Discharge—District Magistrate.* When a District Magistrate considers that a Magistrate subordinate to him has improperly discharged an accused person, under section 253 of the Code of Criminal Procedure, he need not refer the case to the High Court but may deal with it under section 437, Criminal Procedure Code. RAOLA VISHTA. 213

——— *Sub-Divisional Magistrate – District Magistrate—Penal Code (Act XLV of 1860), Secs. 182, 500—False information—Master and servant—Defamation.* A Sub-Divisional Magistrate can not properly withdraw a case specifically referred by his superior, the District Magistrate, nor can the District Magistrate properly insist on repeated further inquiries without fresh evidence. The servant of an Abkari Licensee gave false information to his master that the Abkari Inspector asked him for money and adulterated the liquor to get him into trouble:—*Held*, that the accused was not guilty of an offence under section 182 of the Indian Penal Code, as his master was not a public servant, though he might be guilty of defamation. SANTARAM. 315

——— *Series of discharge—Series of further inquiry—Fresh evidence—Sessions Judge.* Section 437 of the Code of Criminal Procedure contemplates that the Court of Sessions shall simply direct the Magistrate of the District, either himself or by one of his subordinates, to make further inquiry. When the further enquiry is into the effect of the evidence already on the record or the testimony of the witnesses already examined, it will usually be desirable that the fresh consideration of the complaint should be entrusted to a different Magistrate from the one who has already formed an opinion on the case. When the further enquiry involves the taking and weighing of additional evidence, the function will generally be best performed by the same Magistrate who made the previous inquiry; though peculiar or prejudiced views, or even the possibility of them, may make it more desirable to bring a fresh mind to bear on the facts. As was held by the Allahabad High Court, the power of ordering further inquiry should be "used sparingly and with great circumspection." BALKRISHNA. 328

CR. P. C. S. 437. *Magistrate—Police report—Striking a case off the register—Sessions Judge—Review.* A Magistrate's order directing a case reported to him by the police, under section 173, Criminal Procedure Code, to be struck off, is not a judicial order dismissing a complaint or charging an accused person which can be reviewed by the Sessions Judge under section 437 of the Code. KAMBU. 521

——— *District Magistrate—Ordering further inquiry.* It is competent to a District Magistrate to order a further inquiry under section 437 of the Code of Criminal Procedure, although he may have declined to do so on a previous occasion in the same matter. KRISHNAJI 522

——— A Magistrate having stopped a case without hearing all the evidence and discharged the accused remarking that "to affix the guilt to the accused is an impossibility" and "there is a certain mystery about the whole proceedings which it appears impossible to clear up," and the Sessions Judge having ordered further investigation, the High Court, in an application for revision, applying the principles laid down in Cr. Rg. No. 19 of 1887, transferred the case to the Court of the District Magistrate with permission for him to send it for trial to any other competent Magistrate who has had nothing to do with the case. VAMAN HARI SABNIS 926

——— (*X of 1872, S. 298*)—*Magistrate—Complaint—Dismissal—District Magistrate—Further inquiry.* When a complaint is, under section 147 of the Code of Criminal Procedure, dismissed by a Magistrate, it is competent to the Magistrate of the District under section 298, to order further inquiry and refer it to the same or any other competent Magistrate subordinate to him under section 47. RATNAGIRI DISTRICT MAGISTRATE'S LETTER No. 3988. 90

——— (*XXV of 1861, Sec. 435*)—*Magistrate—Dismissal—Accused—Previous convictions — District Magistrate— Interference—Practice.* Where a Subordinate Magistrate

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1st Class, dismisses a complaint preferred against the accused who, though twice convicted before, persists in commiting house-trespass, the Magistrate of the District cannot interfere with the order dismissing the complaint, as the offence is not one of the nature specified in Section 435 of the Criminal Procedure Code. If a complaint is made to the Magistrate of the District in such a case, he may proceed with the trial himself, or refer it to a Subordinate Magistrate. RAGHO. ... 28

CP. P. C. S. 438(X *of* 1882)—*Sessions Judge—Acquittal—District Magistrate—Reference—High Court.* A District Magistrate is not warranted by section 438 of the Code of Criminal Procedure in referring, for the orders of the High Court, a case in which the Sessions Judge, on appeal, acquitted and discharged the accused. That section, having regard to section 435 of the Code, empowers the District Magistrate only to refer to the High Court proceedings before an inferior criminal Court, which the Sessions Court is not. If the District Magistrate thinks a failure of justice has occurred in such a case his proper course is to have steps taken for an appeal to be preferred against the order of acquittal by the Sessions Judge. BAPU.... 212

———*Discharge—District Magistrate—Reference.* The accused was charged with theft and discharged by the First Class Magistrate. The District Magistrate referred the case to the High Court:—*Held*, that the High Court need not interfere in a case of mere discharge, the District Magistrate being competent to take steps himself should he deem it necessary. SHRINIVAS. 290

———*District Magistrate—Reference—District Superintendent of Police.* The District Magistrate reported, the proceedings of the Second Class Magistrate, under Section 438 of the Code of Criminal Procedure, on representation of the District Superintendent of Police, who had himself been the complainant in the case before the Second Class Magistrate:—*Held*, that the District Magistrate should have been guided by the Criminal Circulars p. 15, Section 42, and that he had acted irregularly in forwarding with his own incomplete report, the communication addressed to him by the complainant protesting against the Second Class Magistrate's decision. The circumstance that the complainant holds office as District Superintendent of Police can give him no right to make any representation to the District Magistrate in the form of an official letter or memorandum in a case in which he was personally interested; nor can the High Court take such letter or memorandum into consideration when dealing with the case. NAGOO.. 340

CP. P. C. S. 438. *Sessions Judge—Criminal returns—Ordering further enquiry—Reference—High Court.* A Sessions Judge who, on examining the monthly criminal return of a Magistrate, sends for the record and proceedings in a case in which an accused person has been convicted, cannot legally order any further inquiry to be made. If he thinks that any further inquiry is necessary, he must report the matter to the High Court, which alone has the power to order such inquiry to be made in such a case. VALAV 407

———*Sessions Judge—District Magistrate—Sentence—Enhancement—High Court—Government.* A District Magistrate who considers that the sentence passed upon an accused by a Sessions Judge is inadequate and should be enhanced, should, instead of referring the case for orders to the High Court under section 438, Criminal Procedure Code, communicate with the Local Government or with the public Prosecutor. KARSAN. 601

———*Old offender—Committal — High Court.* A Presidency Magistrate convicted under sections 457 and 380 of the Indian Penal Code an accused whom he found to be an old offender:—*Held*, that the Magistrate should have acted under section 438 of the Criminal Procedure Code and committed the accused to the High Court. GAUDASING. 704

———(X *of* 1872, *Secs.* 296, 118)—*District Magistrate—Superintendent of Police—Reference.* Section 296 of the Code of Criminal Procedure does not empower the Magistrate of a District to refer to the High Court the proceedings of a Superintendent of Police, the latter not being a "Court subordinate" to the Magistrate. The Magistrate of a District cannot interfere (except in the way of suggestion and advice) with the exercise of discretion

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given to a Police Officer by section 118 of the Code to summon witnesses. SANKALCHAND. 133

CP. P. C. S. 438 (*XXV of* 1861, *Sec.* 434)— *Subordinate Magistrate— Proceedings called for and examined—District Magistrate —Sessions Judge—Jurisdiction.* Where the proceedings of the Subordinate Magistrate have been called for and examined by the District Magistrate, such proceedings of the Subordinate Magistrate must be considered as incorporated in the case before the District Magistrate and can be called for by the Session Judge. In order to the exercise by the Session Judge of his powers under Section 434 of the Code of Criminal Procedure it is not necessary that any complaint should be made before him. VRIJVALLABH. 55

———**S. 439** — *Revision— Appeal.* The High Court will not interfere in revision merely because the Sessions Judge takes a different view of the evidence to that taken by the Magistrate. Where an accused has his remedy by appeal, but does not choose to exercise it, any subsequent proceedings by way of revision at his instance are barred by section 439 (5), Criminal Procedure Code, 1898. SHAIKH ANBAR. 977

———(*X of* 1882)—*High Court—Revision— Questions of fact.* Section 439 of the Code of Criminal Procedure confers on the High Court, as a Court of Revision, the powers of an Appellate Court, but, in the exercise of its discretion, it will refuse to interfere in regard to findings of fact, except on very exceptional grounds. MAHOMAD HUSAN. 244

———*High Court—Revision—Fresh evidence—Enhancement.* Evidence of previous convictions discovered after the trial does not justify the High Court in enhancing a sentence in the exercise of its revisional power. NAHNA. 457

———*High Court— Revision — Review— Fresh evidence.* The High Court cannot review an order made in the exercise of its revisional jurisdiction; and it would not do so on the ground of discovery of fresh evidence, since the Police ought to have produced the evidence of previous convictions at the trial. CHIMABA. 458

CP.P.C.S.439.—*High Court—Revision— Fresh evidence—Enhancement.* Evidence of previous conviction discovered after the trial does not justify the High Court in enhancing a sentence in the exercise of its revisional powers. KARIM. 461

———*District Magistrate—Sessions Judge —Revision.* Where no special ground is shown by a District Magistrate for applying to the High Court for an order, under section 437 of the Code of Criminal Procedure, report should be made in the first instance to the Court of Sessions, which has concurrent revisional jurisdiction with the High Court under that section. GAMBHIR. 499

———*See* BALU NASIR. 537

———*Revision—High Court—Jurisdiction.* Although section 439 of the Code of Criminal Procedure does give the High Court power to call for cases not only on judicial information but also "which otherwise come to its knowledge," yet, in most circumstances, it is a right practice that Judges should be moved in open Court. ABDUL. 577

———*High Court—Revision—Question of fact.* Although the High Court is generally reluctant to interfere in revision on a matter of fact, it will interfere where a Court has taken a wrong view of the facts through an error in law *e. g.*, where it places the burden of proof on the accused contrary to the principle illustrated by section 101 of the Indian Evidence Act, 1872. NAGESH VAIJNATH. 794

———*High Court—Revision—Appeal.* The High Court is cautious in the use of its jurisdiction to try questions of fact in revision, especially where the suitor has a right to this relief by appeal. Except when it uses express language as in sections 412 and 418, the Code of Criminal Procedure does not provide for the admission of an appeal for the limited purpose of reviewing only a part of the sentence. If the appeal is admitted, the appellant has a right to have the whole merits dealt with by the Judge in solemn form, and, as the close of the hearing of the appeal is the time at which the Judge has to proceed to judgment, any opinion that he may have expressed before sitting to hear the appeal must not be allowed to prejudice the express right of the appellant to a decision on all the issues raised. The High Court

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will direct the rehearing of an appeal where justice has not been administered according to law, such omission being prejudicial to the prisoners. DAGDU GANGARAM 826

CR. P. C. S. 439. *Subordinate Court—Perjury—Sanction—High Court.* The High Court has jurisdiction to deal in revision with an order passed by a Subordinate Court under section 476, Criminal Procedure Code, directing an enquiry into an alleged offence punishable under section 193 of the Penal Code, read with section 249 of the Indian Succession Act. NUSSERWANJI SHERIARJI... 895

——— (X *of* 1872, *Secs.* 297,460)—*Accused — Improper acquittal — Magistrate — High Court—Revision — Appeal — Local Government—Procedure.* Where an accused person has been improperly acquitted by a Magistrate having jurisdiction, the High Court will not interfere in the exercise of its powers of revision and order a retrial on a fresh charge (sections 297 and 460 of the Code of Criminal Procedure). The proper remedy in such a case, appears to be for the Local Government to direct an appeal under section 272 of the Criminal Procedure Code. PIRKHAN... 75

——— *Practice— Appeal — Enhancement of sentence—Notice.* When the proceedings are called for on appeal solely with a view to enhance the sentence notice to that effect should be given to the appellant and to the District Magistrate. NATHA. 179

——— (X *of* 1872, *Sec.* 297) — *Session Judge—Jury—Charge to the Jury.* A Sessions Judge, in summing up to the Jury, should be careful to set out the evidence fully and should record in his charge what evidence he does read to them. BASWANTAPPA LINGAPPA... 917

——— (X *of* 1872, *Secs.* 297, 283)—*Question of fact—High Court.* The High Court in the exercise of its revisional powers, under section 297, Criminal Procedure Code, does possess the power of upsetting a finding of fact by the Lower Court on the ground of misappreciation of evidence but it has been the uniform practice of the Court not to exercise that power, except for some very extraordinary reason. The circumstance that the Court itself might or would have come to a different conclusion is not such a reason. An officer, appointed a Magistrate of the First Class for a whole District, but put in charge by the District Magistrate of particular Talukas only, is not without jurisdiction, if he inquires into or tries a case in another Taluka of the same District. An order of the District Magistrate directing the First Class Magistrate to take up a case in unnecessary. An irregularity in the conduct of an inquiry, eventhough sufficiently serious to induce the High Court to annul a commitment, is not sufficient to justify the annulment of the trial after the commitment had been made and a trial had upon it, unless the irregularity has caused a failure of justice by prejudicing the accused in his defence. JAMSHEDJI. 177

CR. P. C. S. 464.—*Unsoundness of mind —Civil Surgeon—Magistrate.* If after inquiring into the fact of the unsoundness of mind of the accused, and examining the Civil Surgeon, the accused appears to be insane, and unable to understand questions and to return intelligible replies, the Magistrate should follow section 464 and not section 341 and should act on his opinion under section 466 of the Code of Criminal Procedure. KASIMA. 832

——— **S. 466.** *See* KASIMA. ... 832

——— **S. 476.** *Sanction to Prosecut— Committal to a Magistrate— Subordinate Judge's power to try the case himself.* Where a Subordinate Judge being of opinion that certain documents produced before him were forgeries, sends the case against the applicants to be dealt with by a First Class Magistrate under section 476, Criminal Procedure Code, and the Magistrate discharges the accused under section 209, the Subordinate Judge is not entitled to revive the proceedings against them under section 478, Criminal Procedure Code. It is clearly stated in Section 478, Criminal Procedure Code, that the procedure therein prescribed is only alternative, that is to say, that the Court may itself proceed under it instead of sending the case to a Magistrate under section 476, but the section gives no power to a Court in failure of one to adopt the other mode of procedure. RAOJI MEHESHWAR. ... 959

——— *Chap. XVI—District Judge—Jurisdiction.* A District Judge cannot direct the arrest and prosecution of person under section 411, Indian Penal Code, as such an order is not

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warranted by the provisions of sections 195 and 476 of the Code of Criminal Procedure. If, in the hearing of a case before him, he thinks that some one should be proceeded against under section 411 of the Indian Penal Code, he can proceed under Chapter XVI of the Code of Criminal Procedure. VENKATRAMANA. 515

Cr.P.C. S. 476—*Sanction—Subordinate Judge—Report of the bailiff—Inquiries, necessity of making.* A Subordinate Judge acting upon the report of a bailiff that he was obstructed in executing a warrant of attachment, gave sanction for the prosecution, of the persons obstructing, under section 186, Indian Penal Code, without making a preliminary inquiry into the truth or otherwise of the report and sent the case to a First Class Magistrate for trial under section 476 of the Criminal Procedure Code:—*Held*, that the Subordinate Judge would have better complied with the requirements of Section 476 of the Code of Criminal Procedure, if before acting on the mere report of the bailiff, he had made an enquiry of his own, but having regard to the provisions of section 537 of the Code and the fact that, under the circumstances, the most prompt disposal of the case was likely to be in the Court of the Magistrate, it was not necessary to interfere in revision even if the Court had power to do so. SADASHIV. 701

———**S. 478** (*XXV of* 1861, *Sec.* 173)—*Indian Penal Code, Sec.* 465 — *Forgery — Small Cause Court Judge—Commitment.* A Small Cause Court Judge, in hearing a suit, considered that a certain person had made a false document and committed him to take his trial before the Session Court for forgery, under section 465 of the Indian Penal Code: *Held*, that the commitment was illegal the offence of forgery not having been perpetrated in the presence of the Judge. CHOTALAL JHAVER. 31

——— **S. 480**—*Appeal—Sessions Judge.* A Sessions Judge cannot decline to interfere on appeal merely because in his opinion "the matter is a mere trifle." He is bound to hear the appeal and to come to a finding whether the conviction is legal or illegal. JIVACHRAM KESHAVRAM... 978

Cr.P.C. S. 482.—*Contempt of Court—Magistrate—Offence—Presence of the Magistrate—Jurisdiction.* Commitment to another Magistrate is necessary in all cases of contempt save where such contempt is committed in the presence or view of the Court first taking notice of it, and imprisonment without option or fine in excess of Rs. 200 is not deemed requisite. ATMARAM GOVIND. 64

———**S. 488** (*X of* 1882)—*Maintenance—Order — Adultery.* Adultery subsequent to an order for maintenance disentitles a wife to claim a continuance of the maintenance and entitles the husband to apply for a cancellation of the order. TOTARAM. 353

———*Maintenance—Enforcing the order—Breaking open the door.* A Police Officer in executing a warrant to levy the amount of maintenance, under section 488 of the Code of Criminal Procedure, can break open an inner door of the house of the person against whom the order is made. BABA RAGHUNATH.... 431

———*Court Fees Act, Sch. II, Art.* 1 (*b*) *Maintenance order.* An application made to a Magistrate to enforce payment of maintenance already awarded under section 488, Criminal Procedure Code, is chargeable with a fee of eight annas under Schedule II, Article 1 (*b*) of Act VII of 1870. The Court cannot, under section 31 of Act VII of 1870, order the defaulter to repay to the complainant the fee so paid on the application. PALI. 483

———*Maintenance, order of—Breaches of order—Imprisonment—Magistrate.* Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding, the Magistrate acting under section 488, Criminal Procedure Code, has no power to pass a heavier sentence in default than one month's imprisonment, as if the proceeding related to a single breach of the order. PANDU MAHADU.... 801

———(*X of* 1872, *Sec.* 538)—*Maintenance—Advance.* A Magistrate's order directing the payment of maintenance allowance in advance from the date of the Magistrate's order is legal. SHIDDU VITHOJI. ... 189

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Cr. P. C. S. 488. (*Act XXV of* 1861, *ss.* 31,36). *Maintenance—Second marriage—Cruelty—Living separate—Wife.* A wife cannot refuse to live with her husband on the ground that he has contracted a second marriage; she can only claim maintenance in cases where she can prove that her husband has habitually treated her with cruelty. PURUSHOTAM ... 7

——— **S. 490** (*X of* 1882)—*Maintenance—Order—Place of enforcement—Jurisdiction.* The Second Class Magistrate of a place, where the husband is at the time, is competent to enforce the order for maintenance. UBHAI. 288

——— **S. 494** (*X of* 1882)—*Public Prosecutor—Charge— Withdrawal— Assessors—Recording of opinions.*—The accused was charged with the offence of culpable homicide not amounting to murder and on the Public Prosecutor having, with the consent of the Court, withdrawn from the prosecution, was acquitted and discharged by the Sessions Court after taking the assessors' opinions on the evidence recorded in the case:—*Held*, that the Public Prosecutor having withdrawn from the prosecution with the consent of the Court, an acquittal should have been recorded without taking the opinion of the assessors. An acquittal was a matter of right to the accused, whatever the opinions of the assessors might be. CHENBASAPA 307

——— **S. 497** (*X of* 1882)—*Bail—Discretion—Magistrate—High Court.* The High Court would be very cautious in interfering with the discretion of a Magistrate about bail under section 497, Criminal Procedure Code, in a case where the prosecution after the inquiry before the Magistrate has begun does not tender evidence that the accused has some guilty connection with the non-bailable offence. LAKSHMAN SANGOR. 892

——— **S. 512** (*X of* 1872, *s.* 327)—*Evidence Act* (*I of* 1872), *Sec.* 33—*Medical witness—Examination—Absence of accused.* Except in the case provided for in section 327, Criminal Procedure Code, the examination of a medical witness taken in the absence of the accused is inadmissible in evidence in a criminal trial. When, however, there is already sufficient *prima facie* evidence to warrant a commitment to the Sessions Court, and the evidence of the medical officer is likely to be of a purely formal character and great inconvenience would result from his being summoned to a Magistrate's Court at a distance from the Sudder station, the examination need not be taken before the Magistrate, but the attendance of the medical officer before the Sessions Court should be ensured by the committing Magistrate. Under all other circumstances the Magistrate should invariably record the evidence of the medical officer before himself. THE KAIRA DISTRICT MAGISTRATE'S LETTER No. 94. 81

Cr. C. P. S. 513. *See* FATA. ... 671

——— **S. 514** (*X of* 1882)—*Bond—Construction.* The accused bound himself to appear on the 17th January, 1890, or until the disposal of the case. X executed a bond as surety for the accused's appearance "at the aforesaid Court on the aforesaid date," but the bond was not in accordance with Form III of Form XLII, prescribed by Schedule V of the Code of Criminal Procedure, there being no provision in it for the continued attendance of the accused until otherwise directed by the Court or for the accused's attending "on every day" of the inquiry. The accused did not appear on the 3rd June 1890 to which day the hearing was adjourned:—*Held*, that the surety-bond must be construed and as, according to the grammatical construction of the bond, X did not bind himself to secure the attendance of the accused on any date other than the 17th January 1890, X's bond was not forfeited. JODHRAJ.... 547

——— (*XXV of* 1861, *Sec.* 293)—*Magistrate—Mitigating penalty—Personal recognizance.* A Magistrate has no power under section 293 to mitigate the penalty entered in a personal recognizance-bond to keep the peace. The penalty must be enforced to its full amount. KUCHRA PREMCHAND. 20

——— **S. 515** (*X of* 1882)—*First Class Magistrate—District Magistrate—Appeals.* A First Class Magistrate, not being a District Magistrate, has no jurisdiction under section 515, Criminal Procedure Code, to hear an appeal against an order of a Second Class Magistrate under section 514 of the Code. SAMBHAJI. 384

——— **517**—*Disposal of property—Magistrate—Jurisdiction.* It is not competent

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to a Magistrate to pass, before a trial is concluded, an order disposing of the property in respect to which an offence is committed. Section 517, Criminal Procedure Code, provides that such an order shall not be carried out at once in cases which are appealable. VALJI MAHOMED.... ... 957

Cr. P. C. S. 517—*Disposal of property—Magistrate.* Under section 517 of the Code of Criminal Procedure, a Judge has no jurisdiction to make an order for the disposal of the property unless he finds that some offence appears to have been committed regarding it or it has been used for the commission of some offence. USMAN GULMAHOMED.... ... 981

———(*X of* 1882)—*Magistrate—Property—Disposal.* A Magistrate is justified by section 523 of the Code of Criminal Procedure in making an order to deliver the property to the complainant where the property is alleged to be stolen and its seizure by the Police is reported to the Magistrate. AHMED SAHEB. 365

———*Disposal of property.* Section 517 of the Code of Criminal Procedure must be limited to the offence actually under investigation. Property used for the commission of any offence not under investigation, or property regarding which no offence under investigation appears to have been committed, cannot be disposed of by an order under the section. AMRA NATHU 509

———*Money produced in Court—Disposal, order of—Magistrate, discretion.* Where no offence appears to have been committed regarding the money produced in a case, the Magistrate is entitled to refrain from making any order under section 517, Criminal Procedure Code, but, if necessary, proceedings may be taken under section 523 of the Code. GOPALA. 536

———*See* BEERA. 688

———**S. 518**(*X of* 1882)—*Judge—Disposal of property.* An order of reference under section 518 of the Code of Criminal Procedure can be made only in respect of property regarding which any offence appears to have been committed or which has been used for the commission of any offence. GIRJI. 496

Cr. P. C. S. 519 (*X of* 1882)—*Stolen property—Innocent mortgagee—Payment to the mortgagee out of fine.* In a conviction under section 380, Indian Penal Code, the Magistrate ordered Rs. 28 to be paid out of the fine to an innocent mortgagee who had advanced money to the accused on the stolen property:—*Held,* that sections 519 and 545, Criminal Procepure Code, were not applicable as no injury was caused to the mortgagee by the offence committed. RAMA. 631

———**S. 523.** *See* GOPALA. ... 536

———**S. 526**—*Appeal—Transfer.* The High Court can transfer actual appeals only; it cannot direct that appeals that may be filed in future should, when filed, not be heard by the authority to which they are presented. LAGMA. 973

———(*X of* 1882)—*Magistrate—Prejudice—Transfer.* Unless some cause is shown for believing that a Magistrate is likely to be prejudiced or influenced by any improper motive in the decision of a case, the High Court will support such Magistrate. It is highly improper by transfer of a case from his Court to throw a gratuitous slight on the Magistrate. VISHNU. 323

———*Transfer of case— Magistrate—Bias—Practice.* To justify a transfer of case from a Magistrate it must be established that the Magistrate has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter. The fact that a Magistrate has been served with notice of action because of his surrender of some goods seized in the case, does not constitute a bias sufficient to warrant a transfer. HYDERALLY... 685

———*Transfer— Trial— Jury —High Court.* Where an accused made an application for transfer of a trial on the ground mentioned in clause (*d*) Section 526, Criminal Procedure Code, the High Court transferred the case to its if, and directed under section 267 of the Code that the trial before it be by Jury, under the circumstances of the case. KASHINATH VAMAN LELE. 927

———**S. 528**—*District Magistrate—Transfer—Notice.* A District Magistrate should give notice to the parties before order-

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ing a transfer of case under section 528, Criminal Procedure Code. The District Magistrate is not justified in transferring a case from one place to another, on the ground that the complainant is a man of importance at the former place. RATANJI PRAMJI. ... 974

Cr.P.C. S.528—*Transfer—Notice—Personal allegations.* It is highly inexpedient to transfer a case from one Magistrate to another after the prosecution has closed and the defence has begun, without giving notice to the complainant or recording any reasons for such transfer. When personal allegations are made against a trying Magistrate in support of an application to transfer, a District Magistrate need not interfere unless such allegations are clearly established. MAHADHU. 590

———*Transfer of case—Notice.* An order under section 528 of the Code of Criminal Procedure, for the transfer of a case from the Court of one Magistrate to the Court of another Magistrate, should not be made on the *ex parte* representations of the complainant only but notice should be given to the accused before making the order, as the order might operate to the prejudice of the accused. MULUBHAI. 655

———*Transfer of a case—Notice.* When an application for the transfer of a case from one Court to another is made the order of transfer ought not to be made *ex parte* and without notice to the other side. KRISHNA ANANT PAI. 877

———(*XXV of* 1861, *Sec.* 36)—*District Magistrate— Referring a case for trial—Withdrawal of the case.* A District Magistrate cannot refer any case for trial to a Magistrate Full Power unless he has withdrawn it from some Court subordinate to him under section 36 of the Code of Criminal Procedure. TANNA MAGISTRATE'S LETTER. 34

———**S. 537**(*X of* 1882)—*Accused—Evidence in his presence—Absconding—Conviction and sentence in his absence.* An accused was present throughout a trial whilst the evidence was taken; but having thereafter absconded, the Magistrate passed sentence upon him in his absence, and on this re-arrest, re-pronounced his judgment:—*Held*, that the case might be regarded as falling under section 537 of the Code of Criminal Procedure, at least for the purposes of a review not sought by the accused; but that the Magistrate should not have pronounced judgment in the absence of the accused. GHOTIRAM. 325

Cr. P. C. S. 537—*Judge—Jury—Charge—Misdirection—Accomplice, evidence of—Corroboration.* The omission by a Judge to direct the Jury in his charge that, although a conviction upon the uncorroborated evidence of an accomplice is valid in law, it is dangerous to convict a prisoner on such evidence alone, and that they must look for corroboration of it in material particulars from independent sources in the case, is an error of law, which, if it materially prejudiced the prisoner, justifies the High Court in setting aside the verdict. RAMA 466

———*Sessions Judge—Appeal—Retrial.* Where the evidence recorded by the Magistrate is as full as the law required, and where there is no irregularity of procedure or defect in the enquiry necessitating retrial, it is not competent to a Sessions Judge on appeal to order retrial. He must consider, on the evidence given before the Magistrate, whether the conviction can be sustained, or the accused is entitled to an acquittal. MAGANLAL... ... 530

———*See* SADASHIV.... 701

——— *District Magistrate—Commitment, order of—Notice—Irregularity.* Where a District Magistrate, being of opinion that an accused person is improperly discharged by a Subordinate Magistrate, makes an order to commit him to a Court of Sessions without giving any notice to the accused, but the committing Magistrate before so doing issues the notice, the irregularity of the District Magistrate comes within the terms of and is cured by the provisions of section 537, Criminal Procedure Code. RABHA. 899

———**S. 541**(*X of* 1882)—*Prisons Act Sec.* 60 (t)—*Prisoner's Act—Imprisonment—Different Jails— Judge— Local Government.* There is no law empowering a criminal Court, passing a sentence of imprisonment, to divide the imprisonment between different jails. It would seem from section 541, Crimi-

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nal Procedure Code, Section 60 (t) of the Prisons Act, 1894, and Prisoner's Act, 1871, that this power belongs to the Local Government and the Inspector General of Prisons. RADHA. 827

Cr. P. C. S. 545(*X of* 1882)—*Compensation—Fine.* Under section 545 of the Code of Criminal Procedure, an award of compensation cannot be made in addition to the fine imposed, but must be made payable out of the fine itself. DHANJI. 196

——— *Obstructions to Fair Ways Act* (*XVI of* 1881,)—*Compensation.* The accused was ordered by the Superintendent of the coast guard service to remove certain fishing stakes and of his failing to comply with that order he was convicted, under section 283 of the Indian Penal Code, and sentenced to pay a fine of Rs. 20, of which Rs. 15 were awarded by the Magistrate to be paid to the complainant, the coast guard, to cover the expenses of removing the stakes:—*Held*, that the case not having been dealt with under the Obstructions to Fair Ways Act, the order of compensation was illegal, the same not coming within the terms of section 545 of the Code of Criminal Procedure. BHIKARI 241

——— *See* RAMIA. 317

——— *Compensation—Fine—Separate order.* When expenses properly incurred in the prosecution of a criminal charge are ordered to be paid by the accused under section 545 of the Code of Criminal Procedure, such expenses should be paid out of the amount of the fine imposed; a separate order for such expenses is improper. SAGLIARAM. 341

——— *Compensation—Repayment of the sum offered for bribery.* A Magistrate, acting under section 545 of the Code of Criminal Procedure, cannot, in awarding compensation out of the fine imposed upon the accused, order the payment of the sum to the complaint which he might have given to the accused for bribing others. NANESAHEB. 373

——— *See* LIMBA. 397

——— *Compensation—Offences other than those charged—Compensation for offences of which the accused is acquitted.* Section 545 of the Criminal Procedure Code does not empower a Court to award compensation for alleged offences other than those which form the subject of enquiry in the case in which the order is made, still less for offences of which the accused has been acquitted. GOVIND NARAYAN. 407

Cr. P. C. S. 545—*Expenses—Accused, bringing before a Magistrate.* Section 545 of the Code of Criminal Procedure does not apply to such expenses as are incurred in bringing the person of the offender before the Magistrate. RAMASWAMY 608

——— *See* BHAGOOJI... 625

——— *See* RAMA. 631

——— *Compensation—Widow of deceased—Practice.* It is not competent to a Judge to award, in cases of death, compensation to the widow of the deceased out of the fine imposed upon the accused. ABDUL RAHIMAN ... 763

——— *Conviction—Reward—Indian Penal Code, Sec. 379—Indian Forest Act.* Where a conviction and sentence proceeds under the provisions of the Indian Forest Act, it is not competent to a Magistrate to pass an order of reward to the complainant for detecting the offence. VITHU RAMJI 873

——— *Reward, giving of—Theft—Penal Code, Sec. 179—Indian Forest Act, Sec. 5—Trees, cutting of from waste number.* Where a person cuts a teak tree from a waste number he cannot be convicted and sentenced under the Indian Forest Act, 1878. KOYA MAVJI. 873

——— *Compensation order.*—The accused took his sister who was suffering from plague into a town without informing the authorities about it: he was, thereupon, convicted by a Magistrate of an offence under section 188, Indian Penal Code, and was sentenced to pay a fine of Rs. 20. The Magistrate further ordered that out of the fine so recovered Rs. 10 should be paid to the Municipality as damages on account of the expenses incurred by the Municipality:—*Held*, that the order of compensation was illegal. RAHIMATKHA. ... 958

——— (*XXV of* 1861, *Sec.* 44)—*Fine—Compensation—Award—Appellate Court.* The law makes no provision authorizing an appellate Court to award to a complainant any portion of a fine paid by a convict, when the

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trying authority has refused to award it. MAGISTRATE F.P. IN CHARGE SURAT, No. 1193, 39

Cr. P. C. S. 545(*X of* 1872, *Sec.* 308)—*Penal Code* (*Act XLV of* 1860) *Sec.* 62—*Forfeiture—Compensation.* Where a person was, under section 62 of the Indian Penal Code, sentenced to undergo a term of transportation and adjudged to forfeit to the Government the rents and profits of his property during that term:—*Held*, that it was not competent to the Court before which he was tried and convicted to award any portion of the said rents and profits as compensation to the complainant, section 308, Criminal Procedure Code, having no application to the orders for forfeiture of property. NANA PATLU. 146

——**S. 547**—*Accused—Fine—Compensation—Complainant—Repayment of compensation.* The accused were tried by the First Class Magistrate and fined Rs. 25 each and it was ordered that half the fine, if recovered, was to be given to the complainant. The conviction and sentence were quashed by the High Court who ordered a retrial. The Second Class Magistrate, on retrial, fined each of the accused Rs. 10 and said that "as they had already paid a fine of Rs. 25 each, the result of the sentence will be that Rs. 15 will have to be returned to each of them." The complainant who had previously been given half the fine, on being called upon by the District Magistrate, stated that he had spent the money and was unable to repay. A reference was, therefore, made by the District Magistrate as to how the compensation could legally be recovered:—*Held*, that the decision of the Second Class Magistrate amounted to an order to the complainant to refund the sum of Rs. 15 and was, therefore, enforceable under section 547 of the Criminal Procedure Code. RAVJI. 213

——**S. 548**(*X of* 1882)—*Proceedings—Copy.* Inasmuch as every one complaining of an offence by which he is injured is affected by the disposal of his complaint, whether the case has been sent up by a Police Officer or not, the petitioner is entitled to a copy of the Magistrate's order of discharge under section 253, Criminal Procedure Code. ABDUL KADRI 305

Cr.P.C.S. 548(*X of* 1872, *Secs.* 276, 464)—*Accused—Copy of Judgment—Language.* Sections 276 and 464 of the Code of Criminal Procedure are wholly distinct. Section 464 refers to the copy of the judgment in the language of the accused person affected by it, the grant of which is compulsory and independent of any request of that person; whereas section 276 applies to the copy grantable only on his application for the purpose of appeal. An accused person is, therefore, entitled to a copy in his own language unconditionally under section 464, which applies to all Courts; and also to one in the language in which it is written under section 276 under the conditions therein specified. NASIK MAGISTRATE'S REFERENCE No. 1181 73

——**S. 550**(*XXV of* 1861, *Sec.* 167)—*Public Works Department—Overseer—Sanction for prosecution—Letter of Executive Engineer.* An Executive Engineer, Public Works Department, by a letter addressed to a Magistrate Full Power, gave sanction to prosecute the accused his subordinate, a 1st Grade Overseer, not removable from his office without the sanction of Government, for framing an incorrect document. The Magistrate Full Power without a formal complaint, tried and convicted the accused; but the Sessions Judge reversed the conviction on the ground of want of formal sanction for the prosecution—*Held*, that the Executive Engineer's letter constituted a sufficient sanction for the prosecution. NARAYAN RAMCHUNDRA. 32

——**S. 551**—*District Magistrate—Transfer of case.* A District Magistrate alone has jurisdiction to entertain a complaint and make an order under section 551 of the Code of Criminal Procedure. He has no power to transfer such a case to a Sub-Magistrate, and that Magistrate would have no jurisdiction therein. JAGJIVAN VAMALCHAND. 965

——**S. 555**(*X of* 1882)—*Personal interest—Obstruction—Village Police Act* (*Bom. Act VII of* 1867), *Secs.* 28, 29—*Driving on wrong side of a road.* Where a Magistrate is himself one of those obstructed by the driving of the accused on the wrong side of a road, he should not himself try the accused under

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sections 28 and 29 of the Bombay Village Police Act, 1867. LAHANA. 321

Cr. P. C. S. 555—*Magistrate—Personally interested.* The Magistrate and the accused were fellowpassengers in a railway carriage. The latter were smoking; the Magistrate requested them to desist from smoking, but they contemptuously refused to do so. After some altercation the Magistrate arrested the accused and subsequently tried and convicted them under section 35 of the Railway Act, 1879:—*Held*, that under the circumstances of the case the Magistrate was legally and morally disqualified in exercising his judicial functions in relation to the offence imputed; and that although section 64 of the Criminal Procedure Code, gives to a Magistrate authority to arrest a person committing an offence in his presence, yet that section was clearly not intended to trench upon the great principle embodied in section 555 of the Code, that no Judge or Magistrate shall deal judicially with a case in which he is personally interested. VENKANA. 339

——**S. 556**(*X of* 1882)—*Magistrate—Personally interested.* It is usually expedient for the ends of justice that a Magistrate who has as an Assistant Collector supervised and given advice in a departmental inquiry against a Subordinate should not finally try and determine the criminal case against the same Subordinate. VISHNU. 631

——**S. 560**—*Compounding of offences—Compensation.*—Where an offence is compounded under the provisions of section 345, Criminal Procedure Code, a Magistrate is not competent to award compensation under section 560, Criminal Procedure Code. The composition of an offence under the former section has the effect of an acquittal but it is not such an acquittal as to bring the case within the provisions of section 560, Criminal Procedure Code. SANGAPPA. 957

——*Compensation.* A Magistrate has no jurisdiction to award compensation under 560, Criminal Procedure Code, in cases where the offence charged is not triable by him. BAVABHAI KESARISING 961

——(*X of* 1882)—*Compensation—Fine—Imprisonment.* The words used in section 560 of the Code of Criminal Procedure are similar to those used in sections 552, 547 of the Code. They do not empower a Magistrate to award imprisonment in the order for payment of compensation. They provide a procedure for the levy of the payment, *viz.*, that for levy of a fine under sections 386 and 387. It is only when the payment cannot be recovered that the Magistrate is empowered to award imprisonment. HARI. ... 611

Cr. P. C. S. 560. *See* NAMDEO.... 617

——**S. 560(a, b)**—*Compensation—Magistrate—Procedure.* In a proceeding under section 560, Criminal Procedure Code, the procedure provided by clauses (*a*) and (*b*) of the section should be strictly followed. An order directing payment of compensation to an accused under section 560, Criminal Procedure Code, ought not to be made without calling on the complainant to show cause against it, as required by clause (*a*) of the section. MANIK. 725

——*Compounding of offence—Compensation.* Where an offence is compounded under section 345, Criminal Procedure Code, it is incompetent to a Magistrate to award compensation under section 560 of the Code. As there is neither a discharge nor an acquittal but only a composition, section 560 does not apply so as to enable the Magistrate to award compensation to the accused. RAOJI. 700

——*Framing a charge—Frivolous complaint—Magistrate.* The fact that a Magistrate has framed a charge, under section 254, Criminal Procedure Code, against an accused does not of itself prevent him from holding after full inquiry that the charge is frivolous and vexatious under section 560 of the Code of Criminal Procedure. ABDUL RAHIMAN. ... 734

Culpable Homicide. *See* PENAL CODE *s.* 299.

Dacoity. *See* PENAL CODE, *s.* 398.

Defamation. *See* PENAL CODE, *s.* 499.

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), **S. 64**—*Receipt—Gumasta—Principal.* The words of section 64, Dekkhan Agriculturists' Relief Act, 1879, that the person to whom the payment is made shall tender a written receipt, ought to bear their plain meaning. If, therefore, a *gumasta* of a

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firm makes a default contemplated by the section the members of the firm cannot be proceeded with under the section. RAJMAL. ... 903

Dismissal of complaint—*Magistrate.* It is not competent to a Magistrate to refuse to enter a complaint or to dismiss it summarily on the ground that if entertained, it would tend to bring hundreds of similar complaints and would also stir up old religious ill-feelings. RAMCHANDRA. 562

———*Refusal to proceed—Malicious feeling—Complaint made after six years—Limitation.* A Magistrate is not at liberty to dismiss a complaint merely because the complainant is actuated by malicious feelings in making the complaint, nor again, is it open to him to dismiss it, if the offence complained of appears to have occured six years ago. MANJI. 549

Distinct Offences. *See* SOMA DALJI. 924

District Magistrate cannot dispose of a case at a place not in British India. MANEKLAL. 376

Divine displeasure. *See* PENAL CODE, *s.* 508.

Doubt, benefit of. *See* SHIVGOD. ... 127

Epidemic Diseases Act (*III of* 1897) **Rule 6**—*Information as to plague patient—Plague patient.* Rule 6, framed under the Epidemic Diseases Act, does not require the person who is himself attacked with plague to give information of his own sickness, albeit he is an occupant of the house in which he is attacked. MAHADEV GOPAL. 978

———**Ss. 2, 3**—*Notification—Attempt—Offence. Held,* that the notification issued by the District Magistrate did not appear to be a rule imposing quarantine in such a way as to make it an offence to try and evade quarantine, but was merely a notice informing persons of what they were liable to undergo, and made their detention legal, so that they could not escape detention if called upon to undergo it, but did not compel them to take the first step, and offer themselves for detention. *Held, also,* that even if it was an offence for persons liable to be quarantined to try and evade quarantine, the accused could not be said to have abetted even an attempt at evasion of quarantine on the part of these persons until the latter had attempted to evade quarantine and the former had assisted them in so doing. MANEKSHAW MANCHERSHAW. 968

Evidence—*Witnesses—Sessions Court—Committing Magistrate—Evidence at the Sessions—Practice.*—In a trial by a Court of Session, in his reasons for his finding, the Session Judge observed that certain witnesses had before the Magistrate given evidence against the prisoner, which evidence the Session Judge believed to be true though the same witnesses retracted it before the Court of Session. The High Court remarked that the decision must be according to the evidence given in the Session Court, *and that only.* It is illegal to use against the prisoner evidence given before the committing Magistrate except when such evidence is expressly made admissible by law. The only use which could be made of the evidence given by the witnesses before the Magistrate in this case was to show that their evidence before the Sessions Court was valueless and must be left out of consideration altogether. HIROO CHIMA. 39

———*Sessions Judge—Surgeon—Notes—Evidence of the Surgeon.*—A Sessions Judge is not authorized to allow a surgeon to describe the *post mortem* appearances merely from the knowledge acquired by him from a perusal of the notes made by another surgeon. SAVLA. 549

———*Presumption—Rebutting evidence.* It cannot be accepted as a rule of law that any presumption, however weak, is sufficient to sustain the conviction of an accused person, unless such person be able to give direct evidence to rebut such presumption. YESHWANT. 113

———*Burden of Proof—Evidence Act* (*I of* 1872). An accused person is under no obligation whatever to produce any evidence; and, until a strong case has been made out against him, no inference can be drawn from non-production of such evidence. In a criminal case, the burden of proof is on the prosecution under section 101 of the Indian Evidence Act, and a conviction must be based on evidence

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which excludes the theory of innocence; not on circumstances of suspicion, or on more probabilities. NARAYAN NATHU. ... 779

Evidence under Prisoners' Testimony Act. *See* RAMCHANDRA. 776

Evidence of accomplices. 493, ... 750,840

Evidence Act (*I of* 1872), **Ss. 24, 25.**—*Confession—Voluntary character of confession.* A confession to be admitted at all in evidence must be proved to have been made voluntarily; and when it is admitted in evidence, it has to be dealt with like any other piece of evidence, and acted on only if it is believed to be true. A confession, though made voluntarily, by an accused person before a Magistrate and subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it. BALYA DAGDU. ... 952

———**Ss. 25, 26, 27**—*Confession—Production of property by the accused themselves.* The Magistrate believed the witnesses, who deposed that the accused admitted the theft, and that the property was recovered in consequence of the admissions: but the judgment showed clearly that the identity of the *jowari* recovered with that stolen was not proved to the Magistrate's satisfaction, except by these admissions:—*Held*, that as the prisoners themselves produced the *jowari*, it was by their own *act* and not from any *information* given by them, that the discovery took place, and that so much of the information as amounted to a confession of stealing was inadmissible in evidence. KUMALIA. 285

———**S. 26**—*Police Officer and Magistrate.* When a prisoner in Police custody is brought before a Magistrate, for the purpose of having his confession recorded, he does not cease to be in the custody of the Police, even though no Police Officer is in the room while the confession is being recorded. The words "Police officer and Magistrate" in section 26, Evidence Act, 1872, include also Police officers and Magistrate in Native States. LAKSHMYA BHIMA. 885

———**S. 30**—*Retracted confession—Accomplice—Evidence.* The retracted confessions of accomplices may be taken into consideration under section 30 of the Indian Evidence Act, when there is evidence tending to conviction, but they cannot from the basis of a conviction when there is no evidence whatever. WASAPA. 108

Evidence Act, S. 30—*Confession—Co-accused—Admissibility against co-accused.* Although a confession may be accepted for what it is worth against the person making it, yet if it does not amount to such a confession of his own guilt as is contemplated in section 30 of the Indian Evidence Act, it could not be taken into consideration by the Court as against the other persons being tried with him. If a confession substantially implicates to the same extent, the person making it as well as the other accused in the offence for which they are jointly tried it is quite unnecessary to go beyond the actual confession to ascertain the object with which it is made. SADOO... 84

———*Taken into consideration.* The words "taken into consideration" in section 30 of the Indian Evidence Act mean taken into consideration for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not *technically evidence* within the definition given in section 3, it may still be used *quantum valeat* for the basis of a reasonable inference, and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more then by reason, from a finding of guilty thus sustained. BAYAJI. 311

———*Accomplice evidence—Confession of co-accused—Corroborration.* Four accused, B. C. M and T being committed for trial on a charge of murder, B was made an approver, and M and T pleaded guilty; and the trial thereupon proceeded against C alone:—*Held*, that the statements of M and T could not be used against C to corroborate the evidence of the accomplice B; and that as M and T pleaded guilty, and as the trial proceeded against C alone, he was not being tried together with them and section 30 of the Evidence Act had no application to their statements. CHAND. 400

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Evidence Act, S. 30—*Confession—Co-accused—Accomplice—Value of Evidence.* The confession of a co-accused cannot, though it may be taken into consideration under section 30 of the Indian Evidence Act, be treated as of the same value as the evidence of an accomplice taken on oath or solemn affirmation, and tested by cross-examination: in such a case the corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness. GANAPABHAT. 456

——— *Confession—"made"—"at the trial"—Admissibility of confession.* Section 30 of the Indian Evidence Act is not to be read as if the words "at the trial" were inserted after the word "made" and the word "recorded" substituted for the word "proved." Hence, a confession duly made at any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under section 30 of the Evidence Act as against the other accused persons. TANYA. 510

——— *See* CONFESSION. ... ...

——— **S. 33**—*Deceased witness—Deposition in a previous case—Admissibility in a subsequent proceeding.* When there are two or more charges arising out of the same allegations made by an accused the testimony of a deceased witness in a previous proceeding against the accused is admissible in evidence in a subsequent proceeding against the same accused. BHABHUTGAR. 347

——— **Ss. 34, 152, 159**—*Account books—Corroboration—Refreshing Memory—Judge—Cross-examination.* Entries to be admitted as evidence by way of corroboration of other testimony must be made in the regular course of business. It is not sufficient to prove that the entries were taken from books which were regularly and correctly kept. It is the duty of a Judge to control the cross-examination, so as to prevent any gross abuse and to protect a witness from being unfairly dealt with. The authority given by section 152 of the Indian Evidence Act ought to be exercised whenever the occasion arises; nor ought a counsel or a pleader to be allowed to terrify or browbeat a witness by vociferations or gratuitous suggestions of falsehood, calculated rather to crush a weak man or to enrage an irascible one, than to elicit the truth. A witness giving evidence is, *prima facie*, performing a public duty. The degree to which he may properly be pressed depends on circumstances, but it is subject to the general principle that the purpose in view is to get out the truth, not to force on the witness admissions that confuse or distort it. A witness who is being asked in reference to any particular transaction if he had made any entry in a register or book on or about the time when an occurence took place, such as the posting of a letter of which an entry was made, might refer to such entry or memorandum to refresh his memory, but beyond that he could not go. SAYAD SURFUDDIN. 345

Evidence Act, S. 44. *See* GOVERDHAN. 343

——— **S. 45.** *See* DONGAR.... ... 279

——— **S. 73**—*Criminal Procedure Code (Act X of 1882), Sec. 298—Admission—Document—Forgery—Comparison of handwriting.* Before admitting documents under section 73 of the Indian Evidence Act for the purpose only of comparison with a document alleged to be a forgery, it is the duty of the Judge to find, as required by section 298 of the Code of Criminal Procedure, that they are admitted or proved and the fact that the question of admissibility has been determined should be noted by the Judge in the record of the case. TULSAJI. 491

——— **S. 91**—*Summary trial—Evidence—Oral evidence admissible to prove depositions of witnesses in summary trials.* In ordinary case a Magistrate trying a criminal charge must take down the evidence, and then the record thus made is the only admissible proof of what was said, but in a summary trial the Magistrate need not generally record the evidence and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing, they may be proved by persons who heard them made in order to establish the fact that they were made. S. HOWARD v. RUSTOMJI DADABHAI. 334

——— **S. 106.** *See* BAPU NARAN. ... 401

——— *See* HARI DAGDU. 872

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Evidence Act, S. 125—*Construction.* The words "information as to the commission of any offence" in section 125, Evidence Act, 1872, only enact the rule which, as said by *Eyre*, C. J., in *Hardy's case* (1) has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which detection is made should not be unnecessarily disclosed. DYAMA IRAPPA... 937

———*See* GOWLIA. 183

———**S. 132**—*Accused—Previous statements — Criminating answer of witness — Admissibility.* Where an accused person has made a statement on oath, voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge. BHIKAJI HARI... 360

———**Ss. 133, 114, Ill. (b)**—*Accomplices—Evidence.* The Indian law on the subject of the testimony of accomplices as embodied in section 133 and section 114, Illustration (*b*) of the Indian Evidence Act is substantially identical with the law of England in that respect, *viz*:—that not only as to persons spoken of an accomplice must there be corroborative evidence, but also as to the *corpus delicti* there must be some *prima facie* evidence pointing the same direction. Hence, letters found in the possession of an accomplice, which were so ambiguously worded as to admit of no unfavourable inference being drawn against the accused person, without, in the first place, accepting as correct the interpretation suggested by the accomplice himself, were held not to afford any corroboration of the story told by the accomplice. CHATUR. 102

———**S. 145.** 928, 924

———**S. 152.** *See* SAYAD SARFUDDIN. 345

———**S. 155.** *See* GOVARDHAN. ... 343

———**S. 157**—*Statement by a witness—Chief Constable—Evidence—Corroboration.* A statement made by a witness to a Chief Constable may be proved, under section 157 of the Indian Evidence Act, in order to corroborate the testimony of a witness. Such a statement standing by itself, is no evidence on which a conviction can be based. YAKUB. ... 508

Extradition Act (*XI of* 1872)—*Accused — Proceedings in Native States—British territory—Keeping the accused in custody.* A British Magistrate is not warranted in keeping people in custody on a mere allegation that criminal proceedings against them are pending in a foreign State. Unless proper steps be taken against the persons detained under the Extradition Act, they must be released. KALADGI MAGISTRATE'S QUARTERLY RETURN. 124

———**Ss. 8, 9**—*Criminal Procedure Code, Secs.* 174, 175—*Indian British subject—Offence in a Native State—Political Agent—Arrest in British India under a warrant issued by a British Magistrate—Inquiry.* Where an offence was suspected to have been committed by Native British Subjects in Laktur in the Province of Kathiawar, *i.e.*, in a place without and beyond the Indian Territories under the dominion of Her Majesty (section 3 of Act XI of 1872) and the offenders arrested in the Surat District under the authority of a warrant from a Magistrate, First Class, there:—*Held* that, under section 9, Act XI of 1872, the Magistrate was authorized to complete the inquiry himself, and section 174, Criminal Procedure Code, made it unnecessary for him to send the accused to the District Magistrate under section 175, as the certificate required by section 9 of Act XI of 1872 had been duly furnished by the Political Agent. KAHANDAS... 97

Factory Act (*XV of* 1881), **Ss. 15, 17**—*Occupier—Manager—Proprietor.* The Proprietor of a factory who lives in a house on the factory premises for the greater part of the year is an 'occupier' of the factory within the meaning of section 17, Indian Factory Act; and if he does not discharge his liability by proving that the breach complained of was committed by his manager without his knowledge or consent, he renders himself primarily liable under section 15. The proprietor is none the less an 'occupier' because he has not sent in any notice under section 14, as no notice is obligatory, and, therefore, none was ever given, the factory having been started before

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the Act came into force. MANORDAS HARAKHCHAND. 902

False complaint—*See* PENAL CODE, *s.* 182.

False evidence—*See* PENAL CODE, *ss.* 191, 193.

False information—*See* PENAL CODE, *ss.* 177, 182.

Fine—*Fine imposed jointly—Recovery—Appeal of one of the accused—Remission of the fine—Recovery from the others.* When payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or any one of them, and if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to condition subsequent. RATNAGIRI MAGISTRATE'S LETTER No. 205. 90

———*Criminal Court—Cognizance—Departmental inquiries. Held*, that the fine judicially inflicted could not be remitted, not having been in itself an improper one. Departmental punishment cannot withdraw a wrong-doer from the cognizance of the ordinary Courts or relieve him from the penalties provided by the law. The fine imposed departmentally could probably be remitted departmentally. RAMNAIK.... 818

———*Amount—Magistrate—Discretion.* A Magistrate is not justified in inflicting heavy fines on poor persons, on the mere supposition that they are backed up by influential persons. BHILYA... 556

Forest Act (*VII of* 1878), — *Cattle Trespass Act* (*I of* 1871), *Sec.* 11—*Trespass—Reserved Forest.* Where the cattle do not go into the reserved forest of themselves but are driven into it by the accused, they are liable to seizure. GOVERNMENT OF BOMBAY *v.* KALLAPA. 603

———**Ss. 25, 63**—*Court Fees Act Sec.* 31—*Forest—Fuel—Loss—Court Fees.* Accused were convicted of an offence under section 25 of the Indian Forest Act, 1878, and each sentenced to pay a fine of thirteen annas, or in default to suffer one day's imple imprisonment, and all of them were ordered to pay annas five as compensation for the loss of the forest fuel or wood and Rs. 1-4-0 as Court fee expenses under section 31 of the Indian Court Fees Act, 1870:—*Held*, setting aside so much order of the trying Magistrate as directed payment of Court Fees, that no Court fees had been paid, as none were due, under section 31 of the Court Fees Act, offences under section 25 of the Indian Forest Act being, under section 63 of the kind for which Police Officers may arrest without warrant. GOPAL. ... 695

Forest Act, Ss. 25, 67 (2)—*Forest officer — Ranger — Compensation — 'Such officer' meaning of.* The conviction of an accused under section 25 of the Forest Act, 1878 is not illegal, for the reason that the officer, who accepted the compensation is not an officer empowered to do so. In section 67 (2) the words "such officer" mean an officer empowered. GANU. 591

———**Ss. 25, 75**—*Fines—Rewards—Magistrate.* The payment of rewards out of fines and confiscations effected under section 25, Indian Forest Act, is not a part of the sentence, but is a matter for the Executive Government to deal with in the power vested in them by the rules framed under the Act. These rules give the Government the power to pay one half of the proceeds of fines and confiscations by way of reward without any order of the convicting Court; and unless the Magistrate so directs more than one-half cannot be paid. A Magistrate, therefore, is under no obligation to make any direction as to rewards unless he thinks that more than one-half should be paid by way of reward. MOGHJI KUKA 960

———**S. 25 (d)** — *Trespass — Reserved forest—Human being.* The trespass of a human being in a reserved forest is made punishable by section 25 (*d*) of the Indian Forest Act, 1878. UMDYA 602

———**S. 25(i)**— *Rules—Government—Shooting.* A conviction recorded under section 25 (*i*) of the Indian Forest Act, 1878, for shooting in a reserved forest in contravention of any rules which the Local Government from time to time prescribe, is illegal, in the absence of any such rules having been passed by Government. HANMANTA. 684

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Forest Act, S. 41, Rule 26—*Passes—Omission to return Pass—Khandesh District.* There is no rule made under section 41 of the Indian Forest Act, 1878, for the Khandesh District, which provides for the return of passes issued under the Act, and therefore the omission to return one cannot be held to be penal. UMEDA. 500

———*Criminal Procedure Code (Act X of 1882), Secs. 222, 223—Indian Penal Code (Act XLV of 1860), Sec. 414—Charge—General Charge—Pass—Forest Produce.* An *inamdar*, the owner of a forest, obtained, in October 1891, a book of passes authorizing him to issue the same for the transit of forest produce belonging to himself. Between October 1891 and March 1892, he issued 50 of these passes covering forest produce, (*i. e.*, myrabolams) exceeding altogether 10 *khandis*; of these about one *khandi* may have belonged to the *inamdar*, and the rest, it was presumed, belonged to Government, but it could not be made out what particular pass or passes covered the produce belonging to the *inamdar*. The *inamdar* was prosecuted in respect of the passes issued for the myrabolams, over and above his own, and was convicted by a Magistrate under sections 411 and 109, Indian Penal Code, and Rule 26 of the Rules passed under section 41 of the Indian Forest Act, 1878. The charge as framed by the Magistrate was in general terms, with reference to all the transactions between October 1891 and March, 1892. On appeal, the Sessions Judge amended the convictions and found the *inamdar* guilty of an offence under section 414, Indian Penal Code, in respect of the myrabolams covered by the passes issued on 30th March, 1892 and also of a breach of the Rule 26 of the Rules passed under section 414 of the Indian Forest Act in respect of the abovementioned myrabolams: *Held*, (1) that the conviction under Rule 26 of the Rules passed under section 41 of the Indian Forest Act could not be sustained, there being no express prohibition in Rule 3 against issuing such passes for the forest produce belonging to Government; (2) that the general charge as framed by the Magistrate was correct. WAMAN.... 659

———**Ss. 54, 76**—*Reward—Forest produce.* A reward can only be paid out of the proceeds of any forest produce legally confiscated, and in the case of such produce being the property of Government and therefore not liable to confiscation under section 54 of the Forest Act, the payment of a reward would be illegal under section 75 (*h*) of the Act. TULAJI 620

Forest Act, S. 55—*Forest produce—Property of Government—Magistrate—Order.* When the forest produce, in respect of which an offence is committed is found to be the property of Government, the only order which the Magistrate can legally make regarding it under section 55 of the Indian Forest Act, is that it should be taken charge of by a Forest Officer. An order for its sale and the payment of a reward to the informer from its proceeds is therefore illegal. RAMAJI. 361

———**S. 75, Rule 1**—*Reward—Amount—Magistrate.* Under rule 1 of the rules framed under section 75 of the Indian Forest Act, 1878, one-half of the proceeds of the fine is payable as a reward without any order of the convicting Court. ADIVAYA. 622

———*Reward — Amount — Apportionment of reward.* It is not competent to a Magistrate to order a reward to be less than one-half the amount of the fine; and when the reward is to be distributed among more than one person, the apportionment thereof vests in the Conservator of Forest. ADEVEPPA 610

———**S. 75, Rules 13, 26, 3**—*Pass books—Contractor—Liability.*—A person, who had obtained from the Forest Department a contract for cutting timber and had been supplied by the Forest Officer with pass-books containing the following endorsement—"There are 100 passes in this book and there is the official seal in the centre of each pass. This pass-book is given to B, the contractor of Moujeh Medhe, Taluka Wasai, in order that he may let the timber in the compartment go away"—was sufficiently authorized in writing for the purposes of Rule 13, and was guilty of no offence in issuing the passes. The accused who had acted in good faith could not be held criminally liable for the laches of the Forest Officer in not complying with the requirements of the Rule by giving the accused the authority in writing. BALVANTRAO. 424

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Forest produce. *See* RAMAJI. ... 361

Forgery. *See* PENAL CODE, *s.* 463.

Frivolous complaint—*See* CRIMINAL PROCEDURE CODE, *s.* 250.

Gambling Act (*Bom. Act III of* 1866), **S. 6**—*Gaming house—House in which instruments of gaming are found—Presumption.* A house, suspected to be used as a common gaming house, in which any instruments of gaming are found and which is entered in warrant issued under the provisions of Bombay Gambling Act, 1866, is presumed to be a common gaming house until the contrary is proved. GANGARAM. 216

———**S. 11**—*Coin—Instrument of gaming.*—A coin is not an instrument of gaming which means an implement devised or intended for that purpose. RAMA ZILU... 75

———*Tiles — Instruments of gaming.* Pieces of tile are not instruments of gaming within the meaning of section 11 of the Bombay Gambling Act, 1866. MAHOMED. 314

Gambling Act (*IV of* 1887) **S. 3**—*Common gaming house—Evidence.* In the absence of evidence that a house is used for profit or gain, it cannot be held to be a common gaming house as defined in Bombay Act IV of 1887, section 3. MAGAN KALA. ... 840

———**S. 5** — *Common gaming house.* Section 5 of the Prevention of Gambling Act, 1887, refers to persons found in a common gaming house; it does not refer to persons who are in the habit of assembling in various places for the sole purpose of gambling. SHEKH AHMEDBHAI. 763

———**Ss. 6, 7**—*Burden of proof—Warrant—Police Officer—Chief Constable.* Prevention of Gambling Act, 1887, must be strictly interpreted as section 7 of it throws the burden of proof on the accused and is thus a departure from the usual rule. A Police officer of lower rank than a Chief Constable held a warrant, issued under section 6 of the Act, and entered and searched the house:—*Held*, that the entry under the warrant was unauthorized, as the authority could not be given under section 6 to the lower officer, and cannot be treated as valid for the purposes of section 7. SUBHABHATTA. 825

Gambling Act, S. 7—*Bagatelle Board—Presumption.* As a bagatelle, board and billiard balls are capable of being used both for games of skill and for games of chance, no presumption can be drawn under section 7, Prevention of Gambling Act, 1887. MASUKH RAICHAND. 923

———**S. 12**—*Gambling— Conviction — Double sentence— Imprisonment —Fine.* Where a person is convicted of an offence under section 12, Prevention of Gambling Act, 1887, he can be sentenced to pay, a fine or to undergo imprisonment but not to both. TUKARAM. 686

General Clauses Act (*I of* 1868), **S. 5**—*Criminal Procedure Code* (*Act XXV of* 1861), *Secs.* 21, 61—*Fine—Levying of fines.* Section 5 of Act I of 1868 does not apply to fines levied under Regulations and Acts passed prior to the passing of Act I of 1868; but the provisions of section 21 of the Code of Criminal Procedure, have the effect of making section 61 applicable to the levy of such fines, whether imposed under the Indian Penal Code or under any special or local law except when a special mode of levying the fine may be prescribed by such law. GOVIND JHILGA. 57

High Court, power of, to convict for contempt. *See Balvantrao* v. *Ramchandra.* 614

———jurisdiction of, under Act XI of 1846. *See* RATNYA RAJA. 989

House-trespass, *See* PENAL CODE, *s.* 348.

Income Tax Act (*IX of* 1869), **Ss. 3, 25**—*Magistrate—Subordinate Magistrate—Jurisdiction—Non-payment of income tax.* A Subordinate Magistrate, 2nd Class has no jurisdiction to convict for non-payment of Income Tax under Act IX of 1869 for, by section 25 of the Act, such convictions must be had before a "Magistrate," which term is defined in section 3 to mean "any person exercising the powers of a Magistrate, or a Subordinate Magistrate of the First Class." TAPEE POONJA. 37

Joinder of Charges. *See* VITHABE. 4

Judge—*Duties—Administration of justice.* The duty of a Judge is to administer

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justice according to law; he is not entitled to put terms on the Crown or any suitor requiring conformity to his own extrajudicial views. He must not defeat any right given by law by interposing his private notions of morals or an extraneous or extrajudicial consideration. He may fairly meditate an accomodation, but not put terms on pronouncing sentence or giving judgment. In the exercise of his judicial office, he is restrained from the use of language which may prevent the approach of persons aggrieved or which may cause scandal, or may show that he is influenced by fear or favour. What is legal is a matter competent to a Judge to ascertain; but the question whether the Crown is *morally* justified in calling a witness or prosecuting a criminal is not usually one for a Court of law, but is a matter within the discretion of the prosecution. To the law of the land every Judge is strictly bound to conform: and the Judges of the inferior Courts are bound to act upon the interpretations of the High Court, which is the highest tribunal. RAMCHANDRA SAWAIRAM. 786

Jurisdiction—*British India—Political Agency—District Magistrate.* A District Magistrate cannot legally dispose of a criminal case at a place not in British India. MANEKLAL. 376

Jury—*Sessions Judge—Important testimonies to be read over to the Jury—Practice.* Where a trial by Jury is a long one the Sessions Judge ought in his charge read over to the Jury the important testimonies in the trial. FAKIRA VENKAPPA. 850

———summing up to. *See* ABDUL KARIM. 288

——— *Sessions Judge—Verdict—Questioning the Jurors—Practice.* It is not competent to a Sessions Judge to put question to the Jury where the verdict is general and has been delivered without ambiguity and without incompleteness, and where there is no reason to suspect a misconception or disobedience of the doctrines of law. A Sessions Judge is not at liberty to put questions to the Jury, after it has delivered its verdict, with a view to bring on record the points on which his opinion is at variance with the Jury. DESAI DAJI.... 442

Jury—*Evidence—Admissibility—Irregularity—High Court.* The question what the Jury are to *receive* is for the Judge; what they are to *believe* is for the Jury. Where a Sessions Judge allowed certain documents to go upon the record, which were not proved, for the purpose of comparision of handwriting and left it to the Jury to form their opinion whether the accused wrote the disputed signature, the High Court held that there was no such irregularity as to warrant an interference on its part. LALSING. ... 452

———*Presidency Magistrate—Coroner's inquiry—Coroner's Act* (*IV of* 1871). The jurisdiction of a Presidency Magistrate is not ousted by Coroner's inquiry. JOHN PAUL. 540

Land Revenue Code (*Bom. Act V of* 1879), **S. 189**—*Mamlatdar—Summons—Inquiry into the appointment of a Police Patel.* Section 189 of the Land Revenue Code does not empower a Mamlatdar to summon any person to attend before a Deputy Collector, who was making certain inquiries about the appointment of a Patel for a certain *inam* village. VIDIADHAR. 488

———**S. 209.** *See* MIYA SAHEB... 254

———**S. 214** — *Occupant— Removing stones and earth with the occupant's permission —Land belonging to Government.* The accused dug stones and removed them from land in the possessing of a person having the rights of an occupant under the Bombay Land Revenue Code, with the permission of that person:—*Held*, that he could not be convicted under clause (*d*) of Rule 111 of the rules framed under section 214 of the Code, as such land was not land "belonging to Government" within the meaning of the clause. BHOJILAL ... 531

———**Rule 111, cl. 1** (*d*)—*Bombay General Clouses Act* (*Bom. Act III of* 1886), *Sec.* 3 (13)—*Magistrate—Jurisdiction.* An offence committed in contravention of Rule 111, clause I, item (*d*), of the rules framed under section 214 of the Land Revenue Code, 1879, is triable, having regard to the provisions of section 3, clause (13), of the Bombay General Clauses Act, 1886, by any person exercising Magisterial powers under the Code of Criminal Procedure,

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and the decision of *Queen Empress* v. *Shivram* is no longer an authority. BAI EMMA. ... 681

Land Revenue Code, Rule, 111, cl. (1)—*Government—Forest—Trees.* To justify a conviction under Rule 111, clause (*b*) framed under section 214 of the Land Revenue Code, it must be proved that the trees cut down by the accused were the property of Government. In such a case the fact that government has a various times asserted ownership over other trees in other parts of the village is, by itself, of small importance as proof against the accused, as the occupants of the lands may not have known of their rights or may have had their own reasons for submission. GANESH RAGUNATH.... 828

——— **Rule 111 (2) (d)**—*Excavation—Old foundations—Permission.*—Excavating, without permission, a foundation on the side of a village and building a wall upon it is not an offence under Rule No. 111 (2) (*d*) of the Rules under the Land Revenue Code, 1879. SHESHIBHAT. 200

Letters Patent, S. 15—*Discharge—Presidency Magistrate—Appeal—Revision—High Court.* There is no appeal against an order of discharge made by a Presidency Magistrate, nor can such a complainant apply to the High Court with a view to invoke its aid under section 15 of the Charter. S. HOWARD *v.* MAHAMADALLI. 335

——— **S. 29**—*Transfer—Criminal appeal* Under section 29 of the Amended Letters Patent of 28th December 1865, the High Court can transfer for hearing by itself, a criminal appeal filed in a Court of Session. APPA MALLYA. 110

Magistrate issuing a warrant in anticipation of offence. *See* BHAIJI. 90

Maintenance. *See* CRIMINAL PROCEDURE CODE, *s.* 488.

Maxim. *Ex turpi causa non auritur actio....* 301

Mischief. *See* PENAL CODE, *s.* 425.

Municipal Act, City, (*Bom. Act III of* 1888). **Ss. 61 (d) 3 (10), (d), 308, 315**—*Repairs—Rat-holes, stopping of—Stones, re-setting of—Public Street.* The stopping up holes made by rats and setting right slabs of stones that had got out of position by the Health Department of the Municipality is no proof of repairs within the intent of the definition of "public street" in section 3 (10) of the City of Bombay Municipality Act, 1888, but comes more appropriately under section 61 (*d*) of the Act, the Corporation having to make many sanitary provisions "and generally the abatement of all nuisances." Sections 308 to 315 of the Act apply to private and public streets, so that the use by the Corporation of the powers to remove the projections and obstructions is not evidence that the street is a public street. THE MUNICIPAL COMMISSIONER OF BOMBAY *v.* VINAYEK RAMCHANDRA. 802

Mun. Act, City, Ss. 68, 517—*Complainant—Person entitled.* The Municipal Commissioner is the only person empowered under the City of Bombay Municipal Act, 1888, to take proceedings against any person who is charged with any offence against the Act. He has, however, powers under section 68 to delegate his functions under section 517 (*a*) to any Municipal Officer by writting in this behalf and then that person can take proceedings, but no one else can. NADIRSHAW H. SUKHIA. 967

——— **S. 220**—*Municipal Commissioner—House—Ventilation.* Section 220 of the Bombay Municipal Act, 1872, as amended by Bombay Act IV of 1878, does not empower the Municipal Commissioner to direct structural alterations. Hence, where he requires the owner of a chawl to put it in a proper state by providing ridge ventilation within a given time, the notice is illegal and the owner by refusing to comply with it commits no offence. SADANAND. 192

——— **S. 225**—*Wool—Storage.* The accused was charged with using a place within the City of Bombay for the storage of wool, without a license from the Bombay Municipal Commissioner, and fined Rs. 10 under section 225 of Bombay Act III of 1872, as amended by Act IV of 1878:—*Held*, that notwithstanding that there is express mention of "wool" for purposes of watching and drying in the first part of the section and none later on, the words "other articles" may

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include the case of the storage of wool. CURRIMBHOY. 297

Mun. Act, City, S. 394—*Domestic—Bakery—Firewood, stacking of.* The word "domestic" in section 394, City of Bombay Municipal Act, 1888, means "household," and connotes "dwelling" as opposed to manufacture or bake-house. MUNICIPAL COMMISSIONER OF BOMBAY *v.* PROPRIETOR OF PRINCE ALBERT VICTOR BAKERY. 793

——**Ss. 394 (1), 471**—*Commissioner—License—Fire-wood—Presidency Magistrate.* A Presidency Magistrate may, under section 471, City of Bombay Municipal Act, convict and punish any, person contravening any provision of section 394, sub-section 1, as for instance, using any premises for any of the purposes mentioned in that sub-section without a license from the Commissioner. The questions whether the Municipal Commissioner refused the accused a license, and whether the refusal was legally justified are irrelevant to the determination of a case under the section. OOMER. 729

——**S. 402**—*Market—License—Commissioner.* The words of section 471, of the City of Bombay Municipal Act, 1888, provide a punishment contravening any provision of section 402 (1). A person who does what is so distinctly prohibited by clause (2) does, by usurping the powers vested in the Corporation by clause (1), contravene that last mentioned clause. The two clauses must be read and interpreted together in order to give effect to the policy and object of the Legislature. MUNICIPAL COMMISSIONER OF BOMBAY *v.* CAWASJI BYRAMJI.... 733

——**S. 471.** MUNICIPAL COM. *v.* COWASJI. 733

Municipal Act, District, (*Bom. Act VI of* 1873), **S. 3**—*Building—Enclosure—Wattle-fence.* A mere wattle-fence cannot fall within the definition of a "building" or "enclosure" as contained in the Bombay District Municipal Act, the building specified being all of a substantial kind. SALOMIBAI ... 429

——**Ss. 21, 32**—*Tax — Sanction—Tax not due before sanction.* A tax can only be made payable from the date of its levy being sanctioned by Government under section 21 of the Bombay District Municipal Act. A tax is generally payable at the expiration of the period for which it is declared payable, unless a rule has been framed under section 32 of the Act specifying the date on which it is payable. RAMCHANDRA. 514

Mun. Act, District, S. 33—*Rebuilding— Wall — Rebuilding on old foundations —Notice — Municipality.* A person who, without giving notice to the Municipality, merely re-erects on the same foundation a part of a wall, which has fallen down, does not contravene the provisions of section 33 of the Bombay District Municipal Act, as he does not, by so re-erecting it, begin to erect any building or to alter externally or to add to any existing building within the meaning of that section. TIPPANA.... 402

——*Addition to existing building.* The erection of a *katta*, which is permanent in character and which serves as a broad extended door-step or raised platform of communication with the public road, is an addition to an existing building within the meaning of clause (1), section 33, of the Bombay District Municipal Act. DEVENDRAPPA, ... 483

——*Selling of meat—Market—Municipality—By-law.* The by-law prohibiting the sale of fish or meat outside the market, purporting to be made by District Municipality under the repealed section 70 of Bombay Act VI of 1873, is *ultra vires* of that section and also of section 33 of Bombay Act II of 1884. The by-law cannot be treated as a direction under section 66 (1) directing that no place shall be used as a market, as it does not allude to any such use, there being no evidence that the road in question was used as a market. GOOKI. 797

——*Wall, rebuilding of, on old foundations.* The re-erection on the same foundation of a wall which has fallen down is not an offence under section 33, District Municipal Act, 1876. *Quære,* whether a bamboo-fence can be described as a wall? UMAR JAMAL. 932

——**Ss. 33, 74**—*Permission to build—Municipality.* The accused obtained permission from the Surat Municipality to make some alterations in his house, under a *razachithi* dated the 12th May 1892, which allowed

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a year within which to carry out the work. There appeared to be no by-law under section 33 of the District Municipal Act, providing a period within which works were to be carried on. The accused was convicted of an offence under sections 83 and 74 of the Act:—*Held*, that the conviction was wrong, so far as it proceeded upon the period of one year having been exceeded, and that it was unnecessary to determine whether such a by-law would be *ultra vires*. THAKORDAS 684

Mun. Act, District, S. 33 (1)—*Building—Reed fence.* A *Karavi* or reed fencing is not a building within the meaning of section 33 (1) of the Bombay District Municipal Act, 1873. JANARDHAN 145

———**S. 33 (2)**—*Municipality—Notice—Building.* The effect of clause 2, section 33, of the Bombay District Municipal Act, 1873, which permits a person to erect the building of which he has given notice, if within the period prescribed the Municipality has failed to issue written orders, is by implication to prohibit the erection of any building within such period, unless in the meantime written orders have been issued. GANPATRAM... 657

———**S. 33 (3)**—*Magistrate—Review.* In dealing with a case of non-compliance with a legal order made by a Municipality, under section 33 (3) of the Bombay District Municipal Act, a Magistrate has no right to review the order from the stand-point of its propriety and to consider what kind of structure would be sufficient for the purpose in view. MORU. 310

———**Ss. 36, 99**—*Rules—Omission to exhibit printed copies in vernacular—Sanction—Revenue Commissioner—Government.* The omission by a District Municipality to keep printed copies of the rules in the vernacular language for sale as required by section 36 of the District Municipal Act of 1884 does not affect the validity of the rules. The approval by the Revenue Commissioner of the rules is tantamount to approval by the Governor-in-Council within the meaning of section 99 of the District Municipal Act, 1873. BAHADARSHAH 615

———**S. 39**—*Notice—Owner.* One H was required by the Municipality of Poona, under section 39, District Municipal Act, 1873, to white-wash the privy of a house owned by him. The notice was received by the accused, a nephew of H, and the receipt also was signed by him. The notice not having been complied with, the accused was convicted by a First Class Magistrate under section 74 of the Act and sentenced to pay a fine of Rs. 15:—*Held*, that the conviction of the accused was wrong, as the Act concerned itself only with the owner of a house. The fact that the accused received the notice for the owner could not make him liable. NATHUBHAI NAHALCHAND. 973

Mun. Act, District, S. 39 (2)—*Privy—Municipality.* The accused gave a notice to the Bombay Municipality under section 33 of the Bombay District Municipal Act, 1873, of his intention to build a house, and submitted a plan of the proposed building. The Municipality stated in reply that the site for the privy shown in the plan was objectionable, and that the plan was, therefore returned with a view to an amended one being submitted. The accused built a privy on the proposed site after one month had expired:—*Held*, (1) that the action of the accused in building the privy came within the words of the penal section 39 (2) of the Act, as there was a construction of a privy, which was, as regards its site, contrary to the direction of the Municipality; (2) that the action of the accused properly came within the mischief at which section 39 (2) strikes. HARKISONDAS NAROTAMDAS. 819

———**Ss. 48, 74**—*Carriage—Public road—Obstruction.* As a carriage with horses attached is not one of the things contemplated in section 48 of the Bombay District Municipal Act, a person cannot be convicted under sections 48 and 74 for causing obstruction to passers-by in having allowed his carriage to stand half an hour on a public street. LADBA. 324

———*Municipal Act—Sentence.* The Municipal Act is intended to check many offences, petty in their nature but which may cause grievous injury to the neighbourhood as by facilitating fires or serious annoyance as when a householder blocks up a street. The sentences passed for breaches of the provisions of the Act ought not only to be punitive but also deterrent and the fine should bear some

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proportion to the amount awardable by the law. JAMNADAS. 719

Mun. Act, District, Ss. 51, 74—*Conviction—Appeal—District Magistrate.* A Magistrate on the complaint of a Municipality that the accused had, without its permission, occupied land belonging to it, dealt with the case as a Magistrate and convicted the accused under section 51 of the District Municipal Act and sentenced him to a penalty under section 74 of the Act.—*Held*, that the District Magistrate should hear an appeal made by the accused to him and that if the conviction did not properly fall under section 51 of the Act, that was a ground for reversing it and not for refusing to entertain the appeal. KARUNARAM. 313

——**S. 53**—*Dirt—Back of the house.* The High Court reversed a conviction of the accused, under section 53 of the Bombay District Municipal Act, for depositing dirt on the back ground of his house, since the dirt &c., was not deposited in "any street, public quarry, jetty or landing place or any part of the seashore or bank of tidal river." SHAM. 477

——*Street — Obeying call of nature.* To obey the call of nature elsewhere than in a street is not an offence under section 53 of the Bombay District Municipal Act, 1873. DIGAMBUR 507

——**S. 53(1)**—*Cattle—Members of family.* Cattle are not members of a family or household within the meaning of section 53 (1) of the Bombay District Municipal Act and a person cannot, therefore, be convicted of an offence, under clause 2 of that section, for having tied his bullocks near the drain in front of his house so as to allow their dung &c. to drop there. HARI KHUSAL. ... 412

——**S. 61**—*River—Washing dirty clothes.* A person cannot be convicted under section 61 of the Bombay District Municipal Act, on account of his wife's having washed some dirty clothes in a river, without finding (1) that the river in question was a stream, &c., belonging to the Municipality, or (2) that the accused caused the clothes to be washed by his wife in such stream, and where it appeared that he had simply told his wife to wash the clothes, without saying where they were to be washed. FATEH MAHOMED. ... ...

Mun. Act, District, S.66—*Slaughter-house.* A person who kills a goat in his own house for his own consumption cannot be said to use the place as a slaughter-house within the meaning of section 66 of the Bombay District Municipal Act. BHIWA. ... 399

——*Market—Selling fish—Road side*—The accused sold a small quantity of fish on the road side on her way to the market and was convicted, under section 66 of the Bombay District Municipal Act, of using for sale a place other than that licensed by the Municipality:—*Held*, that, as it did not appear that any direction was issued by the Municipality to the effect that no place should be used as a market except the one licensed by them, the conviction was illegal. SANTU... 606

——**S. 66 (1)**. *See* GOOKI... ... 797

——**S. 67**—*Market—Selling meat at one's house—Platform.* The selling of meat in one's own house would not, but the selling of meat on another person's platform abutting on a public road would be, an offence under section 67 of the Bombay District Municipal Act, 1873. RAJYA. 207

——**S. 67 (2)**—*Meat—Permission or license.* A person selling meat not in a public market but at his house without permission or license from the Municipality, cannot be punished under section 67 (2) of the Bombay District Municipal Act. LAKSHMAN 397

——**S. 68**. *See* NARAN NARSING. 763

——**S. 72**—*Bye-law—Birth or death—Parent—Guardian—Servant.* The duty of giving information to the Municipality about the birth of a child is imposed on the parent or guardian of a child, or in the case of the death, illness or inability of the parent or guardian, on the occupant of the house in which the child is born, and not on the servant of such occupant. GOVINDA. ... 373

——**S. 74**—*Nuisance.* An order cannot be made under section 74 (2) of the Bombay District Municipal Act, 1873, in respect of a possible future continuance of the offence for which an accused person has been punished

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under clause (i) of the section. In respect of any such continuance of the offence, a fresh precaution is necessary. BAWAJI. ... 291

Mun. Act, District. S. 74 *See* pp. 313, 324, 684, 719, 974.

———**S. 82**—*Cattle—Straying—Magistrate—Criminal Procedure Code (Act X of 1882), Sec. 191—Cognizance.* Section 82 of the Bombay District Municipal Act does not deprive a Magistrate of the power conferred by Section 191 of the Code of Criminal Procedure, of taking cognizance of an offence upon complaint, or upon a Police report, or upon information &c., to a Police officer of the power conferred by section 28 of the Bombay Act VII of 1887. MULCHAND. 355

———*Complaint—Private person.* Section 82 of the District Municipal Act does not prevent a private person from making a complaint to the Magistrate in certain cases, *e. g.*, where an offensive liquid was allowed to flow from the premises of the accused into the street. BAI REVA.... 630

———**S. 84**—*Octroi duties—Entries in shipping bills and manifests.* A person who imports timber by sea into the Thana Municipal District is not bound by the entries in shipping bills and manifests as to its weight, for the purposes of calculating the octroi duty but is entitled if he disputes the said entries to demand a fresh weighment or measurement at the place of importation. RAMCHANDRA. 541

———*House-tax—Rule—Government, sanction of.* The accused was convicted, under section 84 of the Bombay District Municipal Act, 1873, for non-payment of house-tax, and ordered to pay Rs. 10 for house-tax, and a fine of Rs. 2-8-0 and one anna as process-fee, but it appeared that there was no rule on the subject framed by the Municipality. *Held*, ordering the return of the penalty and the tax levied, that as admittedly the Municipality had not framed a rule for the sanction of Government, as required by the Acts and nothing had been submitted to Government, except some general proposals sent up by the Collector of Satara, the conviction was illegal. LAKSHMAN. 694

———*Honorary Magistrate — Penalty.* Although under section 84 of the Bombay District Municipal Act, a Magistrate has power to inflict, in addition to arrears of cess or other taxes, a penalty not exceeding in any case one-fourth of such arrears, he has no power to levy any penalty computed as an addition to the expenses. SYED MAHOMED. 692

Mun. Act, District. S. 84 *Arrears of tax—Failure to pay—Magistrate.* The effect of the amendment of section 84 of the Bombay District Municipal Act, 1873, by section 49 (i) of the Bombay Act II of 1884, being to make a failure to pay arrears of taxes an offence under the Act, an information laid before a Magistrate by the Municipality for such prosecution is a prosecution for an offence under the Act, even though the Municipality ask only for the arrears due and not that a penalty should be inflicted; and such information must therefore be laid within three months next after the date when the taxes were due and not paid. KARUNASHANKER. ... 420

———*Rule—"Payable in advance"—Construction—Meaning of the words.* The words "payable in advance," in a rule relating to house-tax, do not mean that the taxes are payable on the first day of the year, but would mean only that they would be payable in advance on demand at any time within that year. RAJA HUSEN 868

———*Magistrate—Cess—Discretion to enquire into earnings of accused—Assessment by Municipality no proof per se.* Where in a prosecution for the recovery of a tax the defence is raised as to the proper amount to be paid, the Magistrate is bound to determine the question of the liability of the accused including that part of the liability which depends on the amount of the earnings. It is nowhere provided in the Act or in the Rules that the statement of the Municipality is to be accepted as proof of the amount of the earnings. NATHU 559

———*Cess upon houses—Rule—Construction—"Yielding a yearly rent."* Where it appears to be the intention of a Municipality in drawing up certain rules that a cess should be levied not only on houses actually yielding rent, but also on houses capable of yielding rent, and the cess is recited in the rules as imposed on every house "yielding a yearly rent," the expression must be treated as equi-

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valent to the expression "capable of yielding a yearly rent." MAHADU... 658

Mun. Act, District, S.84—*Arrears of tax—Payment before the hearing of the case—Penalty.* A Magistrate cannot inflict a penalty under section 84 of the Bombay District Municipal Act, 1873, if an order for the payment of the arrears of the tax cannot be made because the arrears were paid before the case came on for hearing. GANESH.... ... 618

———**S. 99.** *See* BAHADARSHAH. 615

Nuisance, head of the house liable for. *See* NARAYAN. 398

Obstruction to Fairways Act (*XVI of* 1881). *See* BHIKARI. 241

Opium Act (*I of* 1878)—*Opium—Possession—Selling.* The accused kept $2\frac{10}{16}$ tolas of opium in his possession with the intention of selling it:—*Held,* that he did not thereby contravene any rule under the Opium Act. LALU KHEMCHUND.... 287

———*Rules— Chandul— Manufacturing for his own use.* A person after purchasing opium from a licensed vendor, made therefrom a preparation called *chandul* for his own domestic use. The Magistrate convicted him of an offence in contravention of the rules prescribed and made by Government under the Opium Act, 1878 :—*Held,* that the conviction was bad, and that Rules 3 and 4 (1) read together must be construed as permitting the manufacture of *chandul,* by a person for his own domestic use, from opium licitly obtained. KAGLO. 676

———**S. 5**—*Accounts—Omission.* The accused was convicted of the offence of contravening a rule made and notified under section 5 of the Opium Act, 1878, by not keeping a regular account of the opium in his possession, in accordance with the stipulation in his license :—*Held,* that the person who contravenes a condition of a license imposed under a rule may be considered guilty of a breach of the rule. JETHALAL. 298

———**S. 9**—*Keeping open a shop after 9 p. m.—Offence—License.* The terms of a license issued under rules promulgated under sections 5 and 8 of the Opium Act, 1878, are not to be regarded as part of the rules themselves; and, consequently, that an infraction of any of the conditions of a license issued under the said rules cannot be considered an infraction of the rules and punishable under section 9 (*f*) of the Act. MAHOMAD. ... 332

Opium Act, S.9 *Breach of condition of license offence.* An infraction of a condition of a license cannot be considered an infraction of the rules made under the Opium Act, and punishable under section 9 of the Act. DATTER BALA. 860

———**S. 9 (e)**—*Cartman—Opium.* One Vaghaji hired the accused with his cart to carry cumin-seed from Ranapur into British India. Illicit opium was found concealed in the cumin-seed, and Vaghaji and the accused were both convicted of an offence under section 9 (*e*) of the Opium Act :—*Held,* that in the absence of evidence that the accused knew that Vaghaji was carrying opium in his cart his conviction could not stand. NARSIDAS. 378

———*Importing Opium.* The accused went on business into foreign territory and while there purchased one anna's worth of opium. He ate a portion of it there, and brought the rest in his turban into British territory. The Magistrate convicted him under section 9, cl. (*e*) of the Opium Act 1878 :—*Held,* that the conviction was illegal. DHONDOO. 969

Penal Code (*Act XLV of* 1860), **S. 21**—*Public Servant—Convict Warder.* A convict warder is not a public servant within the meaning of section 21 of the Indian Penal Code. OODAJI. 389

———**Ss. 21 (2), 223**—*Rakha—Public servant — Negligently allowing a person to escape from custody.* A watchman in the Kaira Collectorate, who does the work of *rakha,* though not borne on the village records as a village servant, and receives a portion of the emoluments assigned as remuneration for the services of a *rakha,* is a person in actual possession of the situation of a public servant within the meaning of explanation 2 of section 21 of the Indian Penal Code and is, therefore, punishable under section 223 of the Code if he negligently allows any persons lawfully given into his custody to escape. FULA BHANA. ... 388

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Penal Code, S.21(9)—*Broach Thakurs' Relief Act (XV of 1872)-Manager—Karkoon—Public servant.* A Karkun employed, to execute revenue processes and receive rents, by a manager appointed under the Broach Thakurs' Relief Act is a public servant within the meaning of section 21 (9) of the Indian Penal Code, as such Karkun receives rents not only on behalf of the Thakur but also on behalf of Government. ISUD MUSA. 117

———*Public Servant — Stamp-vendor—Appointed by Collector under the old Act, after the new Act XVIII of 1869 came into force.* A person was appointed by a Collector after the new Stamp Act XVIII of 1869 came into operation, to sell stamps under rules promulgated under Act X of 1862 :—*Held,* that as that person was not appointed under the new Stamp Act, and could not be appointed under the old one, which had been repealed, he could only be considered a person who had entered into an agreement with the Collector to sell Government property *i. e.,* stamps, and as such agreement created no office, he was not an officer within the meaning of section 21, cl. 9, of the Indian Penal Code. KALYANRAY. 36

———**S.22.** *See* KASHIRAJ MARTAND. 43

———**S. 24.** *See* JAMSETJI.... ... 395

———**S. 30.** *See* GOVIND RAMAPPA 467

———**S. 44.** *See* ALYA DHARMA.... 37

———**S. 64.** *See* VAIDYALINGAM ... 871

———**S. 65.** *Imprisonment in default of payment of fine—Maximum sentence.* The accused was convicted of an offence under section 43 (*c*) of the Bombay Abkari Act, 1878, and sentenced to pay a fine of Rs. 75 or in default to suffer rigorous imprisonment for three months:—*Held,* altering the sentence of imprisonment in default of payment of fine to six weeks, that the sentence passed was illegal under section 65, Indian Penal Code, the maximum term of imprisonment fixed for the offence being six months. BHIKARAO. 979

———**S. 69.** *See* MAYA DEVJI. ... 40

———**S. 70**— *Imprisonment —Fine—Default—Bar of six years.* Imprisonment in default of payment of fine is not a satisfaction of the fine, but is a punishment for contempt; and the fine may be recovered by distress, within six years, even though the full term of imprisonment in default has been undergone. The bar of six years, provided in section 70 of the Indian Penal Code, may save the property of the accused but not his personal arrest. The liability for any sentence of imprisonment awarded in default of payment of fine continues after the expiration of the six years. GANU SAKHARAM. 207

Penal Code, S. 70—*Fine—Warrant to levy it—Subsequent finding of accused's property—Recovery of fine.* Every warrant for the levy of a fine or a portion of it must be issued by the Court passing the sentence. If, at any time subsequent to the passing of the sentence, the fine or any part of it remains unpaid, and the Court, from information gained in any way, has reason to think that any moveable property belonging to the offender is within its jurisdiction, it should issue a fresh warrant for the attachment and sale of that property within a specified period, returnable within a certain time. SATTARA SESSIONS JUDGE'S LETTER No. 562. 35

———**S. 71**—*Criminal Procedure Code (Act X of 1882), Sec. 35—Concurrent sentences — Consecutive sentences — Practice.* The accused was convicted of making a false charge of an offence with intent to injure, punishable under section 211 of the Indian Penal Code, and of intentionally giving false evidence in a stage of a judicial proceeding punishable under section 193, Indian Penal Code, and was sentenced, for each of the charges, to three months' simple imprisonment, the sentences being concurrent :—*Held,* that the Judge could not legally pass concurrent sentences for the offences under sections 211 and 193 of the Indian Penal Code, as the case did not fall under section 71 of the Indian Penal Code; and that under section 35 of the Code of Criminal Procedure consecutive sentences should have been passed, as the second accused was convicted of "two distinct offences" within the meaning of the section. PIR MAHOMAD. 225

———*See* UGRA 307

———*See* SAKHARAM. 449

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Penal Code, S. 71—*Separate punishments.* It is not legal to sentence an accused person to two separate punishments, for what is substantially the same act, though it falls under two separate definitions of offences. FRANCIS XAVIER. 506

———*Offence.* Where a person causes the death of two children by a rash and negligent act committed at the same time and place, he can be convicted for the offence as one act, under section 71, Indian Penal Code. BALI NAGAPPA. 852

———**Ss. 71, 148, 302, 326**—*Criminal Procedure Code (Act X of 1882), Sec. 235—Murder—Rioting—Separate sentences—Offences forming parts of the same transaction.* An accused, who is punished for murder, or voluntarily causing grievous hurt with a dangerous weapon, cannot be also punished by fine for rioting when all the offences formed parts of the same transaction. MUSE BAGAS. 493

———**Ss. 71, 170, 171**—*Wearing a false garb—False personation—Separate sentences.* Where an accused person is convicted of wearing the garb of a Police Constable, under section 170 of the Indian Penal Code, and of personating by means of such garb a Police Constable, and, as such, ordering a person to be kept in custody, under section 171 of the Code; only one sentence ought to be passed on him under the provisions of section 71 of the Code. TUKARAM. 405

———**Ss. 71, 240, 243**—*Convictions—Practice.* A person having four counterfeit coins in his possession, but uttering only one of them, cannot be separately convicted under section 240 of the Indian Penal Code respecting the one rupee, and under section 243 of the Code regarding the other three; because an offence under section 240, implies prior guilty possession. LAKSHIA. ... 202

———**S. 72.** *See* KABHAI. ... 336

———**S. 75**—*Criminal Procedure Code (Act XXV of 1861), Secs. 22, 46—Magistrate—Punishment—Powers.* Section 75 of the Indian Penal Code does not give a Subordinate Magistrate power to inflict a punishment beyond that which he can inflict under section 22 of the Code of Criminal Procedure. This cannot be done except when his jurisdiction is expressly enlarged, as by section 46 of the Code of Criminal Procedure. VITHYA. 49

Penal Code, S. 75. *Previous conviction—Sentence.* The accused having been previously convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, was subsequently convicted of an offence under one of these Chapters punishable with imprisonment which may extend to three years:—*Held*, that a sentence of ten years' transportation is an illegal one. Under section 75 of the Indian Penal Code the accused may be transported for life but he cannot be imprisoned for a longer period than six years. GOPALA. 117

———*Magistrate—Jurisdiction—Separate sentences.* The accused, who was previously convicted, was again convicted by a Second Class Magistrate of theft under section 379 Indian Penal Code, and was sentenced to suffer six months' rigorous imprisonment under section 379, and further rigorous imprisonment for six months under section 75, Indian Penal Code:—*Held*, that section 75, Indian Penal Code, did not authorize the Magistrate to pass a sentence in excess of section 32 of the Code of Criminal Procedure. GULAB. 688

———**S. 79.**—*See* BAI MAHAKOR.... 820

———**Ss. 83, 495**—*Bigamy—Child of ten years—Maturity of understanding*—Where a child of ten years marries again during the life-time of her husband, the marriages being negotiated and caused to be performed by the mother of the accused the child was held not to have attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage. GODI. 876

———**S. 84**—*Insanity—Hereditary insanity—Presumption.* The facts that the conduct of the accused at the time of the trial was unusual and that his father was insane do not justify the conclusion that the accused at the time of committing the offence was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was wrong and contrary to law. JEEVA AMTHA. 10

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Penal Code, S. 84 *Lunatic—Procedure—Burden of proof.* The law presumes every person at age of discretion to be sane unless the contrary is proved; and even if a lunatic has lucid intervals the law presumes the offence of such persons to have been committed in a lucid interval, unless it appears to have been committed during derangement. BALU... 172

——*Criminal Procedure Code* (*Act X of* 1882), *Sec.* 540—*Evidence Act* (*I of* 1872), *Sec.* 45—*Lunacy—Defence.* When the defence is based on section 84 of the Indian Penal Code, the Sessions Judge may under section 540 of the Criminal Procedure Code and Section 165 of the Indian Evidence Act, ascertain the behaviour exhibited by the prisoner during the years of his life previous to the homicide, and, if accused has been kept in a lunatic asylum, record medical evidence of the facts observed there, and of the opinion formed as to his particular form of lunacy. Section 45 of the Indian Evidence Act, illustration (*b*), indicates this evidence as relevant to determine the issue raised. DONGAR. 279

——The *onus* of proving the defence afforded by section 84, Indian Penal Code, rests on the prisoner. IRAPA. 818

——**Ss. 84, 99**—*Murder—Unsoundness of mind.* Partial delusion or the mere existence of mental disease does not necessarily exempt a person from criminal responsibility. The proved unsoundness of mind of the sort described in section 84 of the Indian Penal Code is a complete defence; and mental weakness caused by disease is an extenuating circumstance affecting the sentence. When the absence of any motive, preparation or purpose for a criminal act is admitted, or evidence of some mental derangement such as melancholy or excitement, or of every extraordinary conduct has been given, or other index of disease of the brain appears in the case, the Magistrate or Judge ought to use the means pointed out in the various provisions of law, so as to find out as much as possible about the mental state of the accused. NEPAL. 229

——**S. 95**—*Theft—Property worth 3 pies.* Section 95 of the Indian Penal Code is not applicable to a case where the accused is charged with the offence of theft, in respect of 3 pies worth of dung-cakes and mangoes. RANCHORE. 400

Penal Code, S. 95—*Magistrate—Juvenile offenders—Punishment.* In cases where boys are charged with some offence, the Magistrate before whom they are brought for trial, should very carefully determine whether the affair charged was merely a hoax and should not lightly send them to long terms of imprisonment. BALI 569

——**S. 99.** *See* TULSIRAM ... 380

——**S. 108**—*Abetment—Concert—Intention.* To constitute a man the abettor of another's crime, it must be clearly established that both intended to commit or to further the same crime. HAMAL. 93

——**S. 109**, *See* SAKHARAM. ... 35

——**Ss. 109, 111**—*Murder—Abetment—Different act.* The accused accompanied the brother who was taking a child to murder it: after accompanying him for a while he refused further to go along with his brother, but at the same time, though knowing full well that the child was being taken to be murdered he made no attempt to take the child back with him: and the child was subsequently murdered:—*Held*, that under sections 109 and 111 of the Indian Penal Code, the accused was guilty of murder. SADU.... 207

——**Ss. 110, 149** — *Murder—Unlawful assembly — Common object.* The common object of an unlawful assembly was to beat a person, and two of the persons were armed with wooden bars. In beating the deceased, the armed persons used the bars rather severely and the other persons of the assembly simply used their hands on the deceased:—*Held*, that section 110 of the Indian Penal Code was applicable to the case and the persons who were not armed were guilty of only voluntarily causing grievous hurt. CHUNDERSUNGJEE. 14

——**S. 114** — *Abetment — Presence.* To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encourage-

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ment or unless some specific duty of prevention rests on him, which he leaves unfulfilled, in such wise that he may be safely taken as having joined in a conspiracy for the perpetration of the offence. LAKSHMI. 303

Penal Code, S. 114—*Abetment—Oath—Accomplice, deposition of—Magistrate.* Mere presence at the commission of an offence is not abetment of it, if the person present has no authority to interfere. When a Police Constable makes an arrest in a village, the Code of Criminal Procedure applies to it, and the responsibility is of the Constable and not of the Police Patel who has no power to interfere. A Magistrate should not put persons on oath unless he is satisfied of his authority so to do, for it may be an oppression. A conviction based on the totally uncorroborated story of an accomplice is bad in law. Where a person makes one statement when questioned on oath before a process to compel, his appearance is issued, and makes a different statement in his defence when put at the trial he cannot on this fact alone be convicted under sections 114 and 161 of the Indian Penal Code. The burden of proof in such a case lies on the prosecution and the proper material for judgment is the testimony as to what specific acts the accused did and what particular words he used. SHIDLINGAPPA. 844

———**S. 118.** *See* VISHVANATH. ... 708

———**S. 141.**—*Unlawful assembly—Rioting.* If any person encourages, or promotes, or takes part in riots, whether by words, signs or gestures or by wearing the badge or ensign of the rioteers; he is himself to be considered a rioteer. Active participation in actual violence is not necessary. Some may encourage by words, others by signs, and others again may actually cause hurt and yet all would be equally guilty of rioting. GANU. 99

———**S. 161**—*Illegal gratification.* The accused, the *Kulkarni* of a village, told the ryots who had been given a grant of *tagavi* by Government that he had worked for them for 8 days and that they must pay him 12 annas each or they would get into trouble and in consequence the ryots paid him the money:—*Held*, that the accused was properly convicted of an offence under section 161, Indian Penal Code, as he made use of his official position and claimed and obtained the money as a reward for rendering services which he had not rendered in that position. KRISHNAJI GANESH. 955

Penal Code, S. 170. *See* TUKARAM. 405

———**S. 171.** *See* TUKARAM. ... 405

———**S. 172**—*Absconding—Warrant—Service.* A person, absconding to avoid the service of a warrant issued by a Magistrate to the address of a Police Officer, directing the latter to arrest that person, does not commit an offence under section 172, Indian Penal Code. LAKSHMI. 152

———**S. 173**—*Refusal to receive and sign a summons.* A refusal to receive and sign a summons does not constitute a prevention of service within the meaning of section 173 of the Indian Penal Code. KHUSHAL. 17

———**S. 174**—*Witness—Order to attend—Verbal order—Disobedience of the order.* A verbal order given to a witness by a Court to attend on a particular day at a particular hour is an order the disobedience of which is punishable under section 174 of the Indian Penal Code. GUMAN. ... 75

———*Criminal Procedure Code (Act X of 1872) S. 473—Bhagdaree and Narvadaree Tenures Act (Bom. Act V of 1862),—Mamlatdar—Inquiry under the Bhagdaree and Narvadaree Tenures Act—Summons—Disobedience—Contempt—Offence.* Bombay Act V of 1862 does not provide for the attendance of persons before the Mamlatdar for the purpose of an inquiry under that Act. A conviction, therefore, for non-attendance in obedience to a summons issued under it by the Mamlatdar is illegal. In this case the conviction was also held to be illegal under section 473 of the Code of Criminal Procedure on the ground that the trying Magistrate had no jurisdiction, his Court being the same against which the alleged contempt was committed. MAHOMED ISMAL.... 70

———**S. 176.** *See* SADA. ... 674

———**S. 177**—*Stamp Act (I of 1879)—Stamp vendor—Purchaser giving a false name.* The purchaser of a stamped paper, not being bound by any law, or rule having the force of

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law, to furnish information to the stamp-vendor, is not punishable, under section 177 of the Indian Penal Code, if he gives a false name. PARMAYA.... 210

Penal Code, Ss. 177, 182—*False information—Person not bound to give the information—Person not intending injury or annoyance to any particular person.* Where a person who is not legally bound to furnish information of an offence, falsely informs the Police that such an offence has been committed without intending to cause injury or annoyance to any particular person, he commits no offence either under section 177 or section 182 of the Indian Penal Code. SURAJI. 76

———**S. 179**—*Refusing to answer questions put by police—Juryman.* A person can not be convicted of an offence under section 179, Indian Penal Code, for refusing, when required by a police officer, to look at the hands of a complainant and to answer whether there were any marks of tying with a rope on his hands. FAKIRA. 92

———**S. 182**— *Information—Criminal Procedure Code (Act X of 1872), Sec. 119—Statement—Magistrate—Evidence—Judgment.* A statement made under section 119 of the Code of Criminal Procedure is included in the word "information" as used in section 182 of the Indian Penal Code. A Magistrate after having heard all the evidence in a case, cannot postpone it for judgment by his successor in office, on the same materials; but must pass the judgment himself. BHIKAIJI. 124

———*False information—Public officer.* Where a person gives false information to an officer who has power to be exercised by him to the direct and immediate prejudice of the complainant against whom the information is levelled, he becomes guilty of an offence under section 182, Indian Penal Code. SHRIPATI WAMAN. 946

———**S. 182, 211**—*False-complaint—Police—Offence.* A petition made by a person to the Police falsely stating that the petitioner suspects another person of having committed an offence and praying for inquiry, does not amount to an institution of criminal proceedings against that person within the meaning of Section 211 of the Indian Penal Code. The petitioner should be charged under section 182 of the Code with having given false information with intent to cause a public servant to use his lawful power to the injury of another person. GOPAL BHIKAJI. 72

Penal Code, S. 183. The proceedings of an inferior Court of limited jurisdiction must set forth the facts and orders (not being general statutes of which all Courts must take notice) requisite to give it authority in the particular case. The High Court cannot on review, presume the existence of the necessary circumstances, which are not set forth. Where it did not appear on the face of the conviction that the Mamlatdar was an officer to whom under the provisions of section 12 of the Land Revenue Code, the powers of the Collector, constituted by section 87 of the Code, had been delegated under any general or special order of the Government nor that the karkoon employed to distrain was an officer directed to perform that duty by the Commissioner, under the orders of Government, a person resisting such a karkoon by force when the latter came to distrain some goods at his house, is not guilty of an offence under section 183 of the Indian Penal Code. YESHWANT. 326

———*Bailiff—Refusal to hand over money from a pocket to a bailiff.* The mere refusal by an accused person to hand over to a bailiff money alleged to be in his pocket is not a resistance to the taking of that money within the meaning of section 183 of the Indian Penal Code. ALIBHAI. 412

———**S. 186** *Survey officer—Forbidding to measure lands in a particular manner.* To forbid a survey measurer land in a particular manner, without using or threatening to use force to prevent him from doing so, does not amount to the offence of voluntarily obstructing a public servant in the discharge of his public functions. RAVJI. 377

———*Public servant—Obstruction.* A person, who chains from within the door of his house on the approach of a Karkoon, charged with the execution of a warrant issued by the Mamlatdar for the attachment of his moveable property, is acting within his rights and is not guilty of an offence

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under section 186 of the Indian Penal Code. MAINA 407

Penal Code, Ss. 186, 189, 506—*Custody, rescue from—Criminal Intimidation*—A Constable was sent to fetch to a Police Inspector some persons from whom the latter wished to make inquiries regarding an offence. The order to attend was evidently not in writing. While the Constable was, accordingly, taking two persons with him, the accused came up and threatened them both and the Constable with the Head Constable's vengeance, and as a consequence, the two persons refused to accompany the constable who had to go without them. The Magistrate, on these facts, convicted the accused of offences under sections 186 and 189, Indian Penal Code:—*Held*, that as an order under section 160, Criminal Procedure Code, must be in writing, and a person summoned under such order cannot be forcibly compelled by the person serving the order to attend, the presence of the Constable with the two persons (who were not under duress) was an ordinary circumstance and not a discharge of duty, and that, therefore, the accused was not guilty of an offence under section 186: (2) that the act of the accused properly fell within the terms of section 506, Indian Penal Code. PURSHOTAM VANAMALI 851

———**Ss. 186, 99**—*Public Officer—Survey-officer—Collector's order ultra vires—Mamlatdar—Possessory suit—Mamlatdar's Courts Act (Bom. Act III of 1876).* A Mamlatdar cannot, in the execution of the decree passed in a possessory suit, refer the matter to the Collector in case of difficulty in executing it. A survey officer deputed by the Collector to attend to the execution, is not a public servant in the discharge of his public functions, and persons obstructing him cannot be convicted of an offence under section 186, Indian Penal Code. Section 99 of the Indian Penal Code does not shield an officer whose act is altogther illegal. TULSIRAM 381

———*Registration Act S. 2 (d)—False personation—Village Registrar—Abetment.* Abetment of personation before a Village Registrar, appointed under the Dekkhan Agriculturists Relief Act, 1879, is not punishable under section 82 (*d*) of the Registration Act, 1877; as the section does not, by itself, apply to such abetment. B appeared before a Village Registrar and falsely personated W, and in such assumed character, expressed a desire to execute a lease in favour of A, who was present and assented to take the lease. When B made some mistakes in giving the area of the land, C corrected him. E identified B as W before the Village Registrar and he and D assured the attesting witnesses that B was W:—*Held*, that C, D and E could not be convicted under section 82 (*d*) of the Registration Act, 1877, but that they committed an offence under section 182, Indian Penal Code. BALA KASHABA. 761

Penal Code, S. 186—*Public servant—Obstruction—Municipal servant—Pegs and strings fixed in road—Bona fide dispute of the road—Pulling up pegs.*—A Municipal servant cannot be considered to be discharging a public function in putting down pegs and strings, in order to mark out a road, unless the road is public property vested in the Municipality. A person between whom and the Municipality there is a *bona fide* dispute as to the ownership of the road, commits no offence, under section 186 of the Indian Penal Code, if he pulls up the pegs and cuts the strings in the assertion of his right. SAGAN. 366

———**S. 188.** *See* MANEKCHAND. ... 342

———*Theatre—Proprietor*—A proprietor of a theatre, not in actual possession or management of the theatre at a time when a lawful order promulgated by a public servant was disobeyed, cannot be convicted under section 188, Indian Penal Code. KRISHNA SHET. 527

———*Disobedience—Order posted at a place—Individual service necessary.* The accused was convicted, under section 188 of the Indian Penal Code, for disobeying an order posted at a certain place by a Subordinate Magistrate, 1st Class, prohibiting people from burying and burning corpses there—*Held*, that the order not having been served individually upon the accused, the conviction was illegal. SUKAR BUDHIA. 30

———*Criminal Procedure Code (Act XXV of 1861), Secs. 44, 62, 308—Order—Repair to a well—Disobedience—Fine—Order*

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to execute the repairs out of the fine imposed. A Subordinate Magistrate, 1st Class, issued, under section 62 of the Code of Criminal Procedure, an order calling upon the accused to make certain repairs to a well, and, upon his failing to make these repairs, tried him for disobedience of an order, under section 188 of the Indian Penal Code, and fined him Rs. 100 and directed, under section 44 of the Code of Criminal Procedure, that the repairs should be made to the well and paid for out of fine. *Held*, that in this case section 308 of the Code of Criminal Procedure alone was applicable, and that, therefore the Subordinate Magistrate had no jurisdiction in the matter; and that the order to repair the well was one which he was not competent to make under section 44 of the Code of Criminal Procedure. TATYA... 50

Penal Code, S. 188—*Criminal Procedure Code (Act X of 1872), Secs. 518, 521—Pruning of hedges—Order—Magistrate—Disobedience—Bombay District Police Act (Bom. Act VII of 1867), Sec. 33.* Conviction under section 188, Indian Penal Code, for disobedience to the order of a Magistrate issued under section 578 of the Criminal Procedure Code directing the pruning of hedges:—*Held*, that as the circumstances showed that there was no necessity for a speedy remedy, the Magistrate had no power to issue the order disobeyed, as Explanation 1 to section 578 points out another and less summary procedure in such circumstances. The Magistrate was also informed that section 33 of Bombay Act VII of 1867 was more applicable to such cases. BAPUJI BECHAR. 81

———*Order—Disobedience.* To sustain a conviction under section 188, Indian Penal Code it is necessary to prove that the disobedience complained of would produce one of the consequences specified in the section. HARILAL. 438

——— Section 188, Indian Penal Code, refers to orders made for public purposes and does not apply to an order made in a possessory suit between party and party. ULWAPGAVDA. 864

———*Criminal Procedure Code (X of 1882), Ss. 195, 487—Disobedience of an order—Magistrate—Jurisdiction.* A Magistrate is not competent to try and convict a person under Section 188, Indian Penal Code, of disobedience to an order issued by himself as Magistrate under section 144, Criminal Procedure Code. The Magistrate is further disqualified from trying such a case by section 476, Criminal Procedure Code, for the offence is one mentioned in section 195 of the Code and it is committed in contempt of his own authority. LANGADAVA BALU KOLI. ... 904

Penal Code, S. 189—*Public servant—Threat of injury.*—In order to sustaina conviction under section 189 of the Indian Penal Code there must be "a threat of injury to either the public servant or to any one in whom he (the accused) believes that public servant to be interested." What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself or to some one in whom the accused believes he has an interest. AMIRKHAN. 273

———**S. 190**—*Public Nuisance—Meat, exposing of in a shop.* The mere fact of keeping a shop open for the sale of meat does not constitute the offence of public nuisance. The sight of meat may be offensive to the sentiments of Hindus but it cannot be said to affect seriously, if at all, the health, safety, comfort or convenience of the community at large. HASAN SAMAD. 908

———**Ss. 190, 268**—*Public nuisance—Solicitation of chastity.* Bare solicitation of chastity is not a public nuisance, as it proves or suggests no fact relating to any common injury, danger, or annoyance, which is a part of the definition of public nuisance in section 268 of the Indian Penal Code. RAJI.... 765

———**Ss. 191, 193**—*False evidence—Knowledge—Belief—Materiality.* Under sections 191 and 193 of the Indian Penal Code, false evidence must be intentionally false to the knowledge or belief of the person giving it: cases may arise in which materiality may not be essential to the offence described in the above sections, but it must be taken into consideration in arriving at the intention with which the false statement was made. TOOKARAM. ... 2

———**S. 193**—*False claim.* In a case in which an accused person was convicted

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by a Magistrate, F. P., under section 209, Indian Penal Code, of making a false claim, it appeared that the accused had made a false verification of his plaint. The High Court annulled the conviction on the ground that an offence punishable under section 193 Indian Penal Code, had been committed, and that the Magistrate had no jurisdiction. It was left to the discretion of the Magistrate to take further proceedings against the accused. LUXUMANDAS.... 25

Penal Code, S. 193—*Sessions Judge—Finding containing an intimation of an intention to grant sanction.* A person cannot be tried for giving false evidence in a judicial proceeding on the authority of a finding of a Court of Session, in which an intention to sanction the prosecution of that person was expressed but never carried out. PIRTAPPA. 78

———Where a Judge issues a notice to the accused to show cause why his prosecution under section 193, Indian Penal Code, should not be sanctioned, he must allow sufficient time for the notice to be served upon the accused and should not grant the sanction before the notice has been served. UMARBHAI... 404

———*Police investigation—Magisterial trial—False evidence—Alternative charge—Non-admissibility of statement made before the Police.* The accused was charged in the alternative with having given false evidence either before the Chief Constable in a Police investigation or before a Magistrate in a criminal trial:—*Held*, (1) that the statement made to the Chief Constable by the accused, and reduced by him to writing, was not admissible in evidence against the accused; the only evidence as to such statement that would be admissible for the purposes of such a case as the present being the oral testimony of the Constable, who could, however, refresh his memory by referring to the statement reduced by him to writing: (2) That oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under section 91 of the Evidence Act. The deposition itself ought to have been put in, and the proceedings in the case in which it was taken, ought also to have been put in to show the nature of the proceeding in which the evidence was given BAPU NARAN 407

Penal Code, S. 193. *See* NANA RAJU 468

———*Criminal Procedure Code (Act X of 1882), Secs. 161, 155—Alternative charge—Police officer—Delegation of investigation.* The accused, a Police Patel, having stated to a Chief Constable, that he had paid Rs. 5 to a classer as a bribe to prevent the assessment on his fields from being raised, and subsequently before a Magistrate having stated that he paid the Rs. 5 for provisions, was charged in the alternative and convicted of an offence under section 193, Indian Penal Code:—*Held*, reversing the conviction and sentence, that, as section 161 of the Code of Criminal Procedure, binds a person to answer truly only questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty of forfeiture, the accused was not liable, in respect of his first statement to the Chief Constable, to a prosecution under section 193 of the Indian Penal Code, the offer of a bribe being an offence punishable under the Indian Penal Code, and the accused being liable to loss of his office for misbehaviour. *Quære*:—Whether a Police Inspector, who has been appointed as a Magistrate to investigate a non-cognizable offence, can legally delegate the duty of making the investigation to a Chief Constable. KALIDAS. 486

———*False evidence—Contradictory statements.* The accused was convicted on an alternative charge of giving false evidence by making two contradictory statements,—one in 1886 and the other in 1887. There was no finding that either of the statements was false. On his attention being called, while under examination in 1887, to the contradiction, he said, "If such statement has been made by me in my previous deposition, the same may be true":—*Held*, that the accused must be taken to have withdrawn the statement at first made in his latter deposition, and that he had the right to do so, for a deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him; and the statement that he finally makes must be

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taken to be the evidence that he intended to give. GOPAL. 502

Penal Code, S. 193—*False evidence—Alternative charge.* It is not permissible to charge a person in the alternative in that he gave false evidence either before the Chief Constable or the Magistrate, as the one is an entirely distinct offence from the other. WARDHAN.... 503

———*Criminal Procedure Code (Act X of 1882), Sec. 161—False statements—Contradictory statements—Alternative charge.* A witness is not bound, under section 161 of the Code of Criminal Procedure, to answer truly criminating questions. An alternative charge of an offence under section 193, Indian Penal Code, cannot be permissible in respect of contradictory statements, one of which is made to the Police and another to a Magistrate. ANNIA 518

———*False complaint.* Where a person having reason to believe that a certain man has committed an offence punishable under section 457, Indian Penal Code, instigates the complainant and witnesses in the case to make statements which he knows to be false, he commits an offence under sections 109 and 193 and not under sections 201 and 511 of the Indian Penal Code. RAWJI. 632

———**S. 194**—*False evidence—Offence.* To render a person liable under section 194 (as distinguished from section 193) of the Indian Penal Code, he must have given or fabricated false evidence in the final stage, *i. e.*, the trial and not in the preliminary inquiry into the case. Where an accused had, in a preliminary inquiry before a Magistrate, made a deposition in which he falsely stated that he had seen the persons charged before the Magistrate in the act of committing a murder:—*Held*, that section 194 of the Indian Penal Code was inapplicable, as the natural consequence of such false evidence would be nothing graver than a committal of the persons charged to the Court of Session, and not necessarily a conviction, and it must be presumed that accused intended the natural, that is, the ordinary consequence. GOKALDAS. ... 80

———**S. 197**—*False certificate—False information to a public servant.* A person signed a notice of transfer of survey nos. in the character of his father who was dead; and the declaration to this notice was signed by the accused, who confirmed the assumed character:—*Held*, the accused could not be convicted under section 197 of the Indian Penal Code, but could be convicted of giving false information to a public servant. MULHARJI.... ... 182

Penal Code, S. 201—*Principal offence—Accessary offence.* A conviction of the accessory offence under section 201 of the Indian Penal Code is not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed, the principal offence. LIMBYA. 797

———**S. 202**—*Police Patel.* A Police Patel failed to report the arrival at his village of dacoits, and supplied them with food and drink;—*Held*, that he could not be convicted under section 202 of the Indian Penal Code, as there was nothing to show that an offence was committed by persons who visited his village. BALA 160

———*Police Patil—Report about death.* Where, from the fact of the Police Patil ordering the Kulkarni to write a report regarding a suspicious death in his village, his good faith is apparent, and it does not seem that he had an intention to omit the report, it is not proper to convict him, under section 202, Indian Penal Code, of an intention to evade the law about the first report. MHATU BALAJI. 783

———**S. 205**—*Prosecution—Act III of 1852.* A prosecution under Act III of 1852 is a criminal prosecution within the meaning of section 205 of the Indian Penal Code. GANGA. 59

———**S. 206**—*Fraud—Creditor—Assignment of property—Discharge of debt.* A creditor commits no fraud, who anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor. APPA MALLYA. 110

———**S. 209.** *See* LALA BHARUMAL. 803

———**S. 211**—*False charge—Complaint—Civil nature.* Where a person files an information before a Magistrate, disclosing circumstances of a civil nature, he can not be

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proceeded with under section 211 of the Indian Penal Code if the circumstances alleged by him are found to be false. RAGHOO. ... 4

Penal Code, S. 216—*False complaint—Police.* A person who makes a false complaint to the Police may be proceeded with under section 211 of the Indian Penal Code; and it is not competent to a Magistrate to refuse to entertain such a case on the ground that the accused had not been afforded an opportunity of proving his original complaint in a Court of competent jurisdiction. BHIKA LALA. 524

———*See* GANPAT 704

———**S. 216A**—*Robbers—Harbouring.* To justify a conviction under section 216 A, Indian Penal Code, both knowledge and intention are required. SAKHARAM. ... 775

———**S. 218**—*Public servant—False entry.* To support a conviction under section 218 of the Indian Penal Code it is necessary to prove that the accused believed, or had reason to believe, that the person concerned had committed an offence, though it was not necessary to prove that such an offence had, as a matter of fact, been committed. Hence, where a public servant, whose duty it is to make entries in a cattle pound register, makes a false entry, knowing that a person has committed no offence, and with the intention only of obtaining money from him, the public servant cannot be convicted under section 218 of the Indian Penal Code. KRISHNAJI. ... 405

———*Public Document—Falsification.* Section 218 of the Indian Penal Code contemplates the wilful falsification of a public document with the intent thereby to cause loss or injury and this means by the document itself or by some transaction with which it is essentially connected. RAMCHANDRA. 201

———**S. 220**—*Conviction.* To justify a conviction under section 220 of the Indian Penal Code, there must be a guilty knowledge superadded to an illegal act. AMARSANG. 222

———**S. 223.** *See* FULA BHANA ... 388

———**S. 224.** *Escape—Custody.* The accused was found carrying salt without a permit and was arrested by a Daroga in the Salt Department and handed to a peon in the Department to be taken to the office of the Daroga. On the way to the office of the Daroga, the accused escaped from the custody of the peon. The Magistrate discharged the accused on the ground that he was not charged with or convicted of an offence within the meaning of section 224, Indian Penal Code:—*Held*, that the Magistrate took the word "charged" in too narrow a sense, such as would excuse a person who was arrested on the spot, for murder or grievous hurt and escaped. An arrest of a person by an officer authorized in that behalf is a charging, *i. e.*, an imputation of the alleged offence, though but a *prima facie* imputation until the case goes before some functionary authorized to deal with it. KUTIA ALU. 298

Penal Code, S. 228. *Judicial proceedings—Witness—Prevarication.* It is nowhere laid down that no amount of prevarication of a witness will constitute an offence under section 225 of the Indian Penal Code. JAIMAL. 69

———*Prevarication—Refusal to answer—Contempt of Court—Interruption in judicial proceeding.* Though prevarication or persistent refusal to answer question does not necessarily constitute the offence of contempt of Court, punishable under section 228 of the Indian Penal Code, it may, according to circumstances, constitute such an interruption to a public servant sitting in a stage of a judicial proceeding as to be an offence under that section. DEVJI ASA. 473

———**Ss. 240, 243.** *See* LAKSHIA. 202

———**S. 262**—*Postal stamp.* The mere affixing to a letter a postal stamp which has been previously used does not itself prove fraud or an intent to cause loss to Government within the meaning of section 262 of the Indian Penal Code. [illegible]. ... 145

———**S. 265**—*Fraudulent measure—Cheating.* The accused who sold liquor, measuring it with a glass which was not a prescribed measure, and of which they fraudulently misrepresented the capacity, were convicted of the offence of fraudulent use of a false measure under section 265, Indian Penal Code:—*Held*, that they would more appropriately have been tried for the offence of cheating. NURODIN. 386

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Penal Code, S. 265—*Fraudulent use of false measures.* To ascertain whether a measure is false or not, the only proper test to apply is that of measure, and the same article must be measured in each case, and proof should be adduced that this had been done. The weight of the grain that a measure is found to hold is no evidence of its capacity, as compared with that of another measure, unless the very same grain is used. LAKSHMAN MARTAND 9e9

———**S. 266**—*False scales.* To support a conviction under section 266 of the Indian Penal Code it is necessary to prove that the accused knew the scales to be false and intended to use them fraudulently; the mere possession of the scales, or their use, with a string not accurately tied at the centre of the beam, so that one scale outweighed the other, but which can be shifted at any time and may sometimes have been accurately tied, will not of itself be sufficient evidence of fraud. HAMIRMAL. 514

———**S. 268**—*Public Nuisance—Offensive odour.* Every act which causes an offensive odour does not necessarily constitute a public nuisance: in all prosecutions under section 268 of the Indian Penal Code all the essentials required by the section must be duly established by evidence. SHEWOO. 11

———*Criminal Procedure Code (Act XXV of 1861), Chap. XX.* A prosecution under section 268 of the Penal Code is not illegal on the ground that proceedings have not previously been taken under Chapter XX of the Code of Criminal Procedure. SUKLAL. 23

———*See* RAJI. 765

———**S. 277**—*Public spring—River.* A river is not a public spring within the meaning of section 277 of the Indian Penal Code. PATHA. 14

———*See* VITHOBA 203

———*Public spring—Rivulet.* The water of a rivulet, even though standing in pools, does not constitute a "public spring" within the meaning of section 277, Indian Penal Code. HARI. 215

———*Public spring—Nullah—Fish washing of.* The water of a *nullah* does not constitute a "public spring;" the fouling of the water of a *nullah*, therefore, by washing a fish therein is no offence under section 277, Indian Penal Code. NILAPPA DAYAPPA... ... 963

Penal Code, S. 278—*Call of Nature.* The act of performing the offices of nature in a public street is not an offence under section 278, Indian Penal Code. MAHADSHET.... 201

———**S. 279**—*Careless driving.* The mere driving of a cart the bullocks of which have no nose-strings does not constitute an offence under section 279 of the Indian Penal Code. GANPATEE. 19

———*See* BALI. 396

———**Ss. 280, 109**—*Ferry-boat.* A ferry-boat contractor was convicted under sections 280 and 109 of the Indian Penal Code of abetting the rash navigation of a vessel, on the evidence that the boat hired by him in fulfilment of the contract was upset from not containing sufficient ballast:—*Held*, that, there being no evidence to show that the contractor intentionally omitted to provide the ferry-boat with what he knew to be necessary for safe-navigation, the conviction for abetment could not be supported. SAKARAM GOVIND. 35

———**S. 285**—*Danger to human life—Likelihood of injury to property.* Section 285 of the Indian Penal Code does not render it necessary to show danger to human life: it is sufficient to prove likelihood of injury to property. KRISHNA. 134

———**Ss. 285, 436**—*Wilful act—Rash and negligent act.* Section 285 of the Indian Penal Code is not applicable where the act of the accused is wilful and not rash or negligent. HARI.... 128

———**S. 289**—*Driver—Leaving carriage unattended*—The accused a house-keeper in the employ of the complainant, harnessed his master's horse, put him into his carriage and then went away, leaving the horse and carriage standing in the road of the compound of the complainant's house without any justification:—*Held*, that in so doing, the accused was guilty of knowingly or negligently omitting to take such order with the horse in his possession as was sufficient to guard against the probable danger of grievous hurt from such animal, an offence punishable under section

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289, Indian Penal Code. The horse was not the less in the actual possession of the servant, because it was for some purposes in the constructive possession of his master. NATHA REVA. 163

Penal Code, S. 289—Where the accused's buffalo attacks the complainant's buffalo and injures the latter by breaking its leg, he cannot be convicted of an offence under section 289, Indian Penal Code. PANDU. 197

———*See* BALI. 396

———*Bullock—Injury.* The accused's bullock escaped from a herd and finding its way into a hospital which was close by the accused's house ate up some clothes. The Magistrate convicted him of an offence under section 289, Indian Penal Code:—*Held*, that the conviction could not be sustained because it was through no negligence of the accused that the bullock escaped, and after the escape the accused had done all he could to find it. LINGAPA. 606

———**S. 290**—*Nuisance.* The accused was charged with placing cow-dung cakes to dry close to a public road in such a manner as to cause annoyance to the public and convicted under section 290, Indian Penal Code:—*Held*, that the mere placing of the cow-dung cakes, to dry, close to a public road, without any evidence to show that any material annoyance was actually caused to the public, did not constitute the offence of public nuisance. BAPU JAGA.... 297

———**Ss. 290, 277**—*Public Nuisance—Fouling water.* A person fouling the water of a *nala* by putting into it bundles of stalks of *tur* plants commits an offence not under section 277, but under section 290 of the Indian Penal Code. VITHOBA. 203

———**S. 291** — *Nuisance— Prohibition —Continuance—Proof.* In order to support a conviction of an offence of continuance of nuisance, after an injunction to discontinue under section 291, Indian Penal Code, it is necessary that the order of the Magistrate forbidding the continuance of the nuisance, or evidence of notice of such a character as to make plain the precise terms of the order and notice, be recorded in the case. Strict proof of all the circumstances constituting an offence, especially where the offence is one which is not *malum in se*, should be required as the basis of a conviction. GUNYA. 295

Penal Code, S. 292—*Obscene—Checks to conception.* There is nothing obscene within the meaning of that word as used in section 292 of the Indian Penal Code in advocating checks to conception: also there is nothing obscene in the explanation of what these checks are or in the mere statement of the places where and the prices at which, they can be procured. FRAMJI D. TARAPORE-WALA. 620

———**S. 295**—*Well—Pollution.* Where a person, as a result of a quarrel with a relation, throws a basket containing cooked food (fowl, fish, rice &c), into a well, and without any intention to wound the religious susceptibilities of any one, he cannot be convicted of an offence under Section 295, Indian Penal Code. WAMAN LAKSHMAN. 979

———**S. 297**—*Place of religious worship—Trespass.* The provisions of section 297 of the Indian Penal Code become applicable where there is a trespass in a place of religious worship with the knowledge that the feelings of persons would be wounded thereby. BHAGYA. 148

———*See* GOVERNMENT OF BOMBAY *v.* MALKAJI. 198

———**S. 298**—*Wounding the religious feelings.* The accused, while his caste people were sitting to dine at complainant's house called out in the hearing of all that they would be eating cow's flesh if they took food without them, which made them leave their dishes untouched:—*Held*, that the accused could not be convicted under section 298, Indian Penal Code. DAGADI. 592

———**S. 299**—*Culpable homicide not amounting to murder.* To constitute culpable homicide not amounting to murder, under section 299 of the Indian Penal Code, it must be established that death was caused by an act done either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death or with the knowledge on the part of the doer that he was likely by such act to cause death:

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without one or other of these elements an act though it may be in its nature criminal and may occasion death, will not amount to the offence of culpable homicide of either description. RAHIM 6

Penal Code, S. 300—*Murder—Culpable homicide—Grievous hurt.* Where it is clear that the act by which the death of the accused's wife was caused was so imminently dangerous that the accused must be presumed to have known that it would, in all probability, cause death or such bodily injury as was likely to cause death, then unless he can meet this presumption, his offence will be culpable homicide, and it would be murder, unless he can bring it under one of the exceptions mentioned in section 300, Indian Penal Code. LAKSHMAN.... 44

———**S. 300**—*Culpable homicide—Murder—Grave and sudden provocation—Judge—Jury—Charge—Criminal Procedure Code (Act X of 1882), Sec. 299.* The fact that the accused was angry at his wife's resistance to the act of sexual intercourse is not such a provocation as would make his causing her death an offence less grave than murder. Her denial of a charge of adultery is not sufficient to constitute grave provocation; and the irritable or revengeful state of mind caused by mere jealous suspicions is not a fact which makes the homicide less than murder. In a trial for murder, where grave and sudden provocation causing a loss of the power of self-control is suggested for the defence, it is the duty of the Judge, as is clearly set forth in section 299 of the Code of Criminal Procedure, to explain the distinctions between murder and culpable homicide, and the Jury as Judges of the facts have to decide the issue about sufficient provocation. DADUBHAI. 766

———*Offence—Nature—State of mind—Prisoner — Commission of the act.* The character of an offence is determined by the state of the prisoner's mind at the time of the commission of the offence. Where, therefore, grave and sudden provocation is pleaded in a case of murder, the question that the Court has to decide is whether between the cause of the grave and sudden provocation and the dealing of the fatal blow, there was time for the blood to cool and for reason to resume its seat. DHIRA. 122

Penal Code, S. 304—*Child murder.* Where the murder of a newly born child is deliberately committed in cold blood, the murder is as serious an offence in the eye of the law as that of a grown up person and deserves to be severely punished. INOWA. 401

———*Sessions Judge—Jury.* A Sessions Judge, in summing up, should draw the attention of the Jury to both parts of section 304 of the Indian Penal Code and ask them to say explicitly under which part they find the accused guilty. LADKYA... 530

———*Evil spirit.* The accused, in exorcising the spirits of a girl whom they believed to be possessed subjected her to a beating which resulted in her death:—*Held*, that they should be convicted of culpable homicide not amounting to murder. JAMALUDIN. ... 603

———*Murder.* The Sessions Judge held on the probabilities that it was more likely that the prisoner, rather than the other inmate of his house inflicted the injuries which were proved to have caused his daughter's death, but did not come to any conclusion that the guilt of the prisoner was established by the evidence beyond reasonable doubt:—*Held*, that as a prisoner on his trial is merely on the defensive and owes no duty to any one but himself, he could not be convicted because he had not tried to explain to the Court how the death occurred or by whose means. JEPHMAL NARAYAN. 686

———*Charge — Jury — Sessions Judge.* The prisoners were arraigned on a charge of culpable homicide not amounting to murder under section 304, Indian Penal Code. In his charge to the jury the Sessions Judge omitted to point out that the section is made up of two parts, and the verdict of guilty which the jury gave, failed to shew to which part it was meant to apply. The Judge treating the verdict as found on the first part of the section sentenced each prisoner to transportation for life:—*Held*, that there being nothing in the evidence or the charge to suggest that the offence would have been murder but for one of the exceptions to the definition in section

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300 of the Penal Code, and as every thing pointed to the offence being culpable homicide not amounting to murder and without reference to these exceptions, the verdict must be treated as a finding on the second part of section 304 and the sentences of transportation for life were therefore illegal. POSHA HARI ... 735

Penal Code, S. 304—*Beating a wife—Wife possessed of a devil.* Where a man beats, in good faith, his wife under a mistaken idea that by so doing the devil of which she is possessed would go away, and the wife subsequently dies from the after effects of the beating, the man cannot be convicted of murder or of any minor offence since what he did was done in ignorance and in good faith. DHONDI. 785

———*Sentence.* The sentence consequent upon a conviction for murder must be death. If there exists any grounds for mercy, that circumstance will have to be considered by the Crown or its executive minister: and all that a Court of Justice can do is to submit a recommendation after passing the sentence of the law. ABDURRAHMAN SAID. ... 852

———*Murder—Provocation, grave.* The finding by a man of his wife in actual intercourse with a paramour is a provocation grave and sudden enough to reduce the offence of murder into culpable homicide not amounting to murder; and such an offence must be visited with a light sentence. ASHA GOPAL. 932

———**S. 304A.** *See* BAWAJI... 63

———*See* RADHKIA BADRU.... ... 67

———*Rash driving.* Where the accused is alleged to have been negligent either in rashly driving or in leaving his bullocks to go along the road intended and a child is run over by the bullocks and killed, he ought to be tried under sections 304A, 289, and 279 of the Indian Penal Code. BALI ... 369

———The accused struck at a man with whom he was quarrelling with a wooden rolling pin; the blow missed its aim and falling on the head of a child caused its instant death. The Magistrate convicted the accused of voluntarily causing hurt:—*Held*, the accused should have been convicted of an offence under section 304A of the Indian Penal Code. BUDHYA. 398

Penal Code, S. 304A—*See* WILLIAM KEEGAN. 673

———**304 A**—*Indian Railway Act (IX of 1890), Sec. 101—Guard—Driver—Starting an engine without whistling.* A railway guard failed to give to the engine driver a signal to sound his whistle before starting the engine, which he was bound to do under section 244 of the Railway Rules. The engine having been put in motion caused a boy, who was painting a waggon on the line, injury which resulted in his death. The Magistrate convicted him under section 101, Indian Railway Act, of endangering the safety of persons by a rash and negligent act, and sentenced him to undergo simple imprisonment for one day and to pay a fine of Rs. 20:—*Held*, ordering a new trial that as the trying Magistrate found that as the injury to the deceased boy was caused by the negligence of the accused and that the boy died thereupon, section 304A, Indian Penal Code, appeared more applicable, especially as the trial under it must take place before a higher tribunal. FRANCIS R. THOMPSON. 721

———*Attempt—Murder.* An attempt to murder contemplates an intention to murder and an act done which if it caused death would amount to murder but which did not cause death. RAWAL ARAB. 964

———**S. 307.** *See* JIVA. 558

———*Number—Evidence—Body cannot be found.* Where a prisoner admits having thrown a girl into a canal, but the body cannot be found, it is inexpedient to convict him of murder: his act would properly be met by a conviction of attempt to murder. KASHNA. 687

———**S. 309**—*Attempt—Suicide.* The pounding of oleander roots with an intention to poison oneself with the same does not constitute an attempt to commit suicide. TAYEB. 188

———**S. 318**—*Birth, concealment of.* A Magistrate was held to have rightly convicted a woman of concealment of birth of child in the case of a miscarriage in the sixth month of pregnancy. KASAI... 727

———*Child—Secret disposal.* A woman having been delivered of a dead child, left it at the place of birth which was in the compound of her house and told no one about it:—

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Held, that upon these facts she could not be convicted of an offence under section 318, Indian Penal Code. AMINA. 607

Penal Code, S. 318—*Secret disposal—Dead child.* Where a woman gives her new-born illegitimate dead child to another woman with instructions to dispose of it secretly and the latter carries out the instructions by throwing it in a river, the mother cannot be convicted of the substantive offence under section 318, Indian Penal Code, but her offence can more appropriately come under the definition of abetment. BAJI. ... 775

———*Child birth—Concealment of child birth—Jury—Assessors.* The offence contemplated by section 318, Indian Penal Code, becomes complete when the accused conceals the birth of her child by burying the body of child, independently of the question "whether such child die before or after or during its birth." Where a Sessions Judge tries a charge by a jury instead of with the aid of assessors, the irregularity does not vitiate the trial, which can be treated as one held with the aid of assessors and the verdict of the Jury treated as their opinion as assessors. LALBU.... 961

———**S. 321**—*Spleen, rupture of.* Where a person is beaten and death ensues in consequence of a rupture of a diseased spleen, section 321 of the Indian Penal Code is applicable to the case and not section 304A. BAWAJI. 63

———**S. 323** (*Act XXV of* 1861, *Secs.* 237, 238)—*Special exception—Form of charge.* The charge under section 323 of the Indian Penal Code should distinctly deny the existence of circumstances constituting a special exception, as the terms of section 237 of the Code of Criminal Procedure ought to prevail in preference to any direction which may be inferred from the forms of charge contained in Section 239 (6). RUTNAGIRI SESSIONS JUDGE'S LETTER No. 866 OF 1869. 70

———*Injury—Grievous hurt.* Where the accused upon being insulted by a companion in a drunken brawl throws him down upon the ground and stamps his feet twice upon his prostrate body and this act results in the death of the latter within twenty days; the act of the accused constitutes an offence of voluntarily causing hurt punishable under section 323 and not one under section 304A of the Indian Penal Code. RADKIA BADRU 67

Penal Code, S. 323—The accused threw his stick at deceased with such force that it hit deceased on the head with the point and made a punctured wound which caused the death of the deceased. Upon these facts, the Magistrate held that it was doubtful from the authorities whether the case would fall within section 323 or section 304A of the Indian Penal Code:—*Held*, that according to the facts, the case could not come within the terms of section 304 A of the Code, because injury was intentionally caused to the deceased. WILLIAM KEEGAN.... 673

———**S. 325**—*Throwing wife out of a window.* The accused threw his wife from a window, about 6 feet high; but the fall was broken by a weather-board fixed just below it, and resulted in the fracture of knee-pan and in several small wounds.—*Held*, that the accused's act came within the provisions of section 325 and not of section 307 of the Indian Penal Code. Per *Parsons*, J.—When a man voluntarily does a highly dangerous act and causes hurt the intention and the knowledge with which he must be presumed to have acted is not the intention to cause and the knowledge that he was likely to cause only the hurt actually caused. The intention or knowledge, as the case may be, must be presumed from the nature of the act itself and not from the result. JIVA. 558

———**Ss. 337, 338**—*Driving along a road—Running over.* Where a person by allowing his cart to proceed unattended along a road runs over a boy who is sleeping on the road, he cannot be convicted under section 337 but must be convicted under sections 337 or 338 of the Indian Penal Code. GOVERNMENT OF BOMBAY *v.* MALKAJI. 196

———**S. 341**—*Wrongful restraint—Physical coercion.* A invited B to his house in order to be ready to give evidence in a judicial proceeding. A used no physical coercion nor threat of any kind to detain B in the house, but B, from a mere general dislike or dread of giving offence to A, remained there—*Held*, reversing a conviction for wrongful

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restraint, that the conduct of A did not constitute an offence. LAKSHMAN KALYAN.... 89

Penal Code, S. 341—*Wrongful restraint—Locking a house.* A person cannot be convicted of wrongful restraint, under section 341, Indian Penal Code, where he locks up a house under a *bona fide* claim to the same. HOWANA. 451

———*Offence — Insult.* The accused stood in the road while the complainant was driving along it and blocking his way called out to him some insulting words; the Magistrate convicted them under sections 341, 352, 504 and 142, Indian Penal Code, and sentensed them heavily:—*Held*, that the offence would have been sufficiently dealt with if it had been treated as a silly and reprehensible outbreak of ill manners and not as a grave and serious crime; and that the offenders should have been punished with a small fine. OSMAN. 933

———**S. 342.** *See* RAMCHANDRA. 220

———**Ss. 352, 99**—*Criminal force.* The accused who had been brought to a certain place to serve as a coolie attempted to run away; but was obstructed and prevented from doing so by the complainant, a peon in the Mamlatdar's Office. In the struggle which ensued the accused seized the complainant's wrist, for which he was convicted of using criminal force under section 352, Indian Penal Code:—*Held*, that as the act of the complainant was altogether illegal and amounted to wrongful restraint the second para of section 99, Indian Penal Code, did not apply and the accused had committed no offence. GANPATI. 665

———**Ss. 356, 378**—*Criminal force—Attempt.* Section 356 of the Indian Penal Code applies to cases of using criminal force in an attempt to commit theft and not to those cases in which theft has been actually committed. MUKUN 4

———**Ss. 361, 362, 366**—*Kidnapping—Abduction—Removing a minor Hindu girl by paternal guardian from the guardianship of a maternal relation for purposes of marriage—Good faith—Exception—Burden of proof.* The right to dispose of a minor Hindu girl in marriage does not necessarily belong to the person, who has the right of guardianship. The paternal relative's right to select the husband and perform the marriage is not absolute either as against the minor or as against the guardian; and he is not, by Hindu law justified if he removes the minor by fraud or force for the purpose of getting the marriage performed, without any consideration for her own wishes and in spite of the objections of the guardian. The burden of proving the exception of good faith is on the accused. A mistake of law does not make an exception under section 79, Indian Penal Code, even where the due care and attention of section 52 is proved. As a rule where the act done comes within the words of the Penal Code, proof of a general or special exception is required to take it out. *Held*, upon the facts, that, the acts of the accused amounted to a kidnapping as defined in section 361, and also to an abduction as defined in section 362 of the Indian Penal Code; and that the case did not come within the exception of section 361 as there was no evidence of good faith, and was not taken out of section 366 as the girl objected to the marriage, and the paternal cousin had no authority to insist at all events on her marriage with his own nominee. BAI MAHAKOR. 820

Penal Code, Ss. 372, 373—*Unlawful—Immoral.* Per *Candy*, J.—The word "unlawful" in sections 372 and 373 of the Indian Penal Code must be *ejusdem generis* with "immoral." NARAYEN. 440

———*Girl—Let to hire—Prostitution.* The words "let to hire" in section 372, Indian Penal Code, refer to a making over of a minor either in perpetuity or for a term and not for the commission of an immoral act of sexual intercourse. These words are the counterpart of the word "hire" in section 373. AHMEDKHAN. 962

———**Ss. 376, 511**—*Rape—Impotent person—Presumption.* A person physically incapable of committing the offence of rape cannot be found guilty of an attempt to commit that offence. In India the potency of a person charged with the offence has to be proved by evidence in each case, as unlike the English law, there is no limit of age laid down under which the law presumes a person to be phy-

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sically incapable of committing rape. A person proved to have the power of erection must be presumed to be physically capable of committing rape. GOPALA RAMA... 865

Penal Code, Ss. 376, 511—*Rape—False charge*—Rape is an offence punishable with transportation for life or with imprisonment for a term which may extend to ten years. The offence, therefore, of making false charge of rape is triable exclusively by the Court of Session. BHIKHI. 953

——**Ss. 378, 22, 30**—*Valuable securities—Moveable property—Theft*—Valuable securities are moveable property and may be the subject of theft. KASHIRAJ... ... 43

——**S. 379**—*Theft.* Where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal thereof does not constitute theft. BHICAJEE 22

——*Theft—Stridhan.* A wife cannot be convicted of theft for taking her own *pulla* from out of the custody of her husband. NATHA KULLIAN. 44

——*Stolen property—Criminal Procedure Code (Act X of 1882) Sec. 342.* In order to sustain a conviction on a charge of theft or dishonest receipt of stolen property it is not sufficient that the property found in the prisoner's possession was *like* that stolen. There must be a finding to the effect that property was the property stolen. Under section 342 of the Code of Criminal Procedure an accused person, before he is put on his defence, must be examined by the Court. BAVA CHELA. 227

——Every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishments. RAM NHANA. 296

——*Mamlatdar—Possessory suit—Parties—Order, binding effect of.* The order of a Mamlatdar in a possessory suit is operative only on the parties to the suit. Hence, where in execution of such an order passed against F. alone, symbolical possession of a field with crops standing thereon was given to A, and F's brothers S and G by whom the crops had been raised, and their two servants afterwards cut and removed the crops, they could not be convicted of theft or any other offence. SHEKH HUSSAIN. 866

Penal Code, S. 379—*Theft—Criminal Procedure Code (X of 1882), Sec. 439—Revision.* A removal of property dishonestly, that is, with the intention of wrongfully depriving the owner of the possession thereof to which he was legally entitled, for however short a period, is theft. The power of the High Court upon revision to go into questions of fact is undoubted; whether or not it will exercise the power in any particular case depends entirely upon the merits of the case itself. The High Court does interfere when the interests of justice require it or when the inquiry in the lower Courts has been faulty. SHOMA CHATUR. 906

——*Theft—Distinct offences.* Removal by one single act of several articles constitutes one offence of theft only, though the articles may belong to different persons. Hence, where a person steals at the same time two bullocks, which belong to two different owners and which are tied together to the yoke of a cart, he may be sentenced for one offence only. KRISHNA SHAHAJI.... 927

——*Theft* — Bona fide *dispute.* A charge of theft cannot be sustained in a case where there is a *bona fide* dispute as to ownership, and the removal of a thing by the accused is under a *bona fide* belief that it is his own property. HARI BAPUJI. 920

——**Ss. 379, 380**—*Theft—Recovering one's own property.* The accused was charged with having stolen his own property in the custody of a Police Constable: he admitted the taking but pleaded not guilty on the ground that the property was his own:—*Held*, that the Police Constable, being intrusted with the bundle, for which he was accountable, had special property in it; and that therefore the accused was guilty of theft. SHEKH HUSAN. 344

——**Ss. 379, 409**—*Removal—Theft.* The complainant washed a carpet at the village tank and hung it up there to dry; the accused having dishonestly taken it away, was convicted of the offence of criminal misappropriation of property under section 403, Indian Penal Code:—*Held*, that the carpet had never

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left the complainant's possession and the offence committed was that of theft. MATHI. 314

Penal Code, Ss. 379, 409—*Forest guard—Cutting of trees—Theft.* V. a forest round, guard, allowed B. a timber merchant, to cut trees without the permission of Government in the Government Forest of which V. was in charge. Some trees were cut in persuance of this arrangement, and some were concealed and the rest taken to an open space preparatory to a removal thereof. *Held*, (1) that V. could not be convicted of the offence of attempting to commit criminal breach of trust by a public servant, because he was not in any manner entrusted with the trees or with any dominion over them, and apparently was not authorized to deal with the trees in any way for the benefit of Government but was merely a watchman employed to guard the trees and prevent injury being done to the forest; (2) that the trees being immovable property, the offence of criminal breach of trust could not be committed in respect of him; (3) that, on the facts found, the accused had committed the offence of theft, the intention to steal being carried into effect when they cut the trees and moved the timber. BHAGU.... 928

——— **Ss. 379, 428**—*Mischief—Theft.* Where a person steals a bullock and then kills it, he can only be convicted of theft under section 379 of the Indian Penal Code and not to mischief also under section 428 of the Code. GENYA. 129

——— **Ss. 379, 410**—*Theft—Cattle.* A person who steals cattle which are let loose by the owner with a view to their going to drink water at a river, commits the offence of theft and not of criminal misappropriation. LAKSHMIA. 136

——— **S. 380**—*Dwelling house—Theft—Presence of the owner.* The accused person entered the dwelling house of the complainant and in his presence dishonestly took away certain property in spite of his remonstrances:—*Held*, that this constituted an offence under section 380 of the Indian Penal Code, the aggravating circumstance under that section being the invasion of a dwelling or of a building used for the custody of property. Such invasion is not diminished in culpability by the presence of the owner in the house. KASHINATH BHAUSHET. 56

Penal Code, S. 380—*Theft—Railway carriage.* The accused was convicted of the offence of theft, under section 380, Indian Penal Code, in that he stole some luggage and cash from a Railway carriage when it was at a Railway Station :—*Held*, upholding the conviction, that though the Railway carriage was not a building, the Railway Station was. SHEIK SAHEB. 293

———*Sentence.* Under section 380, Indian Penal Code, imprisonment only is a legal punishment, fine need not necessarily be inflicted in addition. SAVI 893

——— **Ss. 380, 429**—*Theft—Mischief—Separate sentences.* The accused having stolen a bullock killed it; for this they were sentenced separately on the charges of theft and mischief :—*Held*, that the double sentences were not illegal as the theft preceded the mischief and the property was not transferred by the theft. KRISHNA. 430

——— **S. 382**—*Criminal Procedure Code (Act X of 1882), Secs. 393, 439—Whipping Act (III of 1874), Sec. 3.* The accused was convicted under section 382, Indian Penal Code, and was sentenced to whipping which was duly administered:—*Held*, that the sentence was legal and could not be reversed; and that it could not be enhanced under section 439 of the Code of Criminal Procedure by the addition to it of a term of imprisonment as the offence of which the accused was convicted was the first offence under section 382 of the Indian Penal Code, and that it could not be enhanced by the infliction of an additional number of stripes, as, under section 393 of the Code of Criminal Procedure, no sentence of whipping can be executed by instalments. BALU NASIR... 537

——— **S. 390**—*Hurt committed in the act.* Where hurt is caused not for one of the purposes specified in section 390, Indian Penal Code, but to avoid capture when surprised, the stealing is not converted by the said hurt into robbery. KALIO KRIO. 65

——— **Ss. 392, 394**—*Convictions.* As the offence under section 394, Indian Penal Code, necessarily includes the offence under

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section 392 of the Code, an accused convicted under both the sections can be convicted and sentenced under section 394 alone. DURGA. 511

Penal Code, Ss. 394, 397—*Robbery—Grievous hurt.* If a Magistrate finds that an accused person has caused grievous hurt in committing robbery, he is bound to commit him to the Court of Sessions for an offence under section 397 of the Indian Penal Code; it is illegal to treat the grievous hurt as simple hurt and convict the accused under section 394 of the Code. JOBANIA. 476

——— **Ss. 395, 412**—*Separate convictions—Same property.* Separate convictions and sentences under section 395 and section 412, Indian Penal Code, with respect to the same property, are obviously improper, as section 412 implies receipt from another person, or an act by one not himself the dacoit. BAHIRU. 312

——— **S. 397**—*Enhanced punishment.* The liability to an enhanced punishment, under section 397 of the Indian Penal Code, is limited to the offender who, in the commission of robbery or dacoity actually causes grievous hurt. DEOJI KERU. 65

——— **S. 398**—*Dacoity—Charge.* To justify a conviction under Section 398, Indian Penal Code, there must be a charge framed of the offence in which the carrying of arms is distinctly alleged. Where the accused are charged and convicted for an offence punishable under section 395, they cannot be punished under section 398 of the Code. PUNYA SAKHARAM. 921

——— *Dacoity — Deadly weapons.* To support a conviction under section 398 Indian Penal Code, as under section 397, it is necessary to prove that at the robbery the accused was armed with a deadly weapon, and not merely that one of the robbers who was with the accused at the time carried one. BHAVJYA. 797

——— **S. 400**—*Dacoits—Wives or mistresses of dacoits.* The mere fact that women lived as wives or mistresses with men, who are dacoits, is not sufficient for a Court to hold that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of section 400, Indian Penal Code, unless it be proved that the women themselves were associated with their husbands or protectors for the purpose of themselves habitually committing dacoities. YELLI YELLA... 863

Penal Code, S. 411—*Dacoits—Habitual offenders.* To justify a conviction, under section 401 of the Indian Penal Code, it is not sufficient to prove that certain persons have been convicted of a theft and that other persons charged with them have lived or associated with them; but it is necessary to prove not merely association but that the gang of persons have been associated for the purpose of habitually committing theft or robbery: and that habit must be proved by an aggregate of acts. SAVALDAS.... 418

——— **S. 403**—*Theft—Criminal Misappropriation—Taking proof of.* Where there is no proof of 'taking' of the property found in the possession of the accused, he must be convicted not of theft but of criminal misappropriation. SHIVBASHIA. 143

——— *Criminal Misappropriation—Money found from land.* A person finding out money from a piece of land purchased by him and appropriating it to his own use cannot be convicted of criminal misappropriation. CHODAPA.... 8

——— *Temple—Property.* The property of an idol or of a temple must be used for the purposes of that idol or temple; any other use would be a malversation of that property, and, if dishonest, would amount to criminal misapproriation. GADGAYYA *v.* GURU SIDDHESHVAR. 919

——— **S. 405**—*Criminal Breach of Trust—Chairman—Municipality.* The chairman of the Lanowlee Municipality was convicted of criminal breach of trust in respect of Rs. 68, part of a sum of Rs. 466. The Cash-book made up to the 8th December 1888 showed correctly that the sum of Rs. 466 was the balance received. On the 12th when the Mamlatdar came to examine the accounts at the order of the President of the Municipality, the accused told him that he had Rs. 298 in hand and that the rest was with the Secretary. It turned out that the Secretary had with him only Rs. 99, and that Rs. 68 were in hand due to petty ser-

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vants which fact the accused concealed from the Mamlatdar, the money being paid on or about the 14th to petty servants :—*Held*, reversing the conviction and sentence, (1) that no duty to pay the servants on a fixed day of such a stringent character that its breach would in itself be evidence of misappropriation having been proved, the mere delay of payment to petty servants did not imply any criminality; (2) that as no evidence was given of any dishonest use of the money in fact, the money having been always ready and available, since the servants were all paid about the 14th at the latest, and as there was no evidence of any demand for earlier payment, the Judge ought to have very carefully charged the Jury as to the necessity of strict proof of a *mens rea*, a fraudulent intent, a wilful violation of the trust with fraudulent design, and not merely a civil breach of trust, and at the same time suggested the possibility of the facts being reasonably consistent with innocence; (3) that the case differed substantially from the cases of *Q. E.* v. *Ramkrishna* and 31 L. J. M. C. 71 as in both those cases there were erroneous statements as to the money received, which was not the case here. ARDESHIR MEERWANJEE. 484

Penal Code, S. 406. The mother of a child recently vaccinated accepted two annas from the vaccinator under a promise to take the child to another village where the vaccinator wanted to take lymph out of the baby, and she subsequently refused to take the child there at the instance of her husband:—*Held*, that she could not be convicted of criminal breach of trust, under section 406 of the Indian Penal Code. SATAWA. 557

———*Evidence Act* (*I of* 1872), *Sec.* 106—*Burden of proof—Presumption.* Where at the trial for an offence under section 406, Indian Penal Code, the accused admits having received the money alleged to have been misappropriated by him, but defends himself by saying that he made it over to the proper person, the *onus* does not lie on him to prove payment, but on the prosecution to prove non-payment; for, it is only when the latter is proved that a presumption will arise of misappropriation of breach of trust. HARI DAGDU. 872

Penal Code, Ss. 406, 24—*Contract not to adulterate with water—Adulteration—Selling at the rate of the unadulterated.* The servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it he was to receive a certain quantity for himself and he was to account for the remainder to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he mixed water with the liquor, and, having thus increased its amount, sold it at the same rate per gallon as was chargeable for unadulterated liquor, and appropriated the profit thus made to his own use :—*Held*, that having thus gained by unlawful means money to which he was not legally entitled, he acted dishonestly within the meaning of section 24 of the Penal Code and was guilty of the offence of criminal breach of trust, under section 406 of the Code. JAMSETJI. 395

———**S. 408**—*Criminal misappropriation.* In a case of criminal misappropriation, the Court should consider the question—whether the money was kept with a dishonest intention, or only on a wrong opinion that the prisoner was justified in keeping it, as in the latter case, the act of the prisoner would not constitute an offence of criminal misappropriation. KHANDERAO... ... 700

———**S. 409** — *Criminal Breach of Trust—Onus.* To a charge of criminal breach of trust the accused pleaded that he had rendered accounts as the agent of Sitabai to her and has paid the sums in question to her by the direction of her trustee. Neither Sitabai nor the trustee were called to prove that these sums were not so paid, and the accused was required by the lower Courts to prove the payments:—*Held*, that it was illegal of the Lower Courts to place the *onus* on the accused and convict him because he failed to discharge it. RAMCHANDRA GANESH. 860

———*See* BHAGU. 928

———**Ss. 409, 511**—*Breach of trust—Cattle Trespass Act* (*I of* 1871), *Sec.* 27. The accused a cattle pound keeper, having levied Rs. 5 for five buffaloes in his charge gave a receipt for Rs. 4 only to the owner of

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the cattle, and entered only Rs. 4 in his accounts: but before the money was paid into the treasury, he altered his accounts and entered the proper amount, namely, Rs. 5. The Magistrate convicted him under section 27 of the Cattle Trespass Act, 1871:—*Held*, that the conviction should have been under sections 409 and 511 of the Indian Penal Code and that section 27 of the Cattle Trespass Act was not applicable to such a case. BHULA. ... 632

Penal COde, S. 410—*Theft at Rajkote —Trial at Thana—Statutes* 21 & 22 *Vic.c.* 106. The accused, an inhabitant of the Janjira State was charged with the offence of theft by a servant of property in the possession of his matter, committed at Rajkote, and convicted by the Sessions Judge of Thana :—*Held*, (1) That the Rajkote Civil Station is not part of British India within the meaning of the Statutes 21 and 22, Victoria, Chapter 106, and that the accused being a subject of the Janjira State, the Sessions Court at Thana had no jurisdiction to try him for the theft; (2) That as under section 410, Indian Penal Code, the definition of stolen property, includes property stolen outside of British India, the accused might have been charged with the offence punishable under section 411, Indian Penal Code. ABDUL LATIF. 218

——**Ss. 410, 411**—*Stolen property, receiving of—Erroneously believing it to be stolen.* A person receiving property, which is not stolen property as defined in section 410 of the Indian Penal Code, is not guilty of an offence under section 411 of the Code, although, at the time of receiving it, he erroneously believes it to be stolen. ISSUP. 389

——**S. 411**—*Receiving stolen property.* The circumstance that a person "knew that the property was not his own and yet claimed it before the Magistrate in his depositions in the former case" is not sufficient to warrant his conviction under section 411 of the Indian Penal Code. MUTAYA. 416

——*Receiving Stolen Property— Evidence of theft.* The complainant gave into the custody of Police certain logs of wood as property which he suspected had been stolen from him. The accused rescued the logs from the Police custody by violence. The Magistrate in the First Court and the Sessions Judge in the Appeal Court both convicted the accused of dishonestly receiving stolen property, known to have been stolen, and of rioting, though, as to the former charge, they were of opinion that there was no proof, failing that derived from the recapture of the property, that the logs had in fact been stolen : *Held*, that the conduct of the accused in rescuing the wood might be evidence that he knew or had reason to believe that the wood was stolen, but it could not establish the fact that it was actually stolen. And, in the absence of evidence reasonably proving dishonest transfer of the wood from the complainant to the accused, the conviction on the charge of dishonestly receiving stolen property could not be sustained, the Court being of opinion that a mere scintilla of evidence in support of the proposition that the property was really stolen ought not to be left to a Jury even in a civil case, much less ought it to be left to a Jury in a criminal case, least of all should it be made the basis of a conviction by a Magistrate. SHIVRAM. 99

Penal Code, S. 411—*Stolen property, receiving.* A conviction under section 411, Indian Penal Code, cannot be sustained on the mere fact of possession of stolen articles, not of an unusual character and such as easily pass from hand to hand. RAUAJI. 594

——**Ss. 411, 412**—*Stolen property— Presumption.* In the trial by jury of a person charged with dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession of the stolen property is clearly traced to the accused, and that it could not have been placed in the accused's house, where it was found by any other member of his family. The fact of stolen property being found concealed in a man's house would ordinarily be sufficient to raise a presumption that he knew the property to be stolen property, but not to prove that he knew that it had been acquired by dacoity. MULHARI 184

——**Ss. 411, 414, 71**—*Separate sentences—Convictions—Procedure.* Where an accused is convicted of offences under sections 411 and 414, Indian Penal Code, it is not permissible to pass on him separate and consecutive sentences under each head of charge

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but in such a case, only one sentence must be passed on him for both offences. SAKHARAM. 449

Penal Code, Ss. 411, 414—*Stolen property—Separate sentences.* The accused was convicted under sections 411 and 414, Indian Penal Code, regarding the same property and was sentenced to separate punishment for each offence;—*Held*, that the acts of the accused were parts of one continuous transaction and could not be considered as distinct offences. Section 414 of the Indian Penal Code applies only where there is no actual receipt of the property. ALU KALA. 553

——**S. 412.** *See* BAHIRU. ... 312

——*Stolen property, receiving of—Offence.* To support a conviction under section 412 of the Indian Penal Code, it is not sufficient to show that the accused knew the property to be stolen property; it must be proved that they knew or had reason to believe that its possession had been transferred by the commission of dacoity or that being stolen property they received it from a person who they knew or had reason to believe belongs or belonged to a gang of dacoits. DAJI MAHADHU. 956

——*See* SAKHARAM *and* ALU KALA. 449' 553

——**S. 415**—*Cheating.* The selling of milk and water in about equal proportion as pure milk will support a finding of cheating under section 415, Indian Penal Code. NANA. 145

——*See* NURODIN. 386

——**Ss. 415, 420**—*Cheating.* The offence of cheating accompanied by a delivery of property may be punished under either of the sections 415 or 420 of the Indian Penal Code: but where the case appears to be of a serious nature, steps must be taken to send it to Court of Session for trial under section 420 of the Code. BAPU 3

——**S. 417**—*Cheating—False information.* The accused falsely told his master's brother that his master was ill in a certain village and so induced him to go to that village. The Magistrate, thereupon, convicted him under section 417, Indian Penal Code:—*Held*, that the conviction under the section could not be upheld, unless it appeared that by deceiving his master's brother, the accused fraudulently or dishonestly induced him to do a certain thing which he would not have done, if not so deceived, and which act caused or was likely to cause damage or harm to his master's brother in body, mind, reputation or property. PUNJIA. 423

Penal Code, S. 417—*Cheating.* Where a person who gives a false name and address in order to shield himself from prosecution for an offence, he cannot be convicted of an offence under section 417, Indian Penal Code, because his intention cannot be said to be fraudulent and his act is not likely to cause damage or harm to the person to whom the false information is given. LADKA. 635

——**Ss. 417, 420**—*Cheating—Distinction between section* 417 *and section* 420. Cheating, unaccompanied by delivery of property, is an offence punishable under section 417, Indian Penal Code and within the competence of a Second Class Magistrate; but where property passes, it is an offence, punishable under section 420, triable by a Court of Session or a First Class Magistrate. BAVAJI.... 96

——**S. 420.** *See* BAVAJI.... ... 96

——*False representation — Caste—Maxim*—Ex turpi causa non oritur actio. The accused falsely represented to a Kunbi that a woman Harkha of the Koli caste was of a higher caste, namely a Kunbi, and thereby induced him to remarry her and to pay to them some money. The Magistrate convicted them under section 420, Indian Penal Code. The Joint Sessions Judge in appeal reversed the conviction and sentence. On appeal by the Government:—*Held*, that as the Joint Sessions Judge had found that the complainant was not really deceived, the order of acquittal was right. The maxim *ex turpi causa non oritur actio* is not a sufficient excuse for a man who acts in opposition to the provisions of a penal statute and this principle is best illustrated by the familiar case of a man who gave a spurious coin to a prostitute if the prostitute was suing the man, she could hardly succeed in getting compensation, but the person who cheated her committed a breach of the law and was convicted. Criminal laws form generally a part of the public law not variable in any of the parts by the volition of private individuals and they

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are not necessarily deprived of their effect merely by the possible culpability of the individuals who may be the sufferers by the breach. BHALJI. 301

Penal Code, S. 420—*Evidence of similar transactions—Intention to pay at the time of purchase.* The accused purchased some wool with delivery of possession from a firm, agreeing to pay the price on the next day. Default was made in payment of the purchase money at the stipulated time, and the accused pledged the wool to another and raised money thereon. In these circumstances the accused was convicted of cheating and thereby dishonestly inducing delivery of property, under section 420, Indian Penal Code. The Magistrate admitted in evidence the statements of two persons, Bhawan and Kundandas from whom the accused purchased wool in similar circumstances, and who had not been paid yet, their wool also having been pledged by the accused to another:—*Held*, (1) that the evidence of Bhavan and Kundandas must be excluded from consideration on the principles of *Reg.* v. *Parbhudas* because their evidence related to transactions, the character of which was itself in question, and to accept their statements as proving cases of cheating against the accused would be to find him guilty in those instances without a trial; (2) that a fraudulent purpose could not, under the circumstances, be safely inferred from the accused not paying, or from his inability to pay, for the wool on the next day as agreed; (3) that to sustain a conviction of cheating under section 420, Indian Penal Code, there must be evidence to prove that when the accused bought the wool, he did not intend to pay for the same. FAZUL. ... 312

———*See* HIRI. 367

———*Cheating—Attempt—Preparation.* The forwarding of fictitious consignment notes can only be regarded as preparatory to the offence of cheating, as it was not done in the attempt to cheat. RAGHUNATH. ... 470

———**S. 425**—*Cattle—Straying—Wrongful loss—Intention—Knowledge.* The mere permitting of cattle by the accused to stray does not establish his intention to cause or knowledge that he was likely to cause wrongful loss or damage thereby to the public or any person. TOORRAJKHAN... ... 11

Penal Code, S. 425—*Mischief—Intention.* The gist of the offence of mischief lies in the intention. SHAMA.... 88

———*Property—Easement.* The word "property" in section 425, Indian Penal Code, means some tangible property capable of being forcibly destroyed, but does not include an easement. KERU. 387

———*Mischief—Land—Bona fide dispute.* Where in a case regarding mischief to land, the defence raises a *bona fide* plea of right to the land, the Magistrate should determine whether the accused acted with any such intent as made his act criminal, *viz.*, any such intent as is mentioned in section 425 of the Indian Penal Code. MAHADSHET. 432

———*Mischief—Intention—Knowledge.* The terms of section 425, Indian Penal Code, defining mischief, are satisfied when there is a distinct finding on the point of the prisoner's knowledge and the question of intention is material only as regards the sentence. REVSING. 690

———*Mischief—Removing a barricade placed by Municipality.* It is no mischief if a person innocently removes a barricade placed by a Municipality on a piece of land in front of his house, which impairs his ingress and egress to or from the said house. ABDUL AZIZ. 745

———*Mischief—Bailiff—Doors, breaking open of.* An agent of a land-lord accompanied by a bailiff broke open the door of a room in his chawl, in the possession of a tenant, in execution of a distress warrant issued against the tenant for non-payment of rent. The Magistrate convicted the accused of the offence of mischief:—*Held*, (1) that the conviction could not stand; because the bailiff, if he improperly broke open the door, was acting mistakenly in what he supposed to be his duty, and the land-lord's agent, who assisted him, had neither the intention nor the knowledge which is an essential in the definition of mischief: (2) That the proper remedy of the complainant, if his outer door was improperly broken open, was a civil action for the trespass. *Quere.* Whether a room in a

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chawl rented by a particular person is the dwelling house of that person and its door an outer door which a bailiff who has entered the chawl cannot break open? KAIKHUSRO CURSEDJI. 949

Penal Code, S. 426—*Mischief—Cattle—Straying.* The act of the accused in negligently allowing his cattle to stray into one's garden does not amount to mischief within the meaning of section 426, Indian Penal Code. NARSU. 185

———*Mischief — Goats.* In order to convict of mischief under section 426 of the Indian Penal Code, the owner of an animal which has done damage to crops, it is not sufficient to show that he was guilty of carelessness in allowing it to stray: the prosecution is bound to show an intention on his part to cause wrongful loss or damage. BAI BAYA. 187

———*Buffaloes—Mischief.* Where the accused's buffaloes by straying into the complainant's wheat field commits mischief the complainant is not at liberty to set the criminal law in motion: his proper remedy being to impound the cattle. RANGU. ... 189

———*Mischief.* The allowing of goats to enter a garden whereby they do damage cannot be made punishable under section 426, Indian Penal Code. HYDERALLY. ... 199

———*Damage.* The accused's buffaloes in his presence, destroyed the road-side trees, but he did not restrain the cattle; the Magistarte convicted him under section 426 of the Indian Penal Code. The Sessions Judge set aside the convicion thinking it to be a case of negligence only and not of wilful conduct:—*Held*, that the Magistrate was right; driving of the cattle on to the road and then not controlling them in doing what they were almost certain to do, unless prevented, might be regarded as a causing of damage. VITHU. 318

———*Mischief—Cattle, allowing to stray.* The allowing of a buffalo to stray without a keeper does not constitute the offence of mischief. To support a conviction under section 426, Indian Penal Code, it must be proved that there was an intention to cause wrongful loss or damage, or to cause damage by wilfully turning an animal into an enclosure, or at least that the accused was present and able to restrain the animal from causing damage and did not restrain it from so doing. NARSU. 357

Penal Code, S. 428—*Mischief—Bona fide Disputs.* Where the accused put up a hut on a piece of land, to protect the right they believe themselves to possess, they cannot be punished of an offence under section 426, Indian Penal Code. NANDU.... 465

———**S. 428.** *See* GENYA... ... 129

———**S. 430**—*Mischief—Water-course—Diminution of water.* Where it is clear, upon the evidence, that the complainant is the exclusive owner of a water-course and that the accused has no sort of right to assert any claim to it, the causing of a diminution of the supply of water by the accused, even under the colour of right, is only an additional wrong and constitutes mischief within the meaning of section 430, Indian Penal Code. JAGANNATH.... 217

———*Mischief— Water-course—Diminution of water—Damage to crops.* Where the accused closed a water-course by which water had been supplied to the complainant's land, he was held not to have committed mischief, under section 430 of the Indian Penal Code, by the diminution of the supply of water, as no damage was alleged to have been caused by the stoppage of water to any crop on the land. GOVERNMENT OF BOMBAY *v.* KALAYA, ... 217

———**S. 440**—*Trespass— Compound.* When a person unauthorizedly enters the compound of a house, he commits the offence of criminal trespass and not of house-trespass. BHOW. 122

———**S. 441**—*Criminal trespass.* To support a conviction of criminal trespass it is necessary to prove that the accused entered upon the property of another with the intent of committing an offence made punishable by the general criminal law or to intimidate, insult or annoy. VUJEER. 10

———*Criminal trespass— Encroachment—Public Road—Land Revenue Code (Bom. Act V of 1879), Sec. 37.* Under section 37 of the Bombay Land Revenue Code, all public roads are the property of Government and must be taken to be in the possession of the local Government officers on behalf of

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Government. Hence, a person who encroaches on such a road is guilty of criminal trespass, if the encroachment is made with such intent as is contemplated in section 441 of the Indian Penal Code. FAKIRGAVDA... 393

Penal Code, S. 442—*House-trespass—Attempt.* The removal of a trap-door with the intention of committing house-trespass amounts to an attempt to commit the offence. NARSHI. 188

——**S. 447**—*Criminal Trespass.* The accused was charged with stealing rice plants but was acquitted on that charge by the Magistrate as it did not appear that they were not sown by and the property of the accused; but the Magistrate convicted him of criminal trespass under section 447 of the Indian Penal Code:—*Held*, reversing the conviction, that the conviction for criminal trespass was inconsistent with the acquittal of the charge of theft inasmuch as if the rice plants had been sown by and were the property of the accused he would have been entitled to remove them and could not properly have been treated as a criminal trespasser for so doing. OOMERKHAN. 4

——*Shed, erection of, on another's land.* The erection of shed on another person's land is not an offence under section 447 of the Indian Penal Code, unless it be done with such intent as is set out in section 441 of the Code. An intention to annoy, which must be distinguished from an intention to obtain improper gain, does not follow necessarily from an intention to obtain land unlawfully, but must be made out by some independent evidence. GANPAT,... 390

——**S. 448**—*House-trespass.* The going into a Horse Lines with a sowar without the permission of the Commanding Officer does not constitute the offence of house-trespass. KUSHEB. 328

——**Ss. 448, 457**—*Separate charges.* The accused was convicted of house-breaking by night and of house-trespass in respect of the same acts:—*Held*, that the second head of the charge was superfluous, inasmuch as it involved the same intention substantially as the first, which intention ought not to be applied to support two different charges. KHANDU. 202

Penal Code, S. 457. The accused was convicted of the offence of house-breaking by night with intent to commit adultery under section 457 of the Indian Penal Code, the owner of the house not being the husband of the woman with whom the adultery was to be committed, and the accused not intending to commit any offence except adultery:—*Held*, that the omission of the husband to prosecute for the adultery did not absolve the prisoner from criminal liability under section 457, Indian Penal Code. BANDHU. 689

——**S. 463**—*Forgery—Police Diary.* The accused was convicted of forgery on the ground that he sent an imperfect copy of his diary to the Superintendent of Police: the High Court reversed the conviction on the ground that the two lines not embodied in the copy sent were evidently interpolations in the original diary, subsequently struck through with the pen; and that no forgery could be established unless it were proved that these interpolations were extant on the diary and had not been struck through at the time the copy was made. SHIDDUNGOWDA.... ... 12

——**S. 464**—*Burden of proof.* The concluding words "or at a time at which he knows that it was not made, signed, sealed or executed" of clause 1 of section 464, Indian Penal Code, are to be read distributively, and are not governed by the preceeding words "by or by the authority &c." The Court ought not to adjudge a criminal case on mere probabilities as if it were a civil action, or contravene the well-known principle of law that the burden of proof lies on the Crown, not at all on the accused; and, unless the evidence is such as to enable the Court to judge rather than conjecture, the accused should not be called upon to make his defence. GANESH BHIKAJI. 772

——*Forgery—Burden of proof—Prosecution—Practice—Procedure.* Where it is alleged on behalf of prosecution that a deed is forged, it is not sufficient for the prosecution to prove that it is improbable that the deed is genuine, but it must prove for a certainly that the deed is forged. BAYAJI NATHA. 917

——**S. 465**—*False entries.* A person making false entries with intent to conceal

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misappropriation, the documents charged being unaltered documents, cannot be convicted of the offence of forgery. BALWANT. 595

Penal Code, S. 466—*Forgery—False original—True copy.* A person who is bound to give a true copy cannot be convicted of forgery merely because the original of which he gives a true copy contains a statement which is false and is known or belived by him, to be such. MARIGAWDA.... 583

——— **S. 467**—*Forgery— Valuable security—Sale deed unregistered.* A sale-deed, the registration of which is compulsory under section 17 of the Registration Act and which under section 49 of the same Act could not affect the immovable property to which it referred without such registration, is a valuable security within the meaning of section 30 of the Indian Penal Code, since it, being in other respects complete as a conveyance of land, is, apart from the want of registration a document purporting to be a valuable security. Any forgery of such a deed, therefore, falls within the purview of section 467, of the Indian Penal Code. GOVIND RAMAPPA. 4

——— **S. 475**—*Forgery— Fraudulent—Dishonest intent.* The intention to create a favourable impression about oneself or an unfavourable impression about another in the mind of a third person, does not fall under the words "intention to defraud" in section 475, Indian Penal Code. BALA.... ... 627

——— **S. 490**—*Workman's Breach of Contract Act (XIII of 1859)—Breach of contract.* Section 490 of the Indian Penal Code does not apply to a contract to supply carts and work them for a certain period, but applies only to a contract to take particular goods or a particular load of goods from one specified point to another. A contract for bringing and letting of carts, whether at a place where the contract is made or elsewhere, at a specified rate for the journey, is not a contract within the meaning of the Workman's Breach of Contract Act, 1859. KESHAV RAMCHANDRA. 349

——— *Contract of service*—Machhwa *Conveying of paddy.* A failure of a contract to convey paddy in one's *machhwa* is not an offence under s. 490 of the Indian Penal Code, as there is no contract for *personal* service of the accused. VITHU. 608

Penal Code, S. 491—*Cook—Leaving service suddenly during illness of complainant's wife.* Section 491, Indian Penal Code, does not apply to a person who is engaged only as an ordinary cook to a family and is not bound by a contract to attend on or to supply the wants of any helpless person. SOLOMON... 354

——— **S. 494**—*Bigamy—Evidence.* To substantiate a charge of bigamy the first marriage of the complainant and his alleged wife must be strictly proved. SHIVANA. ... 190

——— **Ss. 494, 496.** Section 496 of the Indian Penal Code applies to cases in which a ceremoney is gone through which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage, or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose. Where the ceremoney gone through does, but for the previous marriage, constitute a lawful marriage, and both parties are aware of the circumstance of the previous marriage, section 494 of the Code properly applies. RAMA SONA. 77

——— **S. 495.** *See* GODI. 876

——— **Ss. 497, 498**—*Adultery—Subsequent adultery—Fresh offence.* If a man, who has been convicted of adultery with another man's wife, continues his adulterous intercourse he will be liable to a second conviction and punishment for the fresh Act notwithstanding that the woman had not returned to her husband's protection after the conviction of her paramour. EMAJI. 150

——— **S. 499**—*Defamation.* The headmen of a caste issued a notice to a member of that caste, intimating that a complaint had been received by the caste that his daughter had committed adultery with a certain person, and requiring him to appear before the caste with his daughter in order to clear her character:—*Held*, that the notice could not furnish the basis of a charge of defamation, as it contained no imputation by the person who signed it against the daughter and was clearly issued in good faith, on

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information received by them, with a view to such an enquiry as it was competent to the caste to make. BHIKAJI.... 387

Penal Code, S. 499—*Defamation.* The question of the physical and moral as distinguished from the legal character of the act of a person accused of an offence under section 499 of the Indian Penal Code is like those which arise under other sections of the Code one to be determined by considerations and inferences drawn from common experience rather than from rules of legal construction. PITAMBER 140

———*Defamation.* The complainant prosecuted the accused persons for defaming his sister-in-law:—*Held,* that, as there was no imputation made against the complainant, there was no defamation of his within the definition contained in section 499, Indian Penal Code, and that his sister-in-law, being the person defamed, ought herself to have made the complaint. LAKSHMAN. ... 392

———*Defamation—Adultery—Woman—Medical Examination of her person—Practice.* The accused being charged with defamation, in having publicly charged a woman with being pregnant by adultery, requested the Court to have the complainant, the woman medically examined in order that the truth or falsehood of the matter alleged might be satisfactorily established:—*Held,* that there was no law which empowered the Courts to order such an examination in such a case. PUDMON. 474

———*Defamation—Newspaper comments.* Where a defamatory statement is published in a newspaper, any exception on the ground of good faith or public good fails. An accused person is bound by the admission which is unqualified. There is nothing to prevent a person on being questioned under section 342, Criminal Procedure Code, to make an admission, and it is obvious that some admissions on formal matters of law can be better trusted to his legal adviser, and there seems to be no reason in principle why when the admission has been so made in his presence at the trial so as to dispense with the attendance of witnesses for the prosecution, it should not be held to bind him. LEANDRO MASCARENHAS. 769

Penal Code, S. 503—*Criminal intimidation.* A mere threatening to bring a matter before the caste in order to get one expelled does not amount to criminal intimidation. FAKIRAPPA. 186

———**Ss. 503, 44**—*Criminal Intimidation—Threat to put out of caste.* The accused told the complainant, a member of their caste, that he should give up his field or else they would put him out of caste:—*Held,* that this did not amount to criminal intimidation within the meaning of the Indian Penal Code, the injury threatened not falling within the definition contained in section 44 of the Indian Penal Code. ALYA DHURMA. ... 37

———**S. 506.** *See* PURSHOTTAM. 850

———**S. 508** — *Divine displeasure.* Where the accused voluntarily attempts to cause a person to omit to do what he was legally entitled to do by attempting to induce the latter to believe that he would otherwise be rendered by an act of the accused an object of divine displeasure, the accused commits the offence under section 508 of the Indian Penal Code. MHADNACK... ... 376

Personal interest *of the trying Magistrate. See* VISHNU. 631

Petroleum Act (*XII of* 1886) **S. 8, Rule 3**—*Petroleum—Importation—Land.* Petroleum imported by land into British India from territory beyond the limits of British India, but not shown to have been imported from any port does not come within the restrictions imposed by Rule 3 of the Rules framed for regulating the importation of petroleum by sea into the Presidency of Bombay. CHUNILAL. 643

Plea *of guilty.* A prisoner, at the bar of a Sessions Court pleaded guilty but at the same time informed the Judge that he committed the homicide because he was subject to epileptic fits. The Sessions Judge convicted the prisoner of murder on his so-called plea of guilty:—*Held,* ordering a retrial, that the prisoner could not be held to have pleaded guilty and could not therefore be convicted of that plea. MHATARYA.... 698

———*Accused—Statements accompanying the plea*—It is not the duty of the Court of Sessions, at the time of recording a plea, to

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decide whether any statement which accompanies it is true or false; any such statement must be regarded only as explanatory of the plea. LAKSHMAN. 532

Pleader cannot be directed to sit down in the middle of cross-examination for putting questions to a witness. *See* JAMES FITZGERALD... 861

Poisons Sale Act (*VIII of* 1866) **S. 13**—*Magistrate—Jurisdiction.* A First Class Magistrate alone can try an offence of omitting to keep accounts of the sale of poisons, under section 13 of the Bombay Poisons Sale Act, and the Second Class Magistrate has no jurisdiction to try such a case. SHRIRAM. 292

Police Act, District, (*Bom. Act VII of* 1867), **S. 3**—*Police—Duties.* The duties of the Police are divisible into three heads:—(1) those imposed upon them by the rules framed by the Commissioner and approved by the Government; (2) those imposed by rules or orders which the Commissioner may make preventing abuse or neglect of duty and (3) those imposed by law. JETHYA ALLIAJI. 107

——**S. 7**—*Police Patel—Village Mhars—Assisting Public Works Department.* A Police Patel has no authority, under section 7 of the Bombay District Police Act, to order the village Mahars to assist a subordinate officer of the Public Works Department in measuring the high road. DHAVLIA. 509

——**Ss. 7, 26**—*Breach of order—Police Superintendent.* A Police Officer enrolled under Bombay Act VII of 1867 permitted two reputed thieves to escape from his custody and failed to make any report to his superior, as in duty bound, and was convicted of the offence of wilful breach or neglect of orders made by competent authority, under section 26 of the Bombay Act VII of 1867, by the Superintendent of Police, who was also a Magistrate, F. P. *Held*, that the Superintendent of Police, although he was a Magistrate, F. P. had no authority to try the case (section 7 of the Act). SYAD UMAR. 29

——**S. 8**—*Police Inspector—Prosecution.* An Inspector of Police being an officer who may be removed from office under section 8 of the Bombay District Police Act without the sanction of Government, the sanction of Government is not necessary in order to give a Magistrate jurisdiction to entertain a complaint against him of an offence committed in his capacity of a police officer. GANPAT. 142

Police Act, District, S. 9—*Railways Act* (*XVIII of* 1854), *Sec.* 27—*Railway Police—Neglect of duty.* Members of the Police Force who are styled the Railway Police, and are in the pay of a Railway Company, are amenable for neglect of duty to the provisions of section 27 of Act XVIII of 1854, notwithstanding that they hold commission from the Commissioner of Police under section 9 of the District Police Act (Bombay Act VII of 1867. SAYAD KAZI. 51

——**Ss. 11, 26**—*Police officer—Suspension—Engaging in another employment.* The intention of section 11 of Bombay Act VII of 1867 was to prohibit Police Officers from engaging in any other employment, while in the active discharge of their Police duties, but there would appear to be no objection to a Police Officer, who is under suspension, maintaining himself by other work; when his suspension came to an end he would be bound at once to resign any employment in which he might have been engaged in the interval or otherwise he would render himself liable to the penalties specified in section 26 of the Act. UMAR. 53

——**S. 26**—*Police officer—Overstaying leave.* A Police Constable overstayed the casual leave granted to him by the Chief Constable and was absent without leave for a month and two days:—*Held*, that in staying without permission beyond the period of leave granted him, the accused withdrew from the duties of his office without permission and that he committed an offence within the meaning of section 26 of the Bombay District Police Act, 1867. SHEIK SULTAN. ... 279

——**Ss. 27, 29.** A Police Superintendent cannot, under section 27 of the Bombay District Police Act, 1867, legally make an order forbidding sticks to be carried by persons attending a certain *jatra* (fair). Hence, a person who, in contravention of such an order, carries a stick at the *jatra*, is not guilty of an offence under section 29 of the Act. SANGAPPA. ... 394

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Police Act, District, S. 28—*Driving on the proper side of the road.* The Police have power under section 28 of the District Police Act (Bombay Act VII of 1867) to issue a general notification ordering people to drive on the proper side of the road. KHODA BHARTHI. 38

——— **Ss. 28, 29**—*Warning—Going along a road.* The warning or advice given by the Police to certain persons not to go alone on a particular road, as the country was believed to be infested with dacoits, is not an order as can be legally passed, under section 28 of the Bombay District Police Act, and its non-compliance is not punishable under section 29 of the Act. RAMA. 385

——— **S. 29.** *See* SANGAPPA. ... 394

——— **S. 31**—*Cruelty—Animal.* A man who after firing at a dog refrains from again firing at it to put it out of pain, does not commit an offence under section 31 of Bom. Act VII of 1867. FRANCIS. 183

——— *Penal Code (Act XLV of 1860), Sec. 268—"Nuisance."* The term "commits nuisance" in section 31 of the Bombay District Police Act does not mean a nuisance within the definition of the term in section 268 of the Indian Penal Code but a nuisance within the meaning of the common notice to the public to "commit no nuisance." NILKANTH. ... 134

——— *Magistrate resident—On Tour.* The words "Magistrate resident," in section 31 of the Bombay District Police Act, do not include a Magistrate who happens on his tour to stay a few days at the place, mere presence not being the same thing as residence. MAHADU. 483

——— **S. 31 (2)**—*River—Watering Place.* A conviction under section 31, clause 2 of Bombay Act VII of 1867 is illegal, if the prohibitory notice mentioned therein has not been issued. A river is not a watering place within the meaning of the above clause. CHHOTIRAM BHASKER. ... 55

——— **S. 31 (4)**—*Nuisance—Making water—Public Street—Annoyance.* To perform the offices of nature, as, *e. g.*, to make water in a public street is an offence, punishable under section 31 (4) of the Bombay District Police Act, provided there be evidence of annoyance to residents or passengers. MULIA. 305

Police Act, District, S. 33—*Nuisance—Dirt.* A person committing nuisance on or close to, and within sight of, any public road, street, or thoroughfare as specially provided for in clause 4 of section 31 of the Bombay District Police Act, 1867, cannot be legally convicted of depositing dirt under clause 3. SHIVA KASHIRAM. 521

——— **S. 33.** *See* BAPUJI BECHAR. 81

——— *Master — School-boys — Nuisance.* The masters of school were convicted of wilfully permitting a common nuisance to continue, by allowing some two hundred pupils to obey the calls of nature daily in a plot of ground within the town and close enough to other houses to cause annoyance and danger to health:—*Held*, that children once outside the school are not so under the control of the master as to make the latter criminally responsible, as their parents might be, for a nuisance created by their children. If a school is so conducted as to be a nuisance the complainant can get a remedy by injunction. REVANSHIDAPA. 291

——— **S. 42**—*Police officer—Protection—Official act done in good faith.* The protection intended to be afforded to Police Officers by section 42 of the District Police Act, by means of notice, is not a condiction precedent to a prosecution relating to a violent assault by a Police Officer. The protection extends to official acts done in good faith, and which may reasonably be supposed to be done in persuance of official duty, even though legal powers may be exceeded, but not to acts for which there is a total absence of authority. GANU. ... 486

——— **S. 42**—*Penal Code, Sec. 342—Police Officer—Wrongful confinement.* The provisions of section 42 of the Bombay District Police Act must be held to apply to criminal prosecutions as well as to civil actions, notwithstanding the use of the word "decree" in section 43 in connection with prosecutions. The prosecution of a Police Officer for an alleged offence of wrongful confinement, punishable under section 342 of the Indian Penal Code, the Police Officer having, without a warrant, arrested and detained in custody a person in whose possession he found property which

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he suspected to be stolen, is a prosecution for a thing done or intended to be done under the Bombay District Police Act, inasmuch as section 21 of the Act authorizes the arrest, by a Police Officer, without warrant, of any person in whose possession anything is found, which may reasonably be suspected to be stolen property, if the person may "reasonably be suspected of having committed an offence with reference to such thing," and authority given to arrest in such cases implies authority to detain. RAMCHANDRA. 220

Police Act, District, Ss. 34, 36—*Police Constable—Transfer—Not-obeying the order of transfer—Withdrawal from duty.* A Police officer who, having been transferred from one place to another, disobeys the order and remains performing his duties at the former place pending reply to a petition addressed by him to his superiors, does not commit "a withdrawal from the duties" within the meaning of section 34 of the Bombay District Police Act, 1867. TATIA. 555

——**S. 36**—*Absence without leave.* A Police officer who absents himself from the duties of his office for a day without leave commits an offence under section 36 of the Bombay District Police Act, 1890. It is not necessary for a conviction under the section that the withdrawal must be permanent. CHAND 585

——**S. 43**—*District Magistrate—Order—High Court—Revision—Jurisdiction.* The High Court has no jurisdiction to interfere with an order duly made by a District Magistrate under section 43 of the Bombay District Police Act, 1890. KAJI SULTAN. 540

——**Ss. 44, 54, 68, 71**—*Indian Penal Code (Act XLV of 1860), Secs. 114, 188—Order—Procession—Music, playing of—Presence at the procession—Abetment.* It is not necessary for a Magistrate trying an accused, under section 68 of the Bombay District Police Act, for disobedience of an order issued in proper form by the District Magistrate under section 44 of the Act, to inquire into the expediency of the order, it being only necessary under section 68 to prove the disobedience and not the existence of the danger or other occasion for making the order as is essential under the different words of section 188 of the Indian Penal Code. Mere presence of a person at a procession in which music was played in contravention of an order of the District Magistrate under section 44 of the Bombay District Police Act does not by itself constitute an abetment of an offence under the Act. VISHWANATH. 708

Police Act, District, S. 46—*Criminal Procedure Code (Act X of 1882), Sec. 435.* When an order has been duly made by a District Magistrate, or Sub-Divisional Magistrate under section 46 of the Bombay District Police Act, 1890, the Court of Session should not call for the proceeding under section 435, Criminal Procedure Code. It appeared unnecessary to determine the powers of the High Court in this case. Any person aggrieved by the order can petition the Governor in Council under whose control the prerogative of keeping the peace is worked by the Magistracy. HAIBATI. 692

——**S. 61 (d)**—*Negligent driving.* The words "contrary to any Regulation" in clause (*d*) of section 61 of the Bombay District Police Act, 1890, refer to the words "or by driving &c," and not to the words "causes obstruction, injury, &c., by any misbehaviour, negligence or illusage in the driving, management or care of any animal or vehicle" in the first part of the clause. MANYA. 634

——**S. 61 (m)**—*Fishing—Public tank—Defilement.* The mere act of fishing in a public tank, without proof that something that would defile the water was used as bait, cannot sustain a conviction under section 61 (*m*), Bombay District Police Act. MULAN KALAMIA. 868

——**S. 62**—*Cruelly.* To support a conviction under section 62 of the Bombay District Police Act, 1890, it should be found as a fact that pain or suffering has been inflicted. DHONDI MANKU. 738

Police Patel. *See* VILLAGE POLICE ACT.

Practice—*Conviction—Burden of proof.* A prisoner must be convicted upon the strength of the case made against him and not in consequence of his inability to bring forward proof of his innocence. JENKOO. ... 5

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Practice—*Magistrate — Trial— Non-competancy—Police—Taking the trial to another Magistrate.* When it is found by a Subordinate Magistrate before the trial of a case has commenced before him that he is not competent to try it, the Police should be told to take it on to a Magistrate who is competent. SATTARA MAGISTRATE'S LETTER No. 335 OF 1870. 29

———*Magistrate — Witnesses — Taking statement out of Court and in the absence of the accused—Intention of proceeding against them if they changed their statements afterwards.* It is an improper procedure in a Magistrate to take, during the investigation by himself of a criminal case, the statements of certain witnesses on solemn affirmation out of Court and in the absence of the accused with the avowed object of proceeding criminally against the witnesses should they subsequently in open Court deviate from the statement formerly made. JETHA GANESH. 66

———*Prosecution— Probabilities— Doubt —Benefit of doubt —Accused.* Where the probabilities in favour of the prosecution outweigh those in favour of the defence, but looking to all the circumstances there remains a reasonable doubt in favour of the accused, the accused must get the benefit of that doubt. SHIVGOD. 127

———*Imprisonment under two warrants—First warrant to be fully executed before effect is given to the second.* When a convict is imprisoned under two warrants, which order consecutive punishments, the first warrant should be completely executed, both in regard to the substantive sentence of imprisonment and the imprisonment in default of payment of fine, before any effect is given to the second warrant. DHARWAR DISTRICT MAGISTRATE LETTER No. 682. 132

———recording of confessions in writing *See* RAGHAPPI. 838

———*Police—Evidence.* In all important cases, and especially in cases of murder and dacoity, the police officer making the investigation should be examined as a witness regarding the circumstances of the investigation. It is generally important to the trying authority to know why, where and when the accused persons were arrested. It is often important to ascertain what the witnesses said, when they were first questioned by the police, and whether such statements agree with those subsequently made by the witnesses in Court. RAMPURI. 173

Practice—*Magistrate—Complaint—Cognizance—Civil dispute.* A Magistrate is bound to hear a complaint on its being duly presented to him. It is not competent to him either to refuse to take cognizance or to postpone its investigation *sine die* on the ground of non-existent civil proceedings. CHHATRASANGJI. 206

———*Counter-charges—Hearing together —Compounding of charges.* Where there were counter-charges between the parties of offences under sections, 342 and 353 of the Indian Penal Code, the Magistrate took evidence in both cases, without having come to a decision in either case, and eventually allowed the charges to be compounded:—*Held*, (1) that the Magistrate's procedure in hearing the two counter-charges before coming to a decision in either was not illegal, but that he should not have taken the evidence of an accused person on oath against the persons accused by him until the case against himself had been disposed of; and (2) that the order of compounding should be reversed. SORABJI. 331

———*Magistrate — Conviction for two offences—Single sentence—Imprisonment and fine—Appellate Court—Reversal of conviction of one offence—Retaining the imprisonment and refunding the fine.* Where a Magistrate, on conviction of an accused person of two offences (for which separate sentences ought to have been passed) passes a single sentence, combining imprisonment and fine, it is not open to an Appellate Court, on reversing the conviction for one offence, to treat the sentence of fine, as the punishment for one offence and the sentence of imprisonment as the punishment for the other (no such distinction having been made by the trying Magistrate) and to retain the full sentence of imprisonment. PASCOE. 409

———*Conviction—Plea—Trial.* The accused was committed to the Co urt of Sessio

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on charge of culpable homicide not amounting to murder and pleaded guilty to that charge, but the Sessions Judge, instead of convicting him on his plea convicted him, having regard to the evidence recorded before the Committing Magistrate, of causing grievous hurt:—*Held*, that as the Sessions Judge did not convict on the plea, he ought to have tried the case. It was illegal to convict the accused of an offence of which he did not plead guilty and for which he was not tried. RAGHU. ... 413

Practice-*Retracted statements—Previous trial—Conviction.* A conviction based on previous statements of witnesses who retracted them at the trial cannot be sustained in law. RAMDIN. 762

———*Statements made by witnesses to the Police—Copies of the statements—Discretion.* The practice of granting to the accused statements made by witnesses to the Police discussed. SHIDLINGAPPA. 874

Presidency Magistrate,—Jurisdiction not ousted by Coroner's inquiry. *See* JOHN PAUL. 540

——— *Predecessor—Review.* A Presidency Magistrate has no power to review and cancel the order of his predecessor in office. RANCHHOD HARI. 877

Prisoner's Testimony Act, (*XV of* 1869)—*Evidence Act* (*I of* 1872), *Sec.* 118. Two *somars* A and B were convicted of theft and duly sentenced. R and G, who had given evidence as witnesses against them, were afterwards prosecuted under section 411, Indian Penal Code, in connection with the same property, and connected on the evidence of A and B:—*Held*, (1) that the Prisoner's Testimony Act had no bearing on the point in decision and that the two convicts were competent and compellable witnesses, there being no exclusion of them, nor privilege given them by the law; (2) that, in the absence of any pardon or suggestion by any judicial authority of pardon, R and G had no privilege against prosecution or against the evidence of any admissible witness being used against them. Even if, as witnesses against A and B, they made full confessions of crime as being dishonest receivers, they would have no privilege (which can only be conferred by special enactment of the Legislature as in the case of the confessing Mamlatdars by Act XIV of 1889). RAMCHANDRA SAWAIRAM. 776

Prisoner's Testimony Act, S. 3 —*Convict—Attendance—Magistrate.* A Magistrate can under section 3 of Act XV of 1869 procure the attendance of a convict as an accused person without the intervention of the High Court. Section 7 of the Act appears to apply only when a person's evidence is required. If the person, whose appearance to answer a criminal charge is required, be confined in a Jail in a District other than that in which the Court requiring the accused's appearance is situated, the proper procedure is under section 6 of the Act. NASICK DISTRICT MAGISTRATE'S LETTER No. 2619.... 66

Prison's Act (*IX of* 1894), **S. 60** (t) *See* RADHA.... 827

Prospective offence, warrant in cases of. *See* FATEALI. 90

Public Conveyances Act—(*Bom. Act VI of* 1863) **S. 1**—*Tonga—Her Majesty's Mails.* A *tonga*, when used for carrying Her Majesty's Mails, is not a public conveyance within the definition contained in section 1 of the Bombay Public Conveyance Act. NARAYAN. 521

——— **S. 2**—*Magistrate—Jurisdiction.* Under Notification No. 1068, dated 18th February 1891 issued by Government in exercise of the power conferred by section 34 of the Bombay Public Conveyance Act VI of 1863, the Second Class Magistrate of Hubli alone is empowered to try cases under that Act. RAMA. 921

———*Public conveyance—Carriage.* To support a conviction under section 2, Bombay Act VI of 1863, it must be proved that the carriage was a public conveyance and that the accused kept or let it for hire. ABDUL RAHIMAN. 400

——— **S. 4**—*Licenses—Weight, maximum.* Section 4 of the Bombay Public Conveyances Act does not require that licenses granted under the Act shall contain any particulars as to the weight of goods to be carried in a public conveyance. JHINA. 415

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Public Conveyances Act—Ss. 7, 9, 21—*Criminal Procedure Code (Act X of 1882), Sec. 29—Magistrate—Jurisdiction.* The first paragraph of section 29 of the Code of Criminal Procedure, read with section 21 of the Public Conveyance Act, 1861, gives all Magistrates jurisdiction to try offences against sections 7 and 9 of the latter Act. RAMCHANDRA. 364

——— **S. 22**—*"Stand to ply," meaning of.* The word "stand" in section 22 of the Bombay Public Conveyances Act should be understood in its popular sense as the expression "stand to ply" have not been defined in the Act. TAJA. 539

——— **Ss. 23, 35.** In section 35, Public Conveyances Act, 1863, the words "no conviction under this Act...shall be open to appeal or reversal by any other Court" mean no conviction of any person under the Act. Where, therefore, an accused, who was the owner of a public conveyance, was convicted by a First Class Magistrate under section 22 of the Public Conveyances Act, on the ground that he was responsible for the act of his servant who had refused to let the conveyance for hire, the High Court held that it was not precluded by section 35 of the Act from interfering in revision, for the person punishable under section 22 was "the driver or other attendant," and the accused was, therefore, not a person punishable under section 35; and that as the conviction was manifestly wrong it must be reversed. LOUIS FRANCIS. 672

Public Ferries Act—(*Bom. Act II of 1868*), **S. 14**—*Ferry, plying of—Criminal Procedure Code (Act X of 1882), Secs. 517, 545—Compensation—Boat, sale of.* When a person is convicted under section 14 of the Public Ferries Act, 1868, it is not competent to a Magistrate to order the sale of the boat under section 517, Criminal Procedure Code, and to award out of the sale proceeds, compensation to the complainant under section 545, Criminal Procedure Code. BEBRA. 688

——— Section 14, of Bombay Act II of 1868, is to be read by itself; to support a conviction under the section it is wholly immaterial to see from what point the accused started in conveying passengers, animals &c., all that is necessary to consider is only the arriving point and if that is proved to be less than three miles above or below a public ferry, the offence is complete. HARI APPA. 901

Public Nuisance. *See* PENAL CODE, *s.* 190.

Public Servant. *See* PENAL CODE, *s.* 21.

——— obstruction to. *See* PENAL CODE, *s.* 186.

Public Spring. *See* PENAL CODE, *s.* 277.

Question of fact—*District Magistrate—Sessions Judge—Sanction—High Court—Revision.* When a District Magistrate, being of opinion that the Sessions Judge gave sanction for prosecution on a mistaken view of evidence, referred the case to the High Court, the High Court declined to interfere on the ground that questions of fact must be dealt with by the Court which might try the case. HUSEIN. 473

Railway Act (*Act XVIII of 1854*)—*Return ticket—Transfer—Attempt.* The act of buying an un-used half of return ticket does not in itself amount to an attempt to travel within the meaning of the Indian Railways Act, 1854. MUGGAN. 123

——— **Ss. 30, 35**—*Criminal Procedure Code (Act X of 1872), Sec. 2—Offences—Trial—Magistrate—Jurisdiction.* Section 30 of Act XVIII of 1854, and section 2 of the Code of Criminal Procedure, show that offences under the Railway Act, punishable with a fine exceeding twenty rupees, are not triable by Magistrates inferior to a Magistrate of the first class. MIRZA MAHOMED. ... 83

——— **S. 32** (*IV of 1879*),—*Fraudulent Acts—Fine—Fare.* Section 32 (*d*) of the Railways Act applies only to fraudulent acts, and where it appears that the accused has no intention to defraud, he is not liable, under section 32 of the Act to payment of fine as well as the fare, but is liable, under section 31, to pay the fare found due. HUSSENDIN 135

——— **Ss. 45 46**—*Placing obstruction on the rails—Unlawful Act.* The accused was charged under section 46 of the Railways Act, 1879, with pulling up an iron mile-post and

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placing it across the rails. It was done in the dusk of the evening and the mail train might have been derailed. The District Magistrate was of opinion that section 45 of the Act applied and referred the case to the High Court:—*Held* that the trying Magistrate did not give sufficient consideration to the principle that, when an act unlawful in itself is wilfully done, rashness cannot be usually predicated; and that, therefore, the accused should be committed to the Court of Session on a charge under section 45 of the Act. SHIVAPA. 459

Railway Act, S. 46—*Endangering the safety of persons travelling upon the railway.*—A person who fails to remove a stone from a rail is not guilty of negligently doing an act which is likely to endanger the safety of persons travelling upon the Railway, under section 46 of Act IV of 1879, unless it be proved that he was legally bound to remove it. PHAKEERA. 394

———**S. 101.** *See* FRANCIS R. THOMPSON. 721

———**S. 113.** (*IX of* 1890)—*General Clauses Act, Sec. 5—Excess Fare—Fine recovery of—Imprisonment.* As section 5 of the General Clauses Act, 1868, declares the provisions of sections 63 to 70 of the Indian Penal Code applicable to all fines imposed under the authority of any Act thereafter to be passed unless such Act shall contain an express provision to the contrary, a Magistrate, ordering, under section 113 of the Indian Railways Act, 1890, payment of excess charge and fare, which under that section is to be recovered as if it were a fine imposed by him can award imprisonment in default of payment under section 64, Indian Penal Code. VAIDYALINGAM. 871

———**S. 121**—*Resident Engineer—Obstruction—Right of way—Fence.* The accused obstructed the Resident Engineer of a Railway Company (who was acting under orders of the Company) in putting down a line for a fence which would have interfered with the right of way claimed by accused and was convicted by a District Magistrate "with obstructing a Railway servant in the execution of his duty" under section 121 of the Indian Railways Act:—*Held*, that the legality of the conviction depended on the validity of the accused's claim to the right of way; for if that claim was valid, it could not have been the duty of the Resident Engineer to obstruct it and the Railway Company could not by their orders make it his duty to do so. BOMONJI. 675

Railway Act, S. 126—*Rails—Stones, placing of.* A person charged with having placed a stone on the rails, under section 126, Indian Railways Act, 1890, cannot be allowed to plead that no train was due at the time. KESHOW VIRUPAKSH.... 829

Record—*Confessions, record of.* In cases gravity such as murder, and especially as regards records of confessions, the records should be in plain and legible writing. RAGHAPPA. 888

Reference — *Judge — Pending trial.* There is no provision in the Criminal Procedure Code which enables a Judge to stop a trial already commenced and to refer to the High Court any question or questions of law arising on the merits in that case. BAPUJI. 214

———High Court will decline to interfere on a question of fact. *See* HUSEIN. ... 473

———By Sessions Judge. *See* SHIVRAM. 937

Reformatory Schools Act (*V of* 1876), **S. 7**—*Reformatory—Juvenile offender—Sentence.* In the case of a juvenile offender whom it is desirable to confine in a Reformatory, a Magistrate must, on convicting him, sentence him according to law; and if he sentences him to imprisonment, whether rigorous or simple, he may then make a further order such as is contemplated in section 7 of the Reformatory Schools Act, 1876. PURSHOTTAM. 518

———**Ss. 7, 8**—*Juvenile offender.* A direction to confine a prisoner in a Reformatory School can be made under section 7 of the Reformatory Schools Act, 1876, only after passing a sentence of transporation or imprisonment. In cases under sections 7 and 8 of the Act, the age of the prisoner should be ascertained in order that the limit of age provided by section 10 of the Act be not exceeded. It is not every juvenile offender in respect of whom the order under sections 7 and 8, should be made, and the inmates of a Reformatory ought not to be obliged to associate

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with a person convicted of a serious offence under the Indian Penal Code. GOPALA. 726

Reformatory Schools Act Ss. 7, 8—*Youthful offender.* A youthful offender was sentenced to imprisonment and in appeal the Sessions Judge under Government Resolution 3908 (Judicial Department of 21st July, 1890) and under section 7 of the Reformatory Schools Act, 1876, ordered his detention in a Reformatory School:—*Held*, that section 7 of the Act applied only to the Court by which the youthful offender was sentenced; that the order of the Sessions Judge was illegal; and that the proper procedure to be adopted in such a case was that laid down in section 8 of the Act. LALLUBHAI. 586

———**S. 8**—*Judicial Proceeding—Criminal Procedure Code (Act X of 1882), sec. 435.* The order of a Magistrate, under section 8 of the Reformatory Schools Act, 1876, is not an executive act but is a judicial proceeding; and the High Court has jurisdiction to revise it. MANAJI. 494

Reformatory Schools Acts (VIII of 1897, and V of 1876)—*Criminal Procedure Code (X of 1882), Sec. 399—Sessions Judge — Youthful offender.* Where a Sessions Judge purporting to act under section 399, Criminal Procedure Code, ordered a youthful offender, fourteen years old, to be detained in a Reformatory for a period of one year only, the High Court reversed the order as being illegal, inasmuch as it contravened the provisions of section 8 of the Reformatory Schools Act, 1897, and directed the Sessions Judge to pass a legal order. Section 399, Criminal Procedure Code, was repealed when the Reformatory Schools Act 1876, came into force in the Presidency of Bombay. FAKIRA DHARMAPPA.... ... 915

Reformatory Schools Act (VIII of 1897), S. 4 (a)—*Youthful offender—Sentence.* Where a First Class Magistrate ordered an accused person who was evidently not under 15 years of age, to be confined in a Reformatory School, as per orders dated 11th and 18th March 1897, the High Court set aside the orders as illegal under the Reformatory Schools Act, 1897, which came into force on the 11th March, 1897. BHAUSING. 905

Reformatory Schools Act, S. 8—*Juvenile offender—Magistrate, specially authorized.* Where an accused who was convicted of the offences under sections 454 and 380, Indian Penal Code, and sentenced to one year's rigorous imprisonment, but being 14 years old was directed to be detained in the Reformatory for the period; the High Court reversed this latter direction on the grounds that the Magistrate had not been specially authorized and that the order was opposed to the provisions of section 8 of the Act. BHAGIA BHAOO. 947

———**S. 9**—*Procedure.* A Magistrate could act under the Reformatory Schools Act, 1897, only when he is empowered by the Local Government in that behalf. BHUJIA GUJIA. 986

Registration Act (XX of 1866), Ss. 51, 94, 95—*Registering officer—False personation—Court of Session — Jurisdiction.* The offence of abetting false personation before a Registering officer punishable under section 94 of Act XX of 1866 with imprisonment for a term which may extend to seven years, is triable exclusively by a Court of Session. SUPDU. 51

———**S. 82 (a)**. *See* BALA. ... 761

Regulation XII of 1827, S. 19—*District Magistrate—Billiard Saloons—License.* A District Magistrate has no power under the Regulation XII of 1827 to forbid the keeping of billiard saloons or to require the keepr to take out a license. EDWARD GOLDSTEIN. ... 490

———*District Magistrate—Billiard saloons—Order of prohibition.* Section 19 of Regulation 12 of 1827 does not empower a District Magistrate to forbid the keeping of billiard saloons or to require that the keeper should take out a license, his power under that section being confined to the regulation only of such places. Any notice issued by a District Magistrate under Regulation XII of 1827 for the regulation of such places must be fixed and kept at such places must be fixed and kept at such place or places as may be best adapted to convey information to the public or the class concerned. INWARD NO. 990 OF 1889. 483

———**S. 19 (1)**—*Magistrate—Rules—Dharamshala—Bona fide dispute.* Section 19

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(1) of the Police Regulation, 1827, relates only to places, the right of the public to which is not disputed. A Magistrate has, therefore, no authority to institute rules with regard to a *dharamshala* when there is a *bona fide* dispute as to its ownership. LETTER FROM THE PANCH MAHALS COLLECTOR. 389

Regulation XII of 1827, S. 19 (1)—*District Magistrate—Ferry approaches—Order prohibiting bathing or washing of clothes—Order illegal.* The District Magistrate of Ahmednagar having issued a notice caused it to be put up in a conspicuous place at Newasa, prohibiting the washing of clothes on, and bathing from, the masonry pavements of the ferry approaches at that place, or the landings of the said ferry:—*Held*, that the rule made by the Magistrate was not one which could be legally made under section 19, clause 1, of Regulation 12 of 1827. AHMEDNAGAR DISTRICT MAGISTRATE'S LETTER No. 6914. 356

———**S. 16 (6)**—*Pole—Watchman.* It is not competent to a Magistrate to issue a notice under section 19 (6) of Regulation 12 of 1827 calling on the inhabitants of *Pols* to employ a watchman if they lock the *Pol* gates at night in order to open the gates to the Police when required. LETTER FROM KAIRA MAGISTRATE. 159

———*District Magistrate—Notification—Health and comfort—Religious feelings.* The District Magistrate of Ahmedabad issued the following notice under section 19 (6) of Regulation XII of 1827:—"Whereas the Munsar tank is held sacred by the Hindu community and Gusaria Tank is much used by the people whose houses surround it and whereas fishing in these tanks is likely to hurt the religious feelings of the Hindus, who resort to them for worship and for bathing, notice is hereby given that no one shall fish in the aforesaid tanks:"—*Held*, that such a notice could not be issued under the section. LETTER FROM THE DISTRICT MAGISTRATE OF AHMEDABAD. 362

———**S. 27**—*Police Patel—Suspected characters—Failing to attend the daily muster.* The accused, suspected characters, were repeatedly warned to attend the daily muster, but failed to do so. They were all convicted, under section 174 of the Indian Penal Code, of non-attendance in obedience to an order from a public servant, *i. e.*, the Police Patel:—*Held*, reversing the conviction, that section 27 of Regulation XII of 1827 contemplates the taking of security for good behaviour, or with the assent of the person concerned, the more lenient measure described therein; and that the Magistrate alone could take these steps and the proper remedy, for failure to comply with the terms imposed and accepted, was an exaction of security for good behaviour. BALU HATHI... 289

Regulation XIV of 1827, S. 7 (3), 19 (2)—*Imprisonment—Interpretation.* In the Regulation and Acts previous to the passing of the Indian Penal Code, the term "imprisonment" meant imprisonment with or without labour, according as the warrant might direct, (Reg. XIV of 1827, section 7, cl. 3) Except, therefore, in cases in which the law expressly provided that imprisonment should be without labour (*e.g.*, Reg. XIV. of 1827, section 19 cl. 2) the trying authority could order that imprisonment should be with labour. RAMA BAHIRU. 41

Regulation XXI of 1827—*District Magistrate—Special Jurisdiction—Criminal Procedure Code (Act XXV of 1871).* The special jurisdiction vested in the Magistrate of the District by Regulation XXI of 1827 is not affected by the Code of Criminal Procedure, and it is therefore competent to him to try a charge against the opium laws even though the quantity of opium involved be so large that the fine leviable exceeds the Magistrate's jurisdiction under the Code of Criminal Procedure. ABA APAJI. 62

Retrial. *See* CRIMINAL PROCEDURE CODE, *s.* 423.

Review by a Presidency Magistrate, *See* RANCHOD. 877

Revision. *See* CRIMINAL PROCEDURE CODE, *s.* 439.

Rioting. *See* PENAL CODE, *s.* 141.

Robbery. *See* PENAL CODE, *s.* 390.

Salt Act (*Bom. Act VII of* 1873), **Ss. 18, 19, 49**—*Salt Department—Peon—Possession of naturally formed salt.* A peon in the Salt Revenue Department was found to be in possession of naturally form-

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ed salt, which he had collected for his private use:—*Held*, that section 18 of the Bombay Salt Act did not apply to the act of the accused person, which, however, when viewed by the light of section 3 which defines the word "manufacture" to include the collection of salt, is rendered penal by section 19 and made punishable by section 49. FAKIR PARSHOTTAM. 101

Salt Act, Ss. 35, 37—*Distance—Measure.* The distance of ten miles mentioned in sections 35 and 37 of the Bombay Salt Act is to be measured in a straight line "as the crow flies," *i. e.*, along the horizontal plane and not by the nearest mode of parctical access. ADRASHAPA... 139

———*Evidence Act (I of 1872), Sec. 125.* Having regard to the distinction drawn throughout Bombay Act VII of 1873 between a Police Officer and an Officer of the Salt Department, the latter cannot be considered a Police Officer within the meaning of section 125 of the Indian Evidence Act I of 1872, and may, therefore, be compelled to say whence he obtained information as to the commission of an offence. GOWLIA. ... 183

———**S. 54**—*Procedure.* Section 54 of the Bombay Salt Act, 1873, is not an enactment under which, by itself, a charge can be laid. There must, in addition, be reference to some other provision of the Act, or some rule in pursuance thereof according to the actual character of the offence imputed. Nor can a mere loose description of salt as contraband satisfy the requirements of the law as to what is contraband salt for the purposes of the penal sections of the Salt Act. The definitions given in section 3 must, in each case, be satisfied by evidence of facts giving to the salt the character there indicated. DHARAMDAS. 295

Salt Act (*Bom. Act II of* 1890), **S. 3 (g)**—*Salt-water—Purification—Evaporation* The accused bought some dirty salt in the Bazar, dissolved it in water, removed the dirt therefrom and obtained clear dry salt by evaporating off the water:—*Held*, that this was manufacturing salt within the meaning of section 3 clause (*g*) of the Salt Act 1890. DEVKI. 528

Salt Act, S. 47—*Principal—Agent—Liability of principal for acts of agent.* Where a principal has no knowledge or connivance in the illegal act of the agent he cannot be held liable under section 47 of the Bombay Salt Act, 1890, for the acts of the agent done on his own account. BALU MIYA. 576

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, *s.* 195.

———*Perjury—Asking a witness in the course of his examination to show cause why he should not be committed for another offence—Practice.* G. was discharged on a charge of murder by a Magistrate. After G's evidence had been recorded in the trial of certain persons for giving false evidence, the Sessions Judge asked him certain questions as to his liability to be committed to the Sessions Court on a charge of murder and under section 436 committed him:—*Held*, (1) that the consequence to public justice would be very serious, if a witness, during the course of his deposition, and before being absolved from his oath were liable to be suddenly called upon to show cause why he should not be committed for some other distinct and serious crime of which he had been discharged; (2) That the questions put to him could not be considered to be the beginning of these special proceedings authorized by section 436, Criminal Procedure Code; (3) That the Police and Magistracy were not precluded by an order of discharge from receiving a charge if in their judgment there was sufficient reason for holding that the discharge had been made on a wrong view of the facts. GOVIND. 335

———*Application, granting of—Sub-Judge—Indian Penal Code (Act XLV of 1860)—Obtaining a fraudulent decree.* Before granting a sanction for prosecution for an offence under section 210 of the Indian Penal Code, the Subordinate Judge ought to satisfy himself whether there was a *primâ facie* case against the accused that he had committed the offence. GIRDHARLAL. 374

———*Refusal—Subordinate Judge—Sessions Judge—Reference—High Court.* It is not competent to a Sessions Judge to refer to the High Court a matter which he can dispose of himself. If a Subordinate Judge refuses to

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grant a sanction for prosecution, the Sessions Judge, to whom the Subordinate Judge is subordinate has jurisdiction to grant it. SHIVRAM BAHIRDAS.... 937

Search Warrant. *See* CRIMINAL PROCEDURE CODE, *s*, 95.

Security for Good Behaviour. *See* CRIMINAL PROCEDURE CODE, *s*. 108.

Sentence — *Consecutive — Practice — Procedure.* The Criminal Ruling of 21st April 1879 that where a person already undergoing a sentence of imprisonment is sentenced to imprisonment which is ordered to commence after the expiration of the imprisonment to which he has been previously sentenced, such imprisonment commences from the time it is ordered to commence, *viz.*, from the expiration of the previous imprisonment, whether by reversal or completion of the punishment, is adhered to after consideration of the case of *Gregory* v. *The Queen* at 15 A. and E. (Q. B.) p. 974, and the Madras High Court Criminal Proceedings No. 201 of 15th February 1879, quoted at Weir's Criminal Rulings, third edition p. 993. Where, therefore, a person was convicted on the same day in two separate ceses and sentenced to a term of imprisonment in each, and the Court ordered that the sentence in the second case should commence on the expiration of the sentence in the first, and the conviction and sentence in the first case were reversed in appeal after the accused had undergone the whole of that sentence :—*Held*, that the sentence in the seconde case commenced to run after the expiration of the sentence in the first, and not before. KHANDU. 523

Separate Sentences. *See* CRIMINAL PROCEDURE CODE, *s*. 35, and PENAL CODE *s*. 71.

Sessions Judge cannot question jurors. *See* DESAI DAJI. 443

———should read over testimony to the juries when the trial is a long one. *See* FAKIRA. 850

Shooting in a reserved forest. *See* HANMANTA. 684

Stage Carriages Act (*XVI of* 1861)—*Public Conveyances Act* (*Bom. Act VI of* 1863)—*Carriage plying in a town.* The Stage Carriages Act, 1861, does not apply to a carriage plying only within a town and its suburbs, to which the Bombay Public Conveyances Act would apply if extended thereto. DAU. 327

Stamp Act (*I of* 1879), **Ss. 3 (17), 61** —*Receipt—Pledge—Receipt in a book.* Certain ornaments were pledged by the accused to his creditor. They were given back by the creditor and were sold by the accused; and the proceeds were paid by him to the creditor, and the debt due by the accused was thus satisfied. A memorandum of the circumstance was made in the creditor's book and signed by the accused. The accused was subsequently charged with, and convicted of, an offence under section 61 of the Indian Stamp Act, 1879 :—*Held*, reversing the conviction, that although in the memorandum the receipt of the ornaments was acknowledged, it was not a receipt within the definition contained in clause 17 of section 3 of Act I of 1879, as the ornaments were not by it acknowledged to have been received in "satisfaction of a debt." SHANKARLAL. 356

———**S. 3 (17), Arts. 52, 54**—*Receipt—Stamp. Held*, on the facts of the case, that the document was not a renunciation of a claim, and did not come within the definition of "release" in Article 54, Schedule I, of Indian Stamp Act, 1879. The language used in the document brought it within the words in the definition of "receipt" which include an acknowledgment of satisfaction of a debt. The fact that a separate document was used rather than an endorsement on the sale deed of the same date did not distinguish the case from Reference from the Board of Revenue under section 46 of the Indian Stamp Act, 1879. PANDURANG... 732

———**S. 61**—*Unstamped Khata—Receipt* —The mere receipt of an unstamped *Khata* does not constitute an offence under section 61, Indian Stamps Act, 1879. KASAM. ... 682

———**S. 68**—*Stamps—Without a license* —The selling of stamped paper previously bought from a licensed vendor because the seller did not require it is an offence under section 68 of the Indian Stamp Act as the accused was not "a person appointed to sell stamps." SHOBHARAM. 317

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Statement retracted at the trial, conviction based on. *See* RAMDIN. 762

Statute 21 & 22. Vic. c. 106. *See* ABDUL LATIF. 218

——— 24 & 25 *Vic. c.* 100, *s.* 47—26 & 27 *Vic. c.* 44—*Whipping—Imprisonment—Double sentence.* The accused assulted one Zena with intent to know her unlawfully and carnally, and was convicted by the Consular Court of Uganda and sentenced to rigorous imprisonment for two years and to 20 lashes:—*Held*, that the Statute penalizing the offence did not permit a double sentence for the offence. YAKOBO. 971

Summary dismissal of a complaint. *See* RAMCHANDRA. 562

Summary Trials. *See* CRIMINAL PROCEDURE CODE, *s.* 260

Summons, absence of the issue of. *See* SUDASHVAPPA. 8

——— refusal to receive. *See* PENAL CODE, *s.* 174.

Survey and Settlement Act (*Bom. Act I of* 1865). **Ss. 10, 14**—*City Surveys Act* (*Bom. Act IV of* 1868), *Sec.* 12—*Summons — Omission to attend — Sanad—Offence.* A person cannot be convicted for omission to attend for the purpose of receiving a *sanad* which it is incumbent on the Collector to issue, if applied for under sections 12 of Bombay Act IV of 1868, because this purpose is not one of those contemplated under sections 10 and 14 of Bombay Act I of 1865. GAJANAN. ... 67

Transfer of appeal—*See* APPA MALLYA. 110

Transfer of case—*Order of transfer not reaching in time—Disposal of the case—Illegality—Discretion.* The High Court ordered a transfer of a case on the 26th January 1871. Immediately on the passing of the order, the accused's pleader wired the information to his client. On the 27th, the telegram having been shown to the Magistrate, he adjourned the further proceedings till the 30th in order to allow the orders of the High Court to reach him. The order was despatched on the 27th but it failed to reach the Magistrate till the 31st. In the meanwhile, on the 30th no orders having been received, the Magistrate disposed of the case and found the accused guilty and passed a sentence upon him:—*Held*, declining to interfere by way of revision, that though the Magistrate did not act discreetly in not waiting sufficiently for the order of the High Court, there was no illegality in his proceedings. VINAYEK. 46

Trespass in a forest. *See* UMDYA. 602

Trial—*Criminal Justice—Object.* The object of a trial is the administration of justice in a course, as free from doubt or chance of miscarriage as merely human administration of it can be, and not the interests of either party, KALLAPPA. ... 806

——— reference pending a. *See* BAPUJI 214

——— of witnesses with the accused. *See* GOVIND. 588

Unlawful Assembly. *See* PENAL CODE. *s.* 110.

Village Police Act (*Bom. Act VIII of* 1867)—*Police Patel.* A Police Patel has no authority, under the Village Police Act to prevent persons from performing *tamashas* in their houses. TUKARAM. 287

——— *Corpse—Unnatural Death—Medical Inspection—Medical witness.* In cases of unnatural or sudden death and particularly where murder is suspected, it is the duty of the Village Police, under the ancient system recognized in Bombay Act VIII of 1867, to forward the corpse at once for medical examination. The testimony of a medical witness especially in a case of murder, ought, when he is present, to be taken fully, and not supplemented by reading over his testimony given elsewhere and recording an answer that the earlier testimony is true. SALU. ... 792

——— (*Act VII of* 1867)—*Police Patel—Personally interested.* A Police Patel is disqualified from trying a case in which he is personally interested: since though the Code of Criminal Procedure does not apply to Village Police Officers still the principle stated in section 555 of the Code is based on a general principle of justice. BAI KUSA...438

——— **Ss. 6, 15**—*Police Patel—Summons—Lawful order.* A Police Patel has authority to summon a person to appear before him in reference to an offence of which he can take cognizance, since section 6 of the Bombay Village Police Act imposes on him the duty of detecting and bringing offenders to justice and such a summons

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signed by him is a lawful order issued by him personally within the meaning of section 15 of the Act, the refusal to obey which is an offence triable by the Patel. RATNIA. 550

Village Police Act, S. 11—*Inquest—Police Patel—Duty.* The inquest which section 11 of the Bombay Village Police Act, 1867, requires, must be held *forthwith*, so that all the circumstances of the murder may be reported forthwith to the District Police. This law, which imposes on the Police Patel the duty of holding an inquest, and arresting the murderers, and empowers him to take evidence on oath, is obviously intended to make justice effectual by means of prompt inquiry in the face of all the villagers, and by delivery of a verdict of men not open to the suspicions of undue zeal often alleged against the District Police. Like any other Coroner's inquest, it saves the innocent from false charges, as people are not likely to bring such charges against an innocent man, when they have kept silence at the inquest. VASTA JEBHAN.... ... 740

——— **S. 12 (1)**—*Police—Bail—Police Patel.* The power of the Police to take bail being regulated by the Code of Criminal Procedure, the Court cannot authorize Police Constables to admit to bail persons sent up to them by Police Patels under the provisions of (Bombay) Act VIII of 1867 for offences for which bail may be allowed by the Criminal Procedure Code. Section 12 Clause 1 of (Bombay) Act VIII of 1867 authorizes Police Patels to arrest for "any serious offence." KULLADGHEE MAGISTRATE'S LETTER No. 444 OF 1869.... 26

——— **S. 14**—*Police Patel—Powers.* Under section 14 of the Bombay Village Police Act, 1867, the Police Patel on convicting a person of abuse has authority to punish him with confinement in the village *chowri* for a period not exceeding twenty-four hours: but has no authority to inflict a fine. RAGHO NARASING. 187

——— **S. 15**—*Disobedience of an order—Removal of wood from a public road—Patel.* A Police Patel has, under the Bombay Village Police Act, no power to order the removal of a piece of wood lying on a public road; the disobedience of such an order, therefore, is no offence under section 15 of the Act. DAMA GHELA. 980

Village Police Act, S.15—*Non-cognizable offence--Police Patel--Order to attend—Lawful order.* A Police Patel is not authorized to order the accused to attend at his office, in a case of an offence of which he cannot take cognizance; and the refusal to obey such an order is not punishable under section 15 (1) of the Bombay Village Police Act, 1867. VANKATESH. 551

———*Omission to obey—Refusal to obey—Police Patel.* Where there is a mere omission to obey and no deliberate refusal to obey an order given by a Police Patel personally, a conviction under section 15 of the Bombay Village Police Act cannot be sustained. NATHU. 624

——— **S. 15 (1)**—*Refusal to answer questions—Police Patel—Order lawfully issued by Police Patel personally.* The refusal to answer questions put by a Police Patel in a criminal proceeding is not "refusal to obey a lawful order issued by Police Patel personally" within the meaning of section 15 (1) of the Bombay Village Police Act, 1867. RAOJI... ... 610

——— **Ss. 15, 16 (3)**—*Inquest—Refusal to serve.* A refusal to serve on an inquest when called on by a Police Patel specially empowered under section 15 is not a refusal to obey a lawful order of a Police Patel, punishable by the Police Patel himself under section 15 of the Bombay Village Police Act, 1867. The unyoking of bullocks and feeding them on a road is not an offence under section 16 (3) of the Act. RAMASHETTI. 614

———*Police Patels—Superiors—Jurisdiction.* The jurisdiction to punish an offender for nuisance or disorderly acts under section 16 of the Bombay Village Police Act, 1867, is expressly confined to the Police Patels duly empowered under section 15 (1) of the Act and does not extend to their official superiors (the Magistrates in charge of the Talukas within which they are Patels). HANMANTA. ... 196

——— **S. 16**—*Rubbish.* It is a general principle that the head of the house is responsible for all nuisances which emanate from his house. NARAYAN. 338

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Village Police Act, S. 16 (2)—*Rivers.* Section 16, clause 2 of the Bombay Village Police Act, 1878, applies to offences regarding public wells, tanks or reservoirs, but not to offences regarding rivers. PUNJA. 609

——**S. 16 (5)**—*Milk-bush.* Milk-bush put in a river for the purpose of catching fish is not refuse or filth within the meaning of section 16, clause 5, of the Village Police Act. DAGDU. 379

——**S. 31**—*Call of Nature— Public road.* To ease oneself close to a public road is not an offence under section 31 of the Bombay Village Police Act, 1867, unless the act is committed within sight of a public road so as to cause obstruction, annoyance, risk, danger or damage to residents or passengers. BHIKA. 161

——**S. 61**—*Arrest— Warrant.* The Police have no power to arrest without warrant for an offence under section 61 of the Bombay Village Police Act. MEHMAN. 533

Warrant—*Prospective offence.* It is not competent to a Magistrate to issue a warrant or order of arrest in anticipation of an offence being committed: such a case is purely one for the interference of the police. FATEALI. 90

——to recover fine. *See* SATARA SESSIONS JUDGE LETTER No. 562. 350

Watercourse, mischief to. *See* PENAL CODE, *s.* 430.

Whipping Act (*VI of* 1864), **S. 2**—*Sentence— Fine.* Where an accused is sentenced to whipping, it is not competent to also sentence him to pay a fine; such a double sentence being opposed to the provisions of section 2 of the Whipping Act, 1864. DAGDU. 564

——*Criminal Procedure Code* (*X of* 1882), *Sec.* 390—*Whipping.* Where a sentence of whipping is passed as a sole punishment under section 2 of Act VI of 1864 (Act III of 1895, section 5), it is not necessary first to pass a sentence provided for the offence under the Indian Penal Code, and then to convert such sentence into one of whipping. Section 390, Criminal Procedure Code, authorizes the Court passing a sentence of whipping, only to fix the place and time and for its execution, but it does not contemplate a postponement of the execution of the sentence to a future day. ABDULLA. 906

Whipping Act, Ss. 2,3,4,5—*Juvenile offenders.* Sections 2,3,4 of the Whipping Act VI of 1864 apply to juvenile offenders as well as the 5th. This section is not meant to supercede sections 3 and 4, but to be applied in the proper cases alternatively with those sections. JEYKISON. 78

——**S. 3** *See* BALU NAZIR. ... 537

——**S. 5**—*Penal Code—Special Acts.* The Whipping Act, 1864, section 5, applies only to cases of offences under the Indian Penal Code and not to cases under any special law and sentence of whipping in these cases is illegal. DAYA KASBIRAM. 190

——**S. 9**—*Sentence—Appeal—Carrying out of the sentence.* When a Court, whose sentence is open to revision, pronounces a sentence awarding whipping in addition to imprisonment, it must be carried out immediately after the expiry of fifteen days from the date of the sentence or, if an appeal be made within that time, then immediately on the receipt of the order of the Appellate Court confirming the sentence if such order shall not be received within 15 days. It is illegal to direct in the sentence that the whipping shall be carried out at the expiration of the term of imprisonment. SHEKH HUSEN. ... 68

Witness—*Magistrate—Trial —Witness —Trial of witness immediately after his examination—Practice.* During the trial of the accused, a witness was, immediately after he had given his evidence for the prosecution, put upon his trial with the other accused. There was no proof against him sufficient to justify the Magistrate in so acting, and he was discharged subsequently without any charge having been framed:—*Held,* reversing the conviction, that little value could be attached to the evidence of the succeeding witnesses. Such a proceeding as the hasty placing of a witness on trial as an accused is unauthorised, unless the circumstances are exceptional, because the obvious consequences of it must be to intimidate more or less the witnesses who follow. BHOGILAL. 477

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Workman's Breach of Contract Act (*XIII of* 1859)—*Artificer, labourer, workman.* A person who in the ordinary course would himself take part in the work he contracted for is an artificer, labourer or workman within the scope of the Workman's Breach of Contract Act, 1859. AMIRKHAN. 204

———*See* KESHAV RAMCHANDRA. ... 349

———*Repayment of advance—Court Fees Act* (*VII of* 1870) 31 (1). An accused was ordered under section 2 of the Workman's Breach of Contract Act, 1859, to repay the sum advanced to him, and was also ordered under section 31 (1) of the Court Fees Act, 1870, to repay to the complainant the Court fee paid on his petition of complaint under the Act of 1859 :—*Held*, that the latter order as to repayment of the Court fee was illegal; for such repayment could only be ordered "in addition to the penalty imposed" and in this case no penalty had been or could be imposed till the accused was found to have disobeyed the first order, *viz.*, that relating to repayment of sum advanced to him. BUDHU. 534

———*Criminal Procedure Code* (*Act X of* 1882), *Sec.* 545—*Fine.* It is inexpedient to order the payment of expenses of a suit under the Workman's Breach of Contract Act, 1859, because no fine can be imposed under the Act. BHAGOOJI 625

———*Criminal Procedure Code* (*Act X of* 1882), *Sec.* 560—*Compensation.* As refusal to perform work according to a contract is not made punishable by clause (1) section 2 of the Workman's Breach of Contract Act, 1859, a complaint of such a refusal is not a complaint of an offence; and consequently, no compensation can be awarded in such cases under section 560, Criminal Procedure Code, 1882. NAMDEO. 617

———**S. 2**—*Advance—Fixed time.* It is not competent to a Magistrate, under section 2 of the Workman's Breach of Contract Act, to fix a time within which the money advanced is to be repaid. BHAU. 418

———*Magistrate—Order.* The Magistrate can, under section 2 of the Workman's Breach of Contract Act, only order a person to perform the work undertaken; he cannot then, also order that in default the workman should suffer a sentence. BABAJI. 375

Workman's Breach of Contract Act ,S. 2—*Advance, repayment of.* A Magistrate ordering an artificer, workman or labourer to repay the money advanced, or any part thereof, or to perform or get performed the work according to the terms of the contract under section 2 of the Workman's Breach of Contract Act, cannot, at the same time, sentence him to imprisonment in case he should fail to comply with the order. Such a sentence cannot be passed until the failure is proved to have occurred. SAKHARAM. 380

———*Contract to carry wood—Magistrate's power to reconsider the order once made.* A person who contracts only to convey wood is not an artificer, workman or labourer within the meaning of the Workman's Breach of Contract Act, 1859. When a Magistrate has made an order in the first stage of a proceeding, under section 2 of the Workman's Breach of Contract Act, 1859, for the repayment to the complainant of money advanced by him to an artificer, workman or labourer, it must always be open to him to consider at the further stage of the proceeding, when it becomes necessary for him to inflict a penalty under the section, for failure to comply with the order whether the order was legal and justifiable. HANMA. 537

———*Bond—Repayment of the sum by instalments.* The defendant executed a deed of contract whereby he agreed in consideration of Rs. 62, paid in advance to work as a weaver for 31 months repaying each month Rs. 2 out of the wages he might earn, and the bond extended the time of service in case of default of payment. For a breach of this contract without repaying the amount, the Magistrate directed the defendant to perform the work according to the terms of the contract, under section 2 of the Workman's Breach of Contract Act, 1859:- *Held*, that the contract was not within the Act as the sum of Rs. 62 was not money advanced on account of work contracted to be performed. It was a loan to be repaid by monthly instalments of Rs. 2 each, out of the wages earned during the contracted period of service. The bond having provided that the

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defendant was to serve as long as any of the money borrowed remained unpaid, the case came within the terms of the case at 7 Mad., H. C. R. App. xxx. NINGAPPA. 754

Workman's Breach of Contract Act, S. 2—*Claim barred in a Civil Court.* Where a bond containing an agreement to work for 13 months as weavers or in default to pay back Rs. 100 borrowed, cannot be enforced in civil Court being time-barred, it cannot be made the basis of a prosecution under Act XIII of 1859. GOVIND. 874

——**S. 5**—*Magistrate—Specially empowered in this behalf.* Powers under the Workman's Breaches of Contract Act, 1859, can only be exercised, outside the Presidency Towns, under section 5 of the Act, by Magistrates who have been specially appointed in that behalf. The Notification of the Government of Bombay dated 22nd January, 1862, (*Bombay Government Gazette* of 1862, page 140) includes under it such Magistrates only as have been referred to therein as a class and is not prospective. CHONIA.... ... 761

Wrongful Restraint. *See* PENAL CODE, *s.* 341

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